SUPREME COURT
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SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of:	)
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NATHAN POPE,	) S160930
	)
On Habeas Corpus	)
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Third Appellate District, No. C051564
Sacramento County Superior Court No. 05F05526
Honorable Greta Fall, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

CENTRAL CALIFORNIA
APPELLATE PROGRAM

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STATEMENT OF ISSUES IN PETITIONS FOR REVIEW

Both parties' petitions for review were granted, after the Court of Appeal's vacatur of the judgment of the Superior Court granting habeas corpus. There is no order stating issues to be briefed.

The issues as stated in the parties' petitions for review were:

Petitioner (Nathan Pope):

> Does the conduct credit limitation of Penal Code section 2933.1 apply when Penal Code section 654 was applied to the only count that was considered a violent felony?

(Pet. Rev., p. 1.)

Respondent (Department of Corrections):

> Under Penal Code section 2933.1 prisoners who have "been convicted of a violent offense" shall earn no more than 15 percent worktime credit against their sentences. Further, under Penal Code section 654, prisoners who are convicted of multiple offenses for the same criminal act "shall be punished under the provision that provides for the longest potential term of imprisonment." Thus, when a prisoner has been convicted of both violent and non-violent offenses for the same criminal act, and the sentence on the violent offense has been stayed under section 654, does the 15 percent credit limitation nonetheless apply to the prisoner's sentence?

(Pet. Rev., p. 1.)

Review was granted in light of the direct conflict between *In re Phelon* (2005) 132 Cal.App.4th 1214, and the opinion below, which rejected *Phelon* and was certified for publication.

INTRODUCTION AND OVERVIEW

The issue on review – whether a defendant in Mr. Pope's position is subject to the 15% postsentence credits restriction of Penal Code § 2933.1(a)[1] – falls squarely within this Court's decision in *In re Reeves* (2005) 35 Cal.4th 765 ["*Reeves*"], as the Superior Court held. The opinion and the People's briefing below failed to analyze *Reeves*; they scarcely mentioned it. Mr. Pope simply asks this Court to follow *Reeves*, as well as other authorities to like effect.

Reeves held that § 2933.1(a) does not restrict the postsentence credits of a defendant who is not then imprisoned for a violent felony. (*Id.* at p. 780.) That applies equally to this case, where Mr. Pope was *never* imprisoned for a violent felony. In *Reeves*, the defendant wasn't imprisoned for a violent felony at the time in question, because the sentence in question was concurrent to an expired violent felony term. Here, the defendant wasn't in prison for a violent felony at *any* time, because the only violent felony sentences (if *arguendo* there were any, *see infra*, p. 8, fn. 4) – were stayed under § 654. *Reeves* applies directly here.

A fundamental logical flaw in the opinion below is its reliance on a "notwithstanding" clause in § 2933.1(a) that directs *which* law

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[1] All further undesignated code references are to the Penal Code.

applies to a defendant known to be covered by that law, without analyzing the foundational question of *whether* the defendant is covered by that law in the first place. The opinion below bypassed the "*whether*" question by assuming the answer, but "*whether*" was the sole question identified, analyzed, and decided in *Reeves*, as it should have been here.

If anything, *Reeves* should be even more applicable here. *Reeves* rejected applying § 2933.1(a) to a defendant who was serving a concurrent prison term, which is criminal punishment. (*People v. Miller* (1977) 18 Cal.3d 873, 887.) This case involves whether § 2933.1(a) applies to a defendant with § 654-stayed sentences, which involve no time in prison, and are not punishment. (*In re Wright* (1967) 65 Cal.2d 650, 654-655.) If *Reeves*'s holding and reasoning – which were merely an application of § 2933.1's legislative intent (*id.* at p. 770) – apply to Mr. Reeves' case, they must apply here; whether as a simple matter of *stare decisis* which has "special force in the area of statutory interpretation" (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 1005), or on the statutory principle that the greater includes the lesser (Civ. Code, § 3536; *Reynolds v. State Board of Equalization* (1946) 29 Cal.2d 137, 140), or on basic common sense, which the Legislature is presumed to exercise (*Monastra v. Konica Business Machines, Inc.* (1996) 43

Cal.App.4th 1628, 1642) and a court must utilize (*Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567).

Mr. Pope's position is also supported by *In re Phelon, supra*, and further by an opinion on a different *Reeves* question, *In re Tate* (2006) 135 Cal.App.4th 756 ["*Tate*"]. The People's petition for review (p. 5) says the Department of Corrections seeks to ensure compliance with both *Tate* and *Reeves*. Mr. Pope agrees; but if *Tate* and *Reeves* are followed, his position must necessarily prevail.

Though Mr. Pope believes the above result is clear, he is compelled to brief one other properly reviewed issue as well (Arg. II) – that he had no violent felony convictions at all because § 667.5(c)(8) doesn't cover a case with no finding or admission of any intent to injure, based directly on statutory language utilizing governing caselaw, and further supported by numerous indicia of legislative intent. The issue is reviewable in this Court though not raised below, as discussed in the Introduction to Argument II, *post*.[2]

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[2] Mr. Pope's original petition for habeas corpus was addressed solely to his postsentence credits as computed by the Department of Corrections. (CT 3.) It did not address the trial court's imposition of a 15% *pre*sentence credits limitation as part of his sentencing (*see* CT 17). Accordingly, this brief addresses only postsentence credits. (*Compare In re Phelon, supra,* 132 Cal.App.4th at pp. 1217, 1219 [this Court's order to show cause, returnable to the Court of Appeal, included presentence as well as postsentence credits].)

STATEMENT OF THE CASE

On February 6, 2003, petitioner Nathan Pope pled guilty to one count of gross vehicular manslaughter while intoxicated, in violation of Penal Code § 191.5, subdivision (a); one count of driving under the influence of alcohol with injury, in violation of Vehicle Code § 23153, subdivision (a); and one count of driving with a blood alcohol over .08% with injury, in violation of Vehicle Code § 23153, subdivision (b).[3] He also admitted great bodily injury enhancements under § Penal Code 12022.7, subdivision (a) as to the Vehicle Code counts, 2 and 3. The offenses occurred in January 2002. (CT 13, 45.) The record states that the pleas were "straight up." (CT 46.)[4]

The record shows that all charges were for the same act which constituted the vehicular manslaughter while intoxicated. (People's Pet. Rev., pp. 1-2; CT 47.) There were no prior conviction enhancements or sentences. (CT 13.)

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[3] The DUI convictions in this guilty plea case are for lesser-included offenses within the vehicular manslaughter conviction. (*People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1149-1150; *People v. Miranda* (1994) 21 Cal.App.4th 1464.)

[4] A "straight up" plea is one in which the defendant simply pleads guilty, without any promises about sentencing. (*See, e.g., United States v. Valdes* (7th Cir. No. 96-1817, Mar. 6, 1997, unpublished) 1997 U.S. App. LEXIS 4751, p. 1; *United States v. Hernandez* (N.D. Iowa 2006) 450 F.Supp.2d 950, 975; *Lightfoot v. State* (Fla. Ct. App. 1984) 459 So.2d 1157, 1158.)

On March 28, 2003, Mr. Pope was sentenced to the middle term of 6 years in prison on count 1. (CT 13.) The trial court imposed and stayed sentences of 5 years on counts 2 and 3. (CT 13.) Mr. Pope did not file a notice of appeal.

Following Mr. Pope's commitment to the Department of Corrections for the six-year term, the Department calculated his potential release date based on earning credits under § 2933.1, with a 15% worktime limitation. (CT 7-11.) Mr. Pope's pursuit of administrative remedies was unsuccessful. (CT 5, 7-12.)

On June 13, 2005, Mr. Pope filed a *pro. per.* petition for writ of habeas corpus in Superior Court, raising only the credits issue. (CT 1.) As legal authority, he cited the Court of Appeal's opinion in *In re Reeves* (G028823, Sept. 19, 2002; depub'd on grant of review) 102 Cal.App.4th 232 (CT 3), which was subsequently affirmed by this Court. (*In re Reeves, supra,* 35 Cal.4th 765.)

The Superior Court issued an order to show cause on August 25, 2005, directing the Attorney General to file a return (CT 29), and appointed counsel. (CT 32.) The return was filed on September 23, 2005. (CT 34.) Petitioner filed a traverse through counsel. (CT 60.)

On October 21, 2005, the Superior Court granted the petition based on *Reeves* and a published opinion applying *Reeves* to Mr. Pope's type of case, *In re Phelon* (2005) 132 Cal.App.4th 1214

["*Phelon*"]. (CT 67-68.) The Superior Court ordered the Department to recalculate credits under Penal Code § 2933. (CT 68.) The People appealed. (CT 70.)

On January 8, 2008, in an opinion certified for publication (reprinted at 158 Cal.App.4th 860), the Court of Appeal vacated the Superior Court's order and directed the Superior Court to deny the petition. Both parties timely petitioned for review, and both petitions cited the direct conflict between the Court of Appeal's opinion below and the published opinion in *Phelon*. (Pope Ret. Rev., pp. 1, 5; People's Pet. Rev., pp. 2, 3, 5.)

This Court granted the petitions for review on April 9, 2008. Subsequently, this Court designated Mr. Pope as petitioner for the case in this Court.

STATEMENT OF FACTS

Solely for purposes of this brief, Mr. Pope accepts the statement of facts in the Court of Appeal opinion. (Slip op., p. 2.)

ARGUMENT

I. A PERSON WHO NEVER SERVED PRISON TIME FOR ANY VIOLENT FELONY CONVICTIONS, BECAUSE THOSE CONVICTIONS HAD SENTENCES STAYED UNDER SECTION 654, DOES NOT FALL WITHIN SECTION 2933.1(a); THIS COMES DIRECTLY UNDER *REEVES*, AND IS ALSO FULLY CONSISTENT WITH OTHER AUTHORITY IN THE AREA

The opinion below's most basic flaw is that it answered the wrong question. The right question is "*whether*" – whether a particular defendant comes within the terms of § 2933.1(a). The opinion below answered the wrong question of "*which*" – which law applies to a defendant for whom the "whether" answer is already known to be yes.

The answer to the right question follows directly from *Reeves.* Once the right question is answered, the wrong one becomes moot.

Mr. Pope explained this in brief, in his Introduction and Overview at pp. 1-3 above (incorporated by reference here). He now analyzes in greater depth.

A. Analysis

1. *Reeves*

Reeves stated the law governing *whether* Penal Code § 2933.1(a) applies – turning on whether the defendant was then serving prison time for a violent felony offense – in a manner at least as applicable here as it was in *Reeves*:

> [W]e interpret the section as follows: Section 2933.1(a) limits to 15 percent the rate at which a prisoner convicted of and serving time for a violent offense [i.e., a violent felony under § 667.5(c)] may earn worktime credit, regardless of any other offenses for which such a prisoner is simultaneously serving a sentence. On the other hand, section 2933.1(a) has no application to a prisoner who is not actually serving a sentence for a violent offense; such a prisoner may earn credit at a rate unaffected by the section. . . . [W]e interpret section 2933.1(a) as applying to a prisoner's *entire* sentence, so long as the prisoner is serving time for a violent offense.

(*Reeves*, 35 Cal.4th at p. 780 & fn. 18 [underscoring added; italics in original].)

Applying the *Reeves* language above to this case, Mr. Pope always was "a prisoner who is not actually serving a sentence for a violent offense" – because his purported violent felony sentences[5] were stayed under § 654, he never served time in prison for any violent felony offense. A term for which execution of sentence is stayed under § 654 is obviously not time served in prison at all (*accord People v. Percelle* (2005) 126 Cal.App.4th 164, 178), as it cannot be since under the plain language of § 654, it is not

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[5] For the reasons in Argument II below, Mr. Pope does not agree that any of his sentences were violent felony sentences. However, if that were true, then this argument – which is placed first in this brief because it is the one on which this Court granted review – would be moot. Accordingly, solely for purposes of this brief, Mr. Pope will assume counts 2 and 3 were violent felony sentences. Any reference in this brief to Mr. Pope having violent felony sentences is based on that assumption, and is not intended to be nor is it a concession of the point, which obviously is not conceded in light of Argument II.

punishment. (*People v. DeLoza* (1998) 18 Cal.4th 585, 594; *In re Wright, supra,* 65 Cal.2d at pp. 654-655; *cf., e.g., In re Hawkins* (1980) 103 Cal.App.3d 621, 625 [narcotics offender treatment, even if based on a conviction and done in a prison, is not "punishment"; for that reason, it cannot result in a prior prison term enhancement].)

Because as *Reeves* held, "such a prisoner [one not serving a prison term for a violent felony] may earn credit at a rate unaffected by the section" (*id.* at p. 780), the 15 percent restriction of § 2933.1(a) never applied to Mr. Pope. Conversely, the requirement in *Reeves* above for invoking the 15 percent limit, that a prisoner must be "convicted of and serving time for a violent offense" (*id.* [underscoring added]), never applied to Mr. Pope for the same reason – he never served time for a violent felony offense.

That was also the conclusion of *In re Phelon* (2005) 132 Cal.App.4th 1214. In fact, *Phelon* relied on the same language from *Reeves* that Mr. Pope quoted above, to reach the same result. (*Phelon*, at pp. 1218-1219.) Needless to say, Mr. Pope agrees with *Phelon*, in reasoning as well as result. But he doesn't need *Phelon* to rely directly on *Reeves*.[6]

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[6] In *Phelon*, the defendant's pro. per. petition for habeas corpus was originally filed in this Court on May 10, 2004 (No. S124670). About five weeks after *Reeves* was decided, on June 15, 2005, this Court granted an order to show cause returnable to the (continued...)

The opinion below didn't try to apply or analyze *Reeves.* *Reeves* isn't even mentioned, let alone discussed, in the opinion's analysis leading to its conclusion.

The opinion below's only mention of *Reeves* was to distinguish it cursorily, on the ground that this is a § 654 case and *Reeves* was not. (Slip op., p. 7.) This is a distinction without a difference in construing § 2933.1(a), and the opinion failed to explain why it believed otherwise. (What it did address is discussed in section (B)(4)(b) below.) As the above discussion shows, the *ratio decidendi* and analysis of *Reeves* apply to any person who is not currently serving a prison term for a non-violent felony.

The discussion need go no farther. On the above authority, Mr. Pope asks that the judgment of the Court of Appeal be reversed.

2. *Phelon* And *Tate*

a. *Phelon*

At the time this case came before the Court of Appeal below, there was one published opinion on the issue in this case, *In re Phelon, supra*. That opinion was based on an analysis of *Reeves*, which is very similar to Mr. Pope's.

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[6](...continued)
Court of Appeal. The Court of Appeal issued its opinion on September 26, 2005, and certified it for publication. This Court later denied the Attorney General's request for depublication.

The opinion below dismissed *Phelon,* partly on the theory that the People erred there in conceding the applicability of *Reeves*. (Slip op., p. 6.) However, the *Phelon* Court wasn't bound by the Attorney General's concession of a legal issue (*People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1021; *In re C.W.* (2007) 153 Cal.App.4th 468, 471), just as a reviewing court is never bound by a legal concession of any party (*Desny v. Wilder* (1956) 46 Cal.2d 715, 729; *Bradley v. Clark* (1901) 133 Cal. 196, 209-210), since the reviewing court's obligation is to determine and apply the law correctly irrespective of whether the parties do. (*Bradley v. Clark, supra,* 133 Cal. at p. 210.)

Therefore, the *Phelon* Court had to reach its conclusion independently – which it did, by determining the applicability of *Reeves* and then analyzing that opinion. Here, the opinion below did neither of those.

Phelon's application of *Reeves* was straightforward and direct. It is also what Mr. Pope has argued:

> "Section 2933.1(a) limits to 15 percent the rate at which a prisoner convicted of and serving time for a violent offense may earn worktime credit, regardless of any other offenses for which such a prisoner is simultaneously serving a sentence. [Fn. omitted.] *On the other hand, section 2933.1(a) has no application to a prisoner who is not actually serving a sentence for a violent offense; such a prisoner may earn credit at a rate unaffected by the section.* [Fn. omitted.]" (*In re Reeves*, at p. 780, italics added.)

> Under *Reeves*, petitioner's postsentence credits should not be limited by section 2933.1(a) because his sentences on the qualifying violent offenses were stayed pursuant to section 654. The sentence that petitioner is actually serving is not one that qualified as a violent offense at the time it was committed. Accordingly, the Department of Corrections must correct the computation of petitioner's postsentence credits to remove the 15 percent limitation of section 2933.1(a).

(*Phelon*, 132 Cal.App.4th at pp. 1218-1219.)

The opinion below failed to discuss the italicized language from *Reeves* that was applied in *Phelon*, and offered no basis for concluding it doesn't mean what it says. Mr. Pope asks this Court to follow it here, just as *Phelon* followed it.

b. *Tate*

The opinion below is not only contrary to *Reeves* and *Phelon*, it is also contrary to the Fifth District's opinion in *In re Tate* (2006) 135 Cal.App.4th 756.[7]

Tate held that § 2933.1 does not apply to a defendant who is serving a full-term sentence consecutive to a violent felony sentence, because those types of consecutive sentences don't merge into a single aggregate term (unlike consecutive sentences of 1/3 the

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[7] The People, as appellants in *Tate*, did not file a petition for review – in fact, they didn't even file a reply brief to Tate's argument (which the Court of Appeal ultimately accepted), and then they waived oral argument. And in their petition for review in this case, the People state that the Department of Corrections wishes to ensure compliance with *Tate*. (People's Pet. Rev., p. 5.) So *Tate* is by now noncontroversial and plainly represents good law – as should be clear anyway, because it merely follows *Reeves*.

midterm, which do). As a result, the defendant is never serving a non-violent term at the same time he is serving a violent term. Therefore, at the time he is serving the non-violent term, § 2933.1 does not apply because it "only [applies] to the extent the prisoner is serving time for a violent offense." (*Id.* at pp. 764-765.)

Tate, like *Phelon*, correctly characterized *Reeves* as holding that "section 2933.1(a) does not apply to a prisoner who is not actually serving a sentence for a violent offense." (*Tate*, 135 Cal.App.4th at p. 764.) That was the basis of its holding and analysis. (*Id.*) It is also the basis of Mr. Pope's argument.

One could try to distinguish Tate's case from *Reeves* on the ground that *Tate* considered § 2933.1 as to full consecutive sentences, while *Reeves* did so for concurrent sentences – much as the opinion below distinguished this case from *Reeves* on the ground that this case considered § 2933.1 as to § 654-stayed sentences. Such a distinction would have failed in *Tate*, as it should here. What matters is not whether *Tate* involved a white horse and *Reeves* a black horse, but rather, whether *Reeves*'s *ratio decidendi* applies to the case at bar. It did in *Tate*:

> In this case, once Tate completed his sentence for the violent out-of-prison offense, he was no longer subject to imprisonment for a violent offense and consequently no longer a "person who is convicted of a [violent] felony offense" (§ 2933.1(a)). Like the defendant in Reeves,

> Tate's conviction for the violent offense gives the Department no claim to his physical custody; he would be entitled to release but for the time remaining on the separate term for the nonviolent offense.

(*In re Tate, supra,* 135 Cal.App.4th at pp. 765-766.)

Tate's analysis applies here. *Tate* was based on the premise that a prison term for a violent felony is not part of a fully consecutive term for a non-violent felony. (*Id.* at pp. 764-765.) *Tate* concluded that this was dispositive under *Reeves* because "[a]lthough, as the Supreme Court explained in *Reeves*, section 2933.1(a) applies to a prisoner's entire sentence, it only does so to the extent the prisoner is serving time for a violent offense. (*Reeves, supra,* 35 Cal.4th at p. 780, fn. 18.)." (*Tate*, at p. 765.) Similarly here, Mr. Pope's stayed violent felony sentences were not part of the prison time for the non-violent felony, as they were not prison time at all (*see* discussion *ante*, p. 8), and § 2933.1 "only [applies] to the extent the prisoner is serving time for a violent offense" (*Tate*, at p. 765).

B. The Court of Appeal's Opinion Below

1. Contravening *Reeves*, As Well As Other Authority

The opinion below assumed that § 2933.1 clearly and unambiguously applied to Mr. Pope solely on the basis that "its language . . . applies to 'any person who is convicted' of a violent felony." (Slip op., p. 9.)

If one applied that reasoning to the *Reeves* case, then Reeves would have lost, as he was literally "any person who is convicted of a violent felony" – the language of the opinion below, quoted in the paragraph above – just as Mr. Pope was. However, this Court held in *Reeves* that this is **not** a valid interpretation of § 2933.1(a):

> In searching for a reasonable construction of section 2933.1(a), we may at the outset reject a construction that, while arguably consistent with the section's language, is almost certainly not what the Legislature intended. The phrase, "any person who is convicted of a [violent] felony offense" (§ 2933.1(a)), might conceivably refer simply to a point of historical fact. Read in this way, the statute would disqualify, for all time, any person who has ever been convicted of a violent offense from earning more than 15 percent worktime credit. Neither the People nor petitioner endorses this reading of the section.

(*Reeves*, 35 Cal.4th at p. 771 [underscoring added]; *accord In re Tate, supra,* 135 Cal.App.4th at pp. 762, 763-764 [citing and applying this passage in *Reeves*, rejecting the People's argument to the contrary].)

The opinion below therefore necessarily rejected the reasoning in *Reeves* based on a distinction without a difference. It necessarily rejected in a similar manner the reasoning in *Tate, supra* [*see* section (A)(2)(b), p. 12, *ante*], and *In re Carr* (1998) 65 Cal.App.4th 1525 [§ 2933.1 doesn't apply to persons convicted of violent felonies who received no term of imprisonment], since those

cases – like *Reeves* – also declined to apply § 2933.1 to defendants who had been convicted of violent felonies as historical fact. This Court should decline such an approach that would repudiate so much existing authority, and instead, simply apply *Reeves*.

The opinion below distinguished *Reeves* on the ground that *Reeves* didn't involve a sentence stayed under § 654. (Slip op., p. 7.) One could as easily distinguish *People v. Benson* (1998) 18 Cal.4th 24 ["*Benson*"], on which the opinion below relied (slip op. pp. 7-9), as being inapplicable because it is a three-strikes case which doesn't involve the applicability of § 2933.1, the only issue here. (As discussed in the next section, that is a correct distinction of *Benson*.)

In any event, as discussed above, the fact that this a § 654 case while *Reeves* was a concurrent sentence case is a distinction without a difference for purposes of determining the applicability of § 2933.1(a). Under *Reeves*, the question is whether Mr. Pope was serving prison time for a violent felony. (*See ante*, p. 8.) Since he wasn't, *Reeves* and *Tate* apply here.

2. <u>The Opinion Below's Reliance On The "Notwithstanding" Clause: Asking The Wrong Question First ("Which," Instead Of The Foundational "Whether")</u>

The crux of the opinion below turns on the meaning of the phrase "Notwithstanding any other law ..." in § 2933.1, subdivision (a). However, the opinion's analysis asks and answers the wrong

question. In so doing, it assumes the applicability of the statute in question (§ 2933.1(a)), and from that assumption, circularly holds that the statute in question is applicable.

The opinion below accurately quotes the "notwithstanding" language of the three-strikes law (slip op., p. 8), then correctly recites the holding of *People v. Benson, supra,* 18 Cal.4th 24 ["*Benson*"], that the three-strikes "notwithstanding" language is clear and unambiguous. (*Id.*) From those premises, the opinion declares that *Benson* provides a valid analogy to this case. (Slip op., p. 7.) However, its explanation of this purported "analogy," quoted immediately below, contains little analysis:

> Reasoning similar to that employed in *Benson* is applicable in the present circumstances. Section 2933.1(a) states that its 15 percent limitation applies "[n]otwithstanding any other law" to . . . any violent felony. . . . Like the language at issue in *Benson*, the language of section 2933.1(a) is clear and unambiguous – its application withstands any other law and applies to "any person who is convicted" of a violent felony.

(Slip op., p. 9.) Missing from this analysis is the requirement that the defendant be serving prison time on the violent felony (*Reeves*, at p. 780; *see ante*, p. 8) and the effect of a § 654 stay on this requirement.

This incomplete analysis therefore contravenes *Reeves*, by failing to analyze the initial foundational question that was the entire

subject of *Reeves* – *whether* the defendant is a "person who is convicted of a felony offense listed in subdivision (c) of § 667.5" within the meaning of § 2933.1, subdivision (a). Contrary to the passage above, and as Mr. Pope has discussed, the mere fact that a defendant was historically convicted of a violent felony doesn't itself answer that foundational question. (*Reeves*, 35 Cal.4th at pp. 771-772; *ante*, p. 15.)

Focusing solely on the "notwithstanding" clause would put the cart before the horse. A "notwithstanding" clause asks the question of "*which*" law applies to a defendant known to be covered by the law's terms. But here – as in *Reeves* and *Tate* – the mandatory foundational question that must be asked first is "*whether*" the terms of § 2933.1(a) cover this type of defendant at all. If they don't, then nothing else in § 2933.1(a) – including the "notwithstanding" clause – is relevant to a defendant who isn't covered by § 2933.1(a). This was a key omission in the opinion below, which tried to use § 2933.1(a)'s "notwithstanding" clause to determine *whether* Mr. Pope was covered by § 2933.1(a), when a "notwithstanding" clause can only answer "which" and not "whether."

A "notwithstanding" clause is functionally a choice of laws statute. It merely means the statute prevails over other laws on the

same subject, but only "when [the statute is] applicable." (*See People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 524.)

As such, a "notwithstanding" clause may govern the question of *which* law applies to a party known to be covered by a statute. But it does not answer the initial foundational question of *whether* that party is covered by the statute in the first place. If the "whether" answer is that the defendant – for example, a defendant with only misdemeanor priors in a strikes case – is not covered by a law, then the law's "notwithstanding" clause is irrelevant. (*Accord, e.g., Reno v. American-Arab Anti-Discrimination Comm.* (1999) 525 U.S. 471, 504, fn. 2 ["If [a statute containing a notwithstanding clause] is not applicable to [a particular group of persons], then the words 'notwithstanding any other provision of law' cannot have any special force regarding such [group of persons]."]) The "whether" question was the only issue in *Reeves*, and is the only issue here.

Other authorities present similar examples. In *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, the County claimed that the "notwithstanding" clause in Government Code § 844.6, subdivision (a)(2) barred the plaintiff's action. This Court held it did not, based on the initial foundational question of *whether* the plaintiff was covered by the law. Because the plaintiff was not a "prisoner" at the time of the alleged injury, he was not covered by the statute, and

the statute's "notwithstanding" clause therefore had no operation. (*Id.* at pp. 716-717.) In *Catholic Charities of Sacramento, Inc. v. Superior Court* (2004) 32 Cal.4th 527, the statute had a "notwithstanding" clause which applied to "religious employers" as defined by law, but that didn't answer the foundational question of *whether* this particular plaintiff was a "religious employer" covered by the statute containing the "notwithstanding" clause. This Court held, and the plaintiff even conceded, that it was not. (*Id.* at p. 539.) In *People v. Trausch* (1995) 36 Cal.App.4th 1239 [ratified on this ground in *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974-975], the People argued that the three-strikes "notwithstanding" clause – the same one to which the opinion below analogized – meant that a defendant with two prior serious felonies could never be sentenced to a misdemeanor under Penal Code § 17. The *Trausch* Court held that "[t]he People place emphasis on the wrong language," because the "notwithstanding" clause did not answer *whether* a defendant so sentenced was subject to the law in the first place. (*Trausch*, at p. 1245.) And so forth.

Reeves is to like effect. In *Reeves*, this Court didn't even discuss the "notwithstanding" clause; for although that choice-of-law clause could answer a "*which*" question, it didn't answer the foundational question – the one before the Court – of *whether*

Reeves was covered by § 2933.1 for the period in question. Rather, this Court framed the statutory coverage question in *whether* terms:

> The question before us is *whether* section 2933.1(a) restricts petitioner's ability to earn worktime credit against a concurrent sentence for a nonviolent offense.

(*Reeves*, 35 Cal.4th at p. 768 [italics added].) This type of foundational coverage question cannot be circumvented by reliance on a "notwithstanding" clause.

This Court in *Reeves* was quite aware of the "notwithstanding" clause in § 2933.1, subdivision (a); it quoted that clause just before analyzing whether Reeves was covered by the statute. (*Id.* at p. 770, fn. 8.) But the "notwithstanding" clause didn't enter into this Court's framing of the question or its analysis of the answer. Indeed, doing a computer search on "notwithstanding" in this Court's opinion, one finds it is used only in footnotes quoting the statute. (*Id.* at pp. 770, fn. 8, 776, fn. 14.) It simply wasn't relevant to this Court's analysis.

The opinion below relied on *People v. Benson, supra,* 18 Cal.4th 24 as its analogy for the operation of a "notwithstanding" clause. (Slip op., p. 9.) *Benson*, however, followed the paradigm Mr. Pope discusses – a "notwithstanding" clause determines *which* law applies to a defendant known to fall under a law, not *whether* the defendant falls under the law in the first place. *Benson* dealt only with a "which" question; "whether" wasn't at issue there.

In *Benson*, quite unlike *Reeves* and this case, the answer to the initial foundational question of *whether* was completely obvious. Everyone there agreed that Benson fell under the terms of the "three-strikes law," because he had two prior serious felony convictions – residential burglary and assault with intent to commit murder, both with personal weapon use and intentional infliction of great bodily injury. (*Benson*, 18 Cal.4th at p. 27 & fn. 3.)

The *Benson* opinion concerned not *whether* the defendant was covered by the terms of the statute; but rather, *which* statute applied to a covered defendant; i.e., the effect of the "notwithstanding" clause on a defendant for whom the "whether" answer was already known to be yes. That isn't this case.

Notably, the *Reeves* opinion – and for that matter, the *Reeves* dissent – didn't mention *Benson.* For the reasons above, they had no occasion to.

After discussing *Benson*'s resolution of the "notwithstanding" question in that case (slip op. pp. 7-9 ["Proper resolution ...," through three full paragraphs, ending before "Reasoning similar ..." at the top of p. 9]), the opinion below then discussed Mr. Pope's foundational "whether" question as follows:

> Section 2933.1(a) states that its 15 percent limitation applies "[n]otwithstanding any other law" to "any person who is convicted of a felony offense listed in section 667.5 . . . ., i.e., to any violent felony. . . . Like the language at issue in *Benson*, the language of section 2933.1(a) is clear and unambiguous – its application withstands any other law and applies to "any person who is convicted of a violent felony."

(Slip op., p. 9 [underscoring added].)

The underscored passages above merely assume – albeit without discussion – that because Mr. Pope had two convictions for violent felonies as historical fact, he must be "any person who is convicted of a violent felony" for purposes of § 2933.1(a). This Court unequivocally rejected that same approach in *Reeves*, as Mr. Pope discussed *ante*, section (B)(1), p. 15. The assumption of the opinion below is not supported by *Benson*, and is contravened by *Reeves*.

3. The Opinion Below's Reliance On Section 654 And *Benson*, When This Case Has No Issue Of The Meaning Of Section 654, And *Benson* Doesn't Involve The "Whether" Question

The opinion below held that § 2933.1 should be deemed an exception to section 654 "by analogy to the reasoning of *People v. Benson* (1998) 18 Cal.4th 24." (Slip op., p. 7.)

However, this case doesn't turn on the meaning or scope of § 654. Rather, it turns on the meaning and scope of the "*whether*" question in § 2933.1(a). All that should be relevant about § 654 is the truism that a defendant with a § 654-stayed sentence isn't

serving time in prison for the stayed sentence. (*See* discussion and authorities *ante*, p. 8.) Given that, *Reeves* applies directly: "[S]ection 2933.1(a) has no application to a prisoner who is not actually serving a sentence for a violent offense; such a prisoner may earn credit at a rate unaffected by the section." (*Id.* at p. 780; *see* discussion *ante*, p. 7.)

Benson was a case in which one statute created an exception to another for qualifying defendants through unambiguous language. There, § 1170.12, subdivision (b)(1)'s definition of "prior conviction" was clearly stated – a stay of execution of sentence did not affect the definition of "prior conviction." Therefore, in light of the three-strikes law's "notwithstanding" clause, *Benson* held that § 1170.12(b)(1) clearly and unambiguously created an exception to the "subsequent penal action" construction of Penal Code § 654 in *People v. Pearson* (1986) 42 Cal.3d 351, 361. (*Benson,* 18 Cal.4th at pp. 30-31; *see id.* at pp. 28-29, for discussion of what Benson's contention was.)

The "clear[and] unequivocal[]" language of § 1170.12(b)(1), directing *which* law applied to defendants for whom the *whether* answer was already known to be yes, was the basis of this holding in *Benson*. But that has nothing to do with this case, where there is no "clear and unequivocal" language – or any language – that answers this case's "*whether*" question by making § 2933.1(a) automatically

applicable to a non-violent felony sentence for every defendant also convicted of a violent felony, even when the defendant isn't serving a prison term for the violent felony. *Reeves* rejects such a result, as do the Court of Appeal opinions in *Phelon*, *Tate*, and *Carr*.

Another distinction of *Benson* here – though one that shouldn't be relevant here since *Reeves* is dispositive, and this isn't a § 654 case anyway – is that *Benson* addressed the collateral consequences of a prior conviction, while this case involves the direct penal consequences of a current conviction. Quite unlike *Benson*, the opinion below would seek to change the statutory language and very essence of Penal Code § 654, by for the first time creating *current* penal consequences for a conviction with a sentence found subject to § 654. This would be contrary to § 654's plain language that criminal punishment is forbidden on such convictions. (*Accord, e.g., People v. DeLoza, supra,* 18 Cal.4th at p. 592; *People v. Miller, supra,* 18 Cal.3d at pp. 886-887; *In re Wright, supra,* 65 Cal.2d at pp. 652-655.) Reduction of sentence credits for the offenses of conviction increases a defendant's actual time in prison on those offenses, and is therefore a form of criminal punishment. (*Lynce v. Mathis* (1997) 519 U.S. 433, 442-443; *Weaver v. Graham* (1981) 450 U.S. 24, 31-33; *In re Phelon, supra,* 132 Cal.App.4th at p. 1221; *In re Lomax* (1998) 66 Cal.App.4th 639,

646.) Such a drastic change in the essence of § 654's express prohibition against multiple punishment cannot be made by mere implication. (*See, e.g., Cacho v. Boudreau* (2007) 40 Cal.4th 341, 352 [amendments by implication are disfavored, and can only be inferred when statutes cannot be reconciled rationally under any circumstances].)[8]

Mr. Pope doesn't believe this Court needs to address this point, because *Reeves* is so clearly dispositive, and this case deals only with the meaning of § 2933.1(a) and not with how one might interpret § 654. But the point is yet one more reason why the opinion below's decision to bypass *Reeves* is unsound.

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[8] Extra penal consequences based on prior convictions, by contrast, are not added criminal punishment for the prior conviction; they merely reflect the fact that the prior conviction makes a current conviction more serious or aggravated. (*Gryger v. Burke* (1948) 334 U.S. 728, 732; *People v. Snook* (1997) 16 Cal.4th 1210, 1221.) Therefore, *Benson* – which dealt only with a *prior* conviction as to which punishment had been subject to § 654 – does not affect the statutory language or essential nature of § 654 that there can be no extra punishment for a current conviction subject to its provisions (*People v. McFarland* (1962) 58 Cal.2d 748, 762-763); the future use of such a conviction in sentencing for a future crime is not itself criminal punishment for a current offense. By contrast, a 15% restriction on Mr. Pope's postsentence credits *is* criminal punishment for a current offense. (*See* authorities cited in text *ante*, this paragraph.)

4. The Opinion Below's Policy Beliefs About This Case

Finally, the opinion below fashioned its own policy basis for its result; that if one were to assume maximum postsentence credits, a defendant in such a situation (with a middle-term sentence for vehicular manslaughter) would probably spend less real time in prison than if the victim had not died. (Slip op., pp. 9-10.) Of course, questions of policy or legislative "wisdom,"or which choice should be made by the Legislature, are solely for the Legislature and not for the courts. (*People v. Anderson* (2002) 28 Cal.4th 767, 784; *Lake v. Reed* (1997) 16 Cal.4th 448, 465-466.)

A judicial policy discussion would cause a legal analysis of this legislative enactment to stray off target, as it perhaps did here. This case turns solely on the meaning of § 2933.1(a) in light of *Reeves*. If the Legislature wanted to amend § 2933.1 after *Reeves*, it would be empowered to. Since that hasn't happened, the judiciary can only construe the existing statute, in light of existing judicial authority.

In any event, this case is still governed directly by *Reeves*, and there is no principled basis for deviating from it. Once that authority is applied, the ramifications of the Legislature's choice of a statutory scheme, including whether there might be occasional result oddities, become irrelevant because it was the Legislature's choice to make.

If there is any case-specific oddity in the application of *Reeves* to this particular case, it could stem from the Legislature's decision not to include credits eligibility in its 1997 amendment to § 654 – another legislative policy choice that courts can't revisit. Although the 1997 amendment to § 654 is still irrelevant to the only question in this case (the meaning of the 1994 enactment of § 2933.1(a)), Mr. Pope discusses it briefly, in case it affects the policy discussion of the opinion below.

The 1997 amendment to § 654 was enacted to supersede *People v. Norrell* (1996) 13 Cal.4th 1, which held that trial courts had discretion to stay execution of sentence on any of multiple convictions subject to § 654. (*See People v. Kramer* (2002) 29 Cal.4th 720, 723-724.) To supersede *Norrell*, the 1997 Legislature added to § 654 the language "shall be punished under the provision that provides for the longest term of imprisonment."

The phrase "term of imprisonment," which the Legislature chose in its 1997 amendment to § 654, does not include potential postsentence credits. (It does, of course, include enhancements (*People v. Kramer, supra,* 29 Cal.4th 720), but an enhancement – unlike potential postsentence credits – is part of a sentence.) A "term of imprisonment" only refers to the statutory punishment for an offense; "credits" then operate to reduce the real time served in

prison under the term of imprisonment. (*People v. Arnold* (2004) 33 Cal.4th 294, 300; *People v. Buckhalter* (2001) 26 Cal.4th 20, 31.) Moreover, a court which imposes a "term of imprisonment" cannot do so by reference to postsentence credits, since postsentence credits are solely a matter for the Department of Corrections and not for a trial court. (*People v. Mendoza* (1986) 187 Cal.App.3d 948, 954; *People v. Chew* (1985) 172 Cal.App.3d 45, 50-51 [disappr'd on other grds. in *Buckhalter*, 26 Cal.4th at p. 40].) Also, postsentence credits are often not known until years after the "term of imprisonment" is imposed by the trial court, and again are not part of that term.

So the phrase "the longest term of imprisonment" in § 654 – which isn't even at issue here, since the sole issue is the meaning of § 2933.1(a) – cannot properly be construed by reference to postsentence credits, which a court cannot properly calculate and aren't part of the "term of imprisonment." The opinion below erred in making a policy argument on § 2933.1(a) by construing amendments to a different statute (§ 654) via something courts can't properly do.

In addition to all of this, what the 1997 Legislature did with § 654 is irrelevant to the meaning of a 1994 statute such as § 2933.1(a). "It is axiomatic that in assessing the import of a statute [here, § 2933.1(a)], we must concern ourselves with the Legislature's

purpose at the time of the enactment [here, 1994]." (*In re Pedro T.* (1994) 8 Cal. 4th 1041, 1048.)

Section 2933.1(a)'s effective date was Sept. 21, 1994, so it was already law for over a year and a half when *Norrell* was decided, and for over 2 years when the 1997 amendments to § 654 took effect. Since § 2933.1(a) has never changed in any substantive way, its meaning is the same as when it was enacted. (Govt. Code, § 9605; *People v. Morante* (1999) 20 Cal.4th 403, 429-430 & n.14; *People v. Escobar* (1992) 3 Cal.4th 740, 750-751 & n. 5.) The meaning of § 2933.1(a) is not dependent on or tied to an amendment of a different statute that wouldn't exist for another 2+ years after § 2933.1(a)'s enactment.[9]

Even if the 1997 amendments to § 654 had been relevant to this case involving the 1994 enactment of § 2933.1(a), the 1997 Legislature could have amended § 654 in a different way that would

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[9] The unusual situation spotted by the opinion below couldn't have happened under the state of § 654 law on Sept. 21, 1994, when § 2933.1(a) was enacted. As of 1994, the overwhelming weight of authority was that trial courts had discretion to determine which of two (or multiple) sentences subject to section 654 should have execution stayed, and which should be fully executed. (*See People v. Norrell, supra,* 13 Cal.4th at p. 7 & fn. 3 [the one exception cited in *Norrell* had still held that discretion existed under section 1385].) The 1994 Legislature, enacting § 2933.1(a), couldn't have anticipated an occasional oddity resulting from the interplay of an amended version of a different statute (§ 654) that wouldn't exist until 1997. Nor can that later amendment to a different statute change the meaning of § 2933.1 as the Legislature enacted it in 1994.

have addressed the purported problem perceived by the opinion below – but, it didn't do so. For example, instead of saying "...shall be punished under the provision that provides for the *longest term of imprisonment*" (italics added), the 1997 Legislature could have used language such as "...shall be punished under the provision that provides for the *longest potential period of incarceration taking into account both the term of imprisonment and possible credits*."

However, doing so might have created other problems, and the Legislature's choice not to do so cannot be second-guessed by the courts. (*In re Qawi* (2004) 32 Cal.4th 1, 26.) It was within the Legislature's sole purview to choose which approach to take, since courts cannot substitute their policy views for the Legislature's. (*Thomas v. City of Richmond* (1995) 9 Cal.4th 1154, 1165.)

Finally, "legislators cannot foresee all eventualities." (*Drennan v. Security Nat'l Bank* (1981) 28 Cal.3d 764, 773, fn. 8.) So the fact that applications of a legislative choice might produce unforeseen results in a few cases is not a reason to jettison traditional principles of statutory construction (*see, e.g., Tietge v. Western Province etc.* (1997) 55 Cal.App.4th 382, 388; *Knight v. Board of Administration* (1983) 148 Cal.App.3d 973, 980) – let alone jettison *Reeves*. And of course, the wisdom of a statute is solely a matter for the Legislature. (*Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1140, fn. 10.)

Even in a case which might lead to occasional perceived unusual results, "[a court's] task is to interpret the law, not rewrite it." (*Holcomb v. Hartford Casualty Ins. Co.* (1991) 230 Cal.App.3d 1000, 1007.) The Legislature doesn't have to produce a perfect statute; "[i]n practical legislation absolute perfection is unattainable." (*Sheward v. Citizens' Water Company* (1891) 90 Cal. 635, 642.)

Having said all of that, the question before this Court isn't the meaning of the 1997 amendments to § 654. The question is the meaning of § 2933.1(a) as applied to this case. That question is governed by *Reeves*.

C. The People's Positions Below

In the Court of Appeal, the People contended: "[I]f the phrase 'convicted of' [in section 2933.1, subdivision (a)] is interpreted to require the prisoner to not only be guilty of a violent offense but also to be serving the corresponding sentence for that offense, the Legislature's intent will be thwarted." (AOB 7.) However, that was what this Court held in *Reeves* was the intent of the Legislature. (*Ante*, section (A)(1)(a), p. 7.) *Tate* so held as well. (*Ante*, section (A)(2)(b), p. 12.)

Some of the People's presentation below was an effort to distinguish *Reeves*. The essence of their claims appears to be *Reeves* didn't consider the issue presented here, and that it can be

distinguished because "Pope [was] . . . in prison because he engaged in conduct that constituted a violent offense, as well as a nonviolent one." (AOB 10-11.) That isn't true, however, because a § 654-stayed sentence is not a prison term, and Mr. Pope never served any prison terms for his § 654-stayed sentences. (*See* discussion *ante*, p. 8.)

The People offered no support for their position beyond *ipse dixit* – "[w]hile that prisoner [in Reeves's position] cannot and should not be deemed to have the status of a current violent offender, someone like Pope should." (AOB 11.) If the People believe the law "cannot and should not" be as it is, the proper forum is the Legislature. (*Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 215.)

The People also relied on a citation from *Reeves*, but plainly out of context. They said: "As the California Supreme Court explained in [*Reeves*, at p.] 771, the purpose of the credit earning limitation in section 2933.1 is 'to protect the public by delaying the release of prisoners convicted of violent offenses.'" The People didn't mention the rest of that passage on p. 771 of *Reeves*, quoted here:

> The purpose that motivated the section's enactment, however, is clear only in the broadest terms: The Legislature wished to protect the public by delaying the release of prisoners convicted of violent offenses. [Citation.] The general observation that a law was

> intended to delay release does not, in the face of ambiguous statutory language, answer the specific, practical questions of how long and under what circumstances release is to be delayed.

(*Reeves,* at p. 771 [underscoring added].) The full passage from *Reeves* makes clear that the People's partial excerpt doesn't resolve this type of question.

More generally, although Mr. Pope agrees that the purpose of § 2933.1 was to increase the amount of time spent in prison by persons who are subject to that section, this begs the question of whether he was a person subject to that section. One doesn't need *Reeves* to reach that self-evident conclusion. (*Accord, e.g., People v. Garcia* (1999) 21 Cal.4th 1, 12; *People v. Superior Court (Romero), supra,* 13 Cal.4th at pp. 523-524, 528.)

The People also offered an argument emanating from *People v. Ramos* (1996) 50 Cal.App.4th 810, 817, that section 2933.1 "is based on the nature of the offender, rather than on the offense." (AOB 11.) This was one of the arguments rejected in *Phelon*, in the context of presentence credits. (132 Cal.App.4th at pp. 1219-1220.)

This Court in *Reeves* rejected the same type of effort, an argument seeking to transmogrify the reasoning of *Ramos* – a section 1170.1 consecutive sentence case – into an omnibus operation of § 2933.1 on non-violent felony counts every time the

defendant has a violent felony conviction. (*Reeves*, 35 Cal.4th at pp. 775-776.) By the plain language and analysis of *Reeves*, the principle that section 2933.1 "is based on the offender, rather than the offense" is limited to the context of *consecutive* sentences under § 1170.1(a), in which it arose. *Reeves* holds that it has no applicability to concurrent terms, and is even more clearly inapplicable here.

Moreover, *Ramos* is a presentence credits case, coming under § 2933.1, subdivision (c). It doesn't apply to this postsentence credits case [subdivision (a)], any more than it applied in *Reeves*. "Subdivision (c) says nothing at all about postsentence credit. Thus, to read subdivision (c) as limiting postsentence credits or qualifying subdivision (a), as the People here would read it, finds no support in the relevant statutory language." (*Reeves*, 35 Cal.4th at p. 776.)

In any event, the People's desire to apply an "offender-not-the-offense" theory here, with or without *Ramos*, falls to *Reeves*. It also falls to the truism that a sentence stayed under § 654 isn't time served in prison. (*Ante*, p. 8.)

The "offender-not-the-offense" theory is obviously not literally true on all § 2933.1 questions, because as discussed above, *Reeves* as well as other caselaw (*Tate* and *Carr*) already rejects any contention that § 2933.1(a) applies to every defendant who was

convicted of a violent felony as a matter of historical fact. The discussion *ante*, p. 15, is incorporated by reference here.

Rather, the "offender-not-the-offense" theory is limited to its unique context of one-third term consecutive sentences under section 1170.1. Such a consecutive sentence, with a principal and one-third subordinate terms, is a single aggregate term – an interlocking whole – not a set of separate component parts. (*E.g., People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258; *People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1551-1552; *People v. Savala* (1983) 147 Cal.App.3d 63, 68-69.)[10]

These opinions support the conclusion that it makes no sense to try to apply § 2933.1 on some one-third § 1170.1(a) consecutive sentence counts but not others, because the counts are aggregated into a unified sentence and not separate. (*See People v. Marichalar* (2003) 144 Cal.App.4th 1331, 1336 [citing *Ramos*, and *People v. Begnaud, supra,* 235 Cal.App.3d at p. 1552].) This Court agreed in *Reeves*, when it recognized the unique nature of consecutive sentences under § 1170.1(a):

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[10] Full-term consecutive sentences do not fall under section 1170.1, subdivision (a), and are not subject to this reasoning or body of caselaw. (*See Tate,* 135 Cal.App.4th at pp. 764-765.)

> Under the Determinate Sentencing Act (§ 1170 et seq.), multiple consecutive determinate terms must be combined into a single, "aggregate term of imprisonment for all [such] convictions" (§ 1170.1, subd. (a)) that merges all terms to be served consecutively . . . . To suggest that a prisoner serving an aggregate term serves the component terms and enhancements in any particular sequence would be a meaningless abstraction. For this reason, when an aggregate term includes time for a violent offense, at any point during that term the prisoner literally "is convicted of a [violent] felony offense" (§ 2933.1(a)) and actually is serving time for that offense. Accordingly, a restriction on credits applicable to "any person who is convicted of a [violent] felony offense" (ibid.) logically applies throughout the aggregate term.

(*Reeves*, *supra*, 35 Cal.4th at pp. 772-773.)

However, *Reeves* rejected the People's effort to extend this one-third consecutive sentence reasoning to concurrent sentences:

> The People's effort to apply the same logic to concurrent terms is not convincing. A court that decides to run terms consecutively must create a new, "aggregate term of imprisonment" (§ 1170.1, subd. (a)) into which all the consecutive terms merge, but no principle of California law merges concurrent terms into a single aggregate term. Section 1170.1, which articulates the statutory mandate and authority for creating aggregate consecutive terms, says nothing about concurrent terms.

(*Id.* at p. 773.) *Tate*, applying *Reeves* and its analysis above, rejected a similar effort to extend the one-third consecutive sentence reasoning to full-term consecutive sentences. (*Tate*, 135 Cal.App.4th at p. 765.)

The above passage from *Reeves* is even more clearly true in the current case. To use the language of *Reeves* above, "[s]ection

1170.1 . . . says nothing about [terms stayed under section 654]." And again in the language of *Reeves* above, "no principle of California law merges [a served term, plus a term stayed under section 654] into a single aggregate term." Nor could it, for the reasons already stated – a term for which execution of sentence is stayed under § 654 is obviously no prison term at all, as it cannot be since it is not criminal punishment. (*See* discussion *ante*, p. 8.)[11]

D. Conclusion To Part I

That all said, Mr. Pope believes the answer to the question before this Court is easily stated in two words: Follow *Reeves*. This Court should reach the same result if it doesn't (*see ante*, p. 2), but there is no principled basis not to. Applying *Tate*, which also followed *Reeves*, leads to the same result.

Mr. Pope respectfully asks that the judgment of the Court of Appeal be reversed, and that of the Superior Court be reinstated.

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[11] The dissent in *Reeves* believed that a concurrent term does merge into a single aggregate term. (*Id.* at p. 785, fn. 3.) But even under that reasoning, there still is no principle of California law that merges a § 654-stayed sentence into a single aggregate prison term, because as discussed previously in this brief, a § 654-stayed sentence is not service of a prison term at all. (*Ante*, p. 8.)

INTRODUCTION TO ARGUMENT II

Argument II, a pure question of law raised solely on the face of the record, was not raised in Mr. Pope's *pro. per.* habeas corpus petition in the Superior Court, and also was not raised in the People's appeal from the Superior Court's judgment. It is nonetheless reviewable here for each of the following reasons.

A. Fairly Included Within Issue On Review

The issue in Argument II is fairly included within the issue on which this Court granted review, because it directly affects the fundamental premise of the grant of review, that § 2933.1 applies to this case at all. (*See, e.g., People v. Medina* (2007) 41 Cal.4th 685, 701 [where review grant was limited (as relevant here) to whether defendant was convicted of lesser included offenses within § 209.5, Court also considered whether lesser included offense convictions should have sentences stayed as opposed to being stricken altogether, as fairly included within the grant]; *People v. Perez* (2005) 35 Cal.4th 1219, 1228 [where review grant was limited to requirements of aiding and abetting liability, Court also considered whether instructional error on that issue was harmless in the case at bar, because it was "fairly embraced" within the question on review]; *People v. Giles* (2007) 40 Cal.4th 833, 852 [where issues on review related to whether the "forfeiture by wrongdoing" doctrine applied,

Court also considered the question of standard of proof in cases where the doctrine did apply, as fairly included within the grant], vacated and rem'd on other grds. sub nom. *Giles v. California* (June 25, 2008) 554 U.S. ___ [128 S.Ct. 2678, 171 L.Ed.2d 488].)

Here, the issue of whether § 2933.1(a) applies to a case for which all violent felony sentences were stayed under § 654 – the one for which this Court granted review – presupposes as a foundational requirement that there *are* violent felony sentences. The issue in Argument II is therefore quite literally "'fairly included' within the issues on which [this Court] granted review." (*People v. Medina, supra,* 41 Cal.4th at p. 701; *cf. In re Marriage of D'Amico* (1994) 7 Cal.4th 673, 687, fn. 2 [conc. opn. of Kennard, J.] ["threshold issues concerning mootness, standing, jurisdiction, scope of review, and the like are always necessarily included within our scope of review"].)

B. Pure Question Of Law With No Disputed Facts, Pertinent To A Proper Disposition Of The Cause

Even if *arguendo* this issue had not been fairly included within the issue on review, it would certainly be included within this Court's statement of reviewability in *People v. Randle* (2005) 35 Cal.4th 987, 1001-1002. In *Randle*, the grant of review was limited to the question of whether California recognizes the doctrine of imperfect

defense of others. However, this Court also considered whether that doctrine applied to the undisputed facts of the defendant's case:

> As a matter of policy, we generally will not consider on review any issue which could have been, but was not, timely raised in the Court of Appeal. (Cal. Rules of Court, rule 28(c)(1); Gavaldon v. DaimlerChrysler Corp. (2004) 32 Cal.4th 1246, 1265 [13 Cal. Rptr. 3d 793, 90 P.3d 752].) However, "[i]n a number of cases, this court has decided issues raised for the first time before us, *where those issues were pure questions of law, not turning upon disputed facts,* and were pertinent to a proper disposition of the cause or involved matters of particular public importance." (E.g., Temple Community Hospital v. Superior Court (1999) 20 Cal.4th 464, 469, fn. 2 [84 Cal. Rptr. 2d 852, 976 P.2d 223]; Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1, 7–8, fn. 2 [74 Cal. Rptr. 2d 248, 954 P.2d 511]; Jolly v. Eli Lilly & Co. (1988) 44 Cal.3d 1103, 1118 [245 Cal. Rptr. 658, 751 P.2d 923]; Fisher v. City of Berkeley (1984) 37 Cal.3d 644, 654 & fn. 3 [209 Cal. Rptr. 682, 693 P.2d 261].)" (People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888, 901, fn. 5 [119 Cal. Rptr. 2d 1, 44 P.3d 949], italics added.)

(*Randle*, 35 Cal.4th at pp. 1001-1002 [italics in original].)

Here, akin to *Randle*, whether § 667.5(c)(8) applies to any of the convictions in this case is obviously a pure question of law which doesn't turn on any disputed facts. It can be, and is, raised solely by the record before this Court.

Furthermore, the issue raised by Mr. Pope is "pertinent to a proper disposition of the cause," for the reasons *ante*, p. 40, incorporated by reference here. The issue is therefore reviewable under *Randle*.

C. Unauthorized Sentence

The discussion in section (B) above is particularly apt because if there were no violent felony sentences here, then addressing the question on review – which presupposes the existence of violent felony sentences – without addressing whether there are any, could create a legally unauthorized sentence.

An error in credits, occasioned by using a credits statute in a manner that is not permitted by law, creates a legally unauthorized sentence. In such a situation, the Legislature has never authorized imprisoning a defendant in the manner directed by the error. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 646; *People v. Acosta* (1996) 48 Cal.App.4th 411, 428, fn. 8.) (The legal error argued by Mr. Pope in the application of postsentence credits in this case was not technically "at sentencing," but it similarly created a legally unauthorized sentence. (*In re Sosa* (1980) 102 Cal.App.3d 1002, 1003-1004, 1006.))

A legally unauthorized sentence is void, to the extent it is unauthorized. (*In re Sandel* (1966) 64 Cal.2d 412, 414, 417-419; *Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 818-819.)

Undoubtedly for such reasons, "[i]t is settled that an unauthorized sentence is 'subject to judicial correction whenever the error [comes] to the attention of the trial court or a reviewing court.

[Citations.]" (*People v. Serrato* (1973) 9 Cal.3d 753; *accord People v. Cunningham* (2001) 25 Cal.4th 926, 1044-1045; *see People v. Karaman* (1992) 4 Cal.4th 335, 345-346, fn. 11 [even after jurisdiction has expired, trial court may correct judicial error that is void on its face]; *People v. Fares* (1993) 16 Cal.App.4th 954, 958 [no time limit to seek correction]; *Wilson v. Superior Court, supra,* 108 Cal.App.3d at pp. 818-819 [trial court had jurisdiction to correct improper calculation of conduct credits long after time for filing appeal had expired].) A legally unauthorized sentence may therefore be corrected by a petition for habeas corpus. (*In re Harris* (1993) 5 Cal.4th 813, 838-841; *Neal v. State of California* (1960) 55 Cal.2d 11, 15-17.)

This doctrine is particularly applicable to pure questions of law raised solely on the face of the record, as here. "Because these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court.' [Citation.]. . . [A]ppellate intervention [is] appropriate in these cases because the errors present[] 'pure questions of law' [citation], and [a]re ' "clear and correctable' independent of any factual issues presented by the record at sentencing." [Citation.]'" (*People v. Smith* (2001) 24 Cal.4th 849, 952.)

If this Court were to decide against Mr. Pope in the issue on review, but not decide Argument II, then it could create a legally unauthorized sentence – i.e., one that is null and void (*ante*) – should Mr. Pope's Argument II present a proper construction of the law. California courts should not sit to create judgments that are null and void. (*See In re Basuino* (1943) 22 Cal.2d 247, 254; *People v. Labarbera* (1949) 89 Cal.App.2d 639, 644.)

D. Correct Result Reached By The Trial Court

If Mr. Pope is correct in Argument II, then he should have the opportunity to defend the Superior Court's judgment on all legal grounds supported by the record, even grounds that weren't reached by the Superior Court.

"No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal. 3d 1, 19; *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

In defending the judgment of the Superior Court below, Mr. Pope seeks to advance theories of law applicable to this case which present pure legal questions apparent on the face of the record. Under *D'Amico*, *Davey* and similar cases, he should not be bound solely to the issue on which the trial court predicated its judgment, from which the People appealed.

II. THE RECORD DOES NOT SHOW ANY VIOLENT FELONY CONVICTIONS UNDER § 667.5, SO § 2933.1 IS INAPPLICABLE

A. Introduction; Reviewability

Mr. Pope should not be subjected to § 2933.1 at all – on any count – because § 2933.1 does not apply to this case, so any invocation of § 2933.1 results in a legally unauthorized sentence.

Under settled and long-established authority from this Court, the plain language of Penal Code § 667.5, subdivision (c)(8) does not apply to an admission or true finding of a charged enhancement under § 12022.7, absent a separate finding or admission of intent to inflict great bodily injury. The record of this case – including the summary of the pleas in the probation report – does not reflect such a finding or admission.

Consequently, as tragic as this case was, and as indefensible as Mr. Pope's actions were (reflected by his pleas of guilty "straight up"), application of the law provides no basis for a § 2933.1 finding.

B. Summary

The issue is governed by this Court's opinions in cases such as *People v. McGee* (1977) 19 Cal.3d 948, 958 & fn. 3 ["*McGee*"] and *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59 ["*Palermo*"], stating the rule of statutory incorporation by reference as

applied to Penal Code § 667.5, subdivision (c)(8) at the time it was enacted in 1977.

The statutory incorporation rule may also be found in more recent cases. (*E.g., People v. Hernandez* (2003) 30 Cal.4th 835, 865; *People v. Anderson, supra,* 28 Cal.4th at p. 779.) However, the older cases are more germane here, because they represent the governing caselaw when the statute was enacted in 1977. The Legislature is presumed to have enacted a statute in light of the caselaw that existed at the time of enactment (*Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609; *People v. Overstreet* (1986) 42 Cal.3d 891, 897), so the caselaw in effect in 1977 is the caselaw that applies to this question.

Under the statutory incorporation rule described above:

(1) The 1977 version of Penal Code § 12022.7 required the prosecution to plead and prove intent to inflict great bodily injury.

(2) That version of § 12022.7 was incorporated by specific reference into § 667.5(c)(8) when it became operative in 1977.

(3) This provision of section 667.5(c)(8) has never changed.

(4) Consequently, section 667.5(c)(8) continues to require that the prosecution plead and prove intent to inflict great bodily injury – even though § 12022.7 no longer does.

(5) Because there was no such pleading and proof in this case, section 667.5(c)(8) does not apply to this case.

(6) As a result, there is no provision of law which makes any of the convictions in this case violent felonies, and section 2933.1 does not apply.

This issue isn't about § 12022.7, which hasn't required intent to inflict injury since 1997; it's about § 667.5(c)(8). The latter incorporated § 12022.7 by specific reference when enacted in 1977. It means now what it did then.

In other words, under the statutory incorporation rule as applied to this 1977 statute, the violent felony provisions of § 667.5(c)(8) incorporated a 1977 great bodily injury enhancement statute with the same code number (12022.7) as a current great bodily injury enhancement statute. But the 1977 and current versions of § 12022.7 are two different statutes, and only the older one was incorporated by reference into § 667.5(c)(8). In effect, the reference to "Section 12022.7" in § 667.5(c)(8) must be read as if its language was not merely "Section 12022.7," but rather, "The version of Section 12022.7 which was operative at the time § 667.5(c)(8) was enacted."

However, even if *arguendo* there were any ambiguity left, the Legislature's intent would have to be determined based on the law

when the statute was enacted; here, in 1977. (*In re Pedro T., supra,* 8 Cal.4th at pp. 1047-1048; *People v. Anderson, supra,* 28 Cal.4th at pp. 774, 779; *People v. Frawley* (2000) 82 Cal.App.4th 784, 793.) Furthermore, doubts regarding the scope and applicability of a criminal statute should be resolved in favor of the defendant. (*People v. Simon* (1995) 9 Cal.4th 493, 517-518; *United States v. Lanier* (1997) 520 U.S. 259, 266 [federal due process].)

These principles yield the same result. So would common sense.

C. Background

Section 2933.1 states that a person will receive only 15 percent credits if he or she "is convicted of a felony offense listed in Section 667.5[(c)]." The only question raised here is: Did Mr. Pope plead to any "felony offense listed in Section 667.5(c)?"

Mr. Pope pled to one count of violating Penal Code § 191.5, subdivision (a) and two counts of violating Vehicle Code § 23153, none of which are enumerated offenses within Penal Code § 667.5.

As a result, Mr. Pope's convictions may be treated as violent felonies under § 667.5 only under subdivision (c)(8) – i.e., if he had one or more convictions for "inflict[ing] great bodily injury on any person other than an accomplice which has been charged and proved as provided for in Section 12022.7...." (*People v. Ruiz* (1999)

69 Cal.App.4th 1085, 1089 [underscoring added].) Only the convictions for violating Vehicle Code § 23153 could be argued to qualify, because of their enhancements, so those are the only convictions Mr. Pope will discuss here.

Section 667.5(c)(8) states in pertinent part that the category of violent felonies includes (underscoring added):

> Any other felony in which the defendant inflicts great bodily injury . . . which has been charged and proved as provided for in Section 12022.7 . . .

The issue is therefore what the phrase "as provided for in Section 12022.7," within § 667.5(c)(8), means.

That particular language of § 667.5(c)(8) has remained the same over the years, and says today what it said when it was enacted in 1977. (*See In re Schaefer* (1981) 116 Cal.App.3d 588, 591, fn. 2; *People v. James* (1978) 88 Cal.App.3d 150, 162 [both quoting the statutory provision, as of shortly after its enactment in 1977].) The meaning of that language now is therefore whatever its meaning was when the provision was enacted in 1977. (Govt. Code, § 9605; *People v. Morante* (1999) 20 Cal.4th 403, 429-430 & n.14; *People v. Escobar* (1992) 3 Cal.4th 740, 750-751 & n. 5.)

Obviously, some version of § 12022.7 was incorporated by reference into § 667.5(c)(8) when it was enacted. Section 12022.7, like § 667.5(c), was enacted with an operative date of July 1, 1977.

(That these statutes have the same operative date is no coincidence, since July 1, 1977 was the operative date of the entire Determinate Sentencing Act. (Stats. 1976, ch. 1139.))

The version of section 12022.7 which became operative on July 1, 1977 is reprinted in the footnote below (underscoring added).[12]

By its plain language, the relevant (1977) version of § 12022.7 was inapplicable unless the prosecution pleaded and proved intent to inflict great bodily injury. (*People v. Miller, supra,* 18 Cal.3d at p. 884; *People v. O'Connell* (1996) 39 Cal.App.4th 1182, 1191-1192; *People*

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[12] Any person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony shall, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be punished by an additional term of three years, unless infliction of great bodily injury is an element of the offense of which he is convicted.

As used in this section, great bodily injury means a significant or substantial physical injury.

This section shall not apply to murder, manslaughter, assault with a deadly weapon or assault by means of force likely to produce great bodily injury under Section 245. The additional term provided in this section shall not be imposed unless the fact of great bodily injury is charged in the accusatory pleading and admitted or found to be true by the trier of fact.

(*See People v. Superior Court (Grilli)* (1978) 84 Cal.App.3d 506, 512, fn.3.)

v. Phillips (1989) 208 Cal.App.3d 1120, 1124; *People v. Brown* (1985) 174 Cal.App.3d 762, 766 & fn. 2.) In 1996, however, the Legislature amended § 12022.7 to delete the intent to injure requirement. (*People v. Guzman* (2000) 77 Cal.App.4th 761, 764; *People v. Garcia* (1998) 63 Cal.App.4th 820, 835, fn. 16.)

In this 2002 case, Mr. Pope's Vehicle Code § 23153 convictions plus associated Penal Code § 12022.7 enhancements did not require intent to inflict great bodily injury. They therefore did not require an essential element of what had been required by § 12022.7, at the time § 667.5(c)(8) became operative.

Section 667.5, subdivision (c)(8) specifically requires that a violation of § 12022.7 be charged and proved "as provided for in Section 12022.7" before there can be "violent felony" status. (*Accord, e.g., People v. Alvarado* (1982) 133 Cal.App.3d 1003, 1025; *People v. James* (1978) 88 Cal.App.3d 150, 162.)

Consequently, there would be no basis to find the § 667.5(c)(8) requirement of a GBI felony "charged and proved as provided for in Section 12022.7" – if § 667.5(c)(8) incorporates the version of § 12022.7 that was in effect in 1977, when § 667.5(c)(8) was enacted.

D. Legal Discussion: The Statutory Incorporation Rule Applies To This Case

1. Application Of The Statutory Incorporation Rule

The question here is therefore: When the Legislature made § 667.5(c) operative in 1977, did § 667.5(c)(8) incorporate § 12022.7 as it existed in 1977? Or to the contrary, did the 1977 incorporation of § 12022.7 into § 667.5(c)(8) continue to sweep in every later amendment of § 12022.7 on an ongoing basis? If the former is true, then a conviction under a statute not listed in § 667.5(c) cannot be sentenced as a violent felony under § 667.5(c)(8) because of an associated § 12022.7 enhancement, when intent to injure has been neither pled nor proved nor admitted.

The former is indeed true. Violent felony status under § 667.5(c)(8) required intent to injure in 1977 when the statute was enacted, because it incorporated § 12022.7 by specific reference, as the latter statute existed at the time. Section 667.5(c)(8) has never changed. This case is therefore outside of § 2933.1, as there was no allegation, finding, or admission of intent to injure.

This Court has set forth the governing law on many occasions. One of the most common formulations as of 1977, when § 667.5(c)(8) was enacted, stated:

> It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they exist at the time of the reference and not as subsequently modified, and that the repeal of the provisions referred to does not affect the adopting statute, in the absence of a clearly expressed intention to the contrary. [Citations.] . . .
>
> It also [] [must] be noted that there is a cognate rule, recognized as applicable to many cases, to the effect that where the reference is general instead of specific, such as a reference to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time, and (it may be assumed although no such case has come to our attention) as they may be subjected to elimination altogether by repeal.

(*Palermo,* 32 Cal.2d at pp. 58-59; *accord, e.g., People v. Superior Court (Lavi)* (1992) 4 Cal.4th 1164, 1176, fn. 7.)

At the time the Legislature made § 667.5(c)(8) operative, July 1, 1977, the incorporation by reference rule as set forth above was undisputably the law of this State. This Court so held in opinions contemporaneous with the July 1, 1977 operative date of § 667.5(c)(8), *People v. McGee* (1977) 19 Cal.3d 948, 958 & fn. 3, and *In re Sands* (1977) 18 Cal.3d 851, 853-854 & fn.1, both of which relied on the opinion in *Palermo v. Stockton Theatres, Inc., supra.* Contemporaneous Court of Appeal opinions included *Harrington v. Obledo* (1977) 72 Cal.App.3d 705, 711, *People v. Isaac* (1976) 56

Cal.App.3d 679, 682, fn. 1 and *Madrid v. Justice Court* (1975) 52 Cal.App.3d 819, 823, all of which also relied on *Palermo*.

The statutory incorporation rule was therefore an established part of the legal landscape when § 667.5(c)(8) became operative in July 1977. As such, it was part of what the Legislature intended when it incorporated then-§ 12022.7 by reference into § 667.5(c)(8). "[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them." (*Viking Pools, Inc. v. Maloney, supra,* 48 Cal.3d at p. 609; *People v. Overstreet* (1986) 42 Cal.3d 891, 897; *Dalton v. Superior Court* (1993) 19 Cal.App.4th 1506, 1511-1512.) Furthermore, legislative intent for a statute must be construed as of the time the statute was enacted (here, 1977), not some later time. (*People v. Williams* (2001) 26 Cal.4th 779, 785; *In re Pedro T., supra,* 8 Cal.4th at pp. 1047-1048.)

As a result, the statutory incorporation rule is part and parcel of the law underlying the enactment of § 667.5(c)(8) in 1977.

The statutory incorporation rule, particularly as utilized in 1977, is a shorthand convention of plain English. "[T]he legal effect of such reference . . . is the same as though the [incorporated statute] had

been inserted therein [into the incorporating statute] *in extenso*." (*Don v. Pfister* (1916) 172 Cal. 25, 28.)

In other words, unlike most 'rules of statutory construction,' the statutory incorporation rule was long recognized as merely a shorthand form of express incorporation by reference, in lieu of having to physically put the entire text of the incorporated statute *in extenso* into the incorporating statute for every such law (thereby significantly increasing both statutory volume and printing bills). "[W]hen, as here, [the incorporating statute] designates and adopts an entire provision contained in a section of the code by its descriptive number . . . the statute so adopted by reference is the same as though the provision adopted had been bodily incorporated in the adopting statute. [Citations.]" (*Vallejo and North. Ry. Co. v. Reed Orchard Co.* (1918) 177 Cal. 249, 254; *see also, e.g., Goodman v. Kendall Gate-Investco, Inc.* (Fla. Ct. App. 1981) 395 So.2d 240, 241; *City of Pleasant Ridge v. Governor* (1969) 382 Mich. 225, 243-247 [169 N.W.2d 625]; *see generally* 2A C. Sands, Sutherland on Statutory Construction (1984), § 51.08 at p. 516; 73 Am.Jur.2d (1974), Statutes, § 28.)

As a convention of plain language, the statutory incorporation rule – particularly as it was enunciated when section 667.5(c)(8) was enacted in 1977 – could only be overridden by an express contrary

declaration of legislative intent. *Palermo* (among other cases) so held, when it stated that the statutory incorporation rule was applicable "in the absence of a clearly expressed intention to the contrary." (*Id.* at p. 59; *accord, e.g., People v. Superior Court (Lavi), supra,* 4 Cal.4th at p. 1176, fn. 7.) That was also set forth in the 1977 *McGee* case, which was contemporaneous with the enactment of section 667.5(c)(8). (*Id.*, 19 Cal.3d at p. 958, fn. 3.)

Consequently, the 1977 Legislature could rely on the statutory incorporation rule as set forth above, knowing that unless it set forth a "clearly expressed intention to the contrary," a statutory adoption of a target statute by specific reference would be taken as referring to the target statute as it existed at the time of the adoption.

There was no "clearly expressed intention to the contrary" in any statute in 1977. No statute expressed any contrary intention at all, clearly or otherwise.

Accordingly, § 667.5(c)(8)'s reference to section 12022.7 is an incorporation by specific reference: It refers to the version of § 12022.7 in existence in 1977, not to the 1996 amendment to § 12022.7; and, there is no "clearly expressed intention to the contrary" in any statute. As a result, § 667.5(c)(8) does not extend to cases in which there is no pleading and proof (or admission) of intent to injure, as had been required by § 12022.7 in 1977.

This is such a case. Consequently, the great bodily injury enhancements in counts 2 and 3 do not invoke § 667.5(c)(8). There is also no other provision of § 667.5(c) which could be argued to apply to this case.

Because § 667.5, subdivision (c) does not apply to this case, neither does § 2933.1. The 15 percent restriction was therefore a legally unauthorized sentence. (*E.g., People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)

E. Confirming Indicia Of Legislative Intent

Although they should not be necessary in light of the discussion above, there are also many indicia of legislative intent that confirm the plain statutory language. They further show the 1977 Legislature intended § 667.5(c)(8) to contain the intent to injure requirement that existed in the 1977 version of § 12022.7, which was incorporated by reference into § 667.5(c)(8) in 1977.

1. First Confirming Indicium: The Statutory Incorporation Rule, As It Existed In 1977

First is the one which was discussed in the previous section: In decisions in and before enactment of the statute in 1977, the incorporation by reference rule was unequivocally accepted as a matter of plain language, "absent clearly expressed intention to the contrary." That itself is a very strong – and, under the caselaw cited

above, dispositive – indicator of how the 1977 Legislature intended to utilize the rule. (*See* discussion *ante*, p. 56.)

2. Second Confirming Indicium: *Noscitur A Sociis*

The other statutes incorporated into the great bodily injury provisions of § 667.5(c)(8) when it was enacted were former Penal Code §§ 213, 264 and 461, which governed what had been the crimes of first-degree robbery, rape, and burglary. The great bodily injury portions of those statutes, by their plain language, applied only in cases of intent to inflict great bodily injury which was pleaded and proved. (*People v. Cole* (1982) 31 Cal.3d 568, 577-578; *People v. Miller, supra,* 18 Cal.3d at pp. 882-884; *People v. Robinson* (1988) 198 Cal.App.3d 674, 680-681.)

Section 12022.7, in fact, was enacted to supplant former sections 213, 264 and 461. It was the same type of enhancement (albeit more broadly applicable to most felonies); it was merely put in its own section of the Penal Code. (*People v. Cole, supra,* 31 Cal.3d at p. 578; *People v. Robinson, supra,* 198 Cal.App.3d at pp. 680-681.) Section 667.5(c)(8) incorporated both section 12022.7 as it existed as of July 1, 1977, and former sections 213, 264 and 461 as they existed before July 1, 1977, in the same provision and immediately next to each other.

Because the 1977 Legislature put § 667.5(c)(8)'s reference to § 12022.7 in the same subsection and clause as § 667.5(c)(8)'s references to former §§ 213, 264 and 461, the meaning of the 1977 reference to § 12022.7 is determined by reference to the characteristics it shared with the other statutes listed with it (i.e., former §§ 213, 264, 461). *Noscitur a sociis*. (*Grafton Partners L.P. v. Superior Court* (2005) 36 Cal.4th 944, 960; *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159-1160.) That was also a recognized method of effectuating legislative intent in 1977. (*People v. Stout* (1971) 18 Cal.App.3d 172, 177; *People v. Buese* (1963) 220 Cal.App.2d 802, 807.)

Since the great bodily injury provisions of former §§ 213, 264 and 461 all required intent to inflict great bodily injury, application of the principle *noscitur a sociis* means that the version of § 12022.7 incorporated by reference into the 1977 version of § 667.5(c)(8) also included a mental state element of intent to inflict great bodily injury. Consequently, the principle of *noscitur a sociis* applies to the mental state element of the great bodily injury provisions of § 667.5(c)(8), as it did when the statute was enacted in 1977.

3. Third Confirming Indicium: Had The Legislature Intended Differently For Violent Felonies, It Knew What To Do, As It Did In The Serious Felony Statute

If the Legislature had intended § 667.5(c)(8) not to contain an intent to injure requirement, it knew how not to put such a requirement into the statute. That happened in the statute governing the broader category of "serious felonies" enacted as a result of Prop. 8 in 1982, § 1192.7(c).

When a provision is found in the violent felony statutes, but not in the serious felony statutes, it is presumed that the Legislature meant to do exactly that – apply it to the former, but not to the latter. *Expressio unius est exclusio alterius*. (*Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 583.) This was, of course, a well-established statutory principle in 1977, when § 667.5(c)(8) was enacted. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 196; *Ogdon v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 192, 198.)

As an illustration, while § 667.5(c)(8) contains a requirement that great bodily injury must be "charged and proved as provided for in section 12022.7," § 1192.7(c)(8) contains no such requirement. For this reason, battery with serious bodily injury can never itself be a violent felony under section 667.5(c)(8), because great bodily injury can never be pleaded and proved under § 12022.7 for such a conviction. (*People v. Hawkins* (2003) 108 Cal.App.4th 527, 530-

531.) But § 1192.7(c)(8) has no such provision, so battery with serious bodily injury can be a serious felony under § 1192.7. (*People v. Yarbrough* (1997) 57 Cal.App.4th 469, 475-476.)

Here, § 1192.7(c)(8) does not incorporate or otherwise mention § 12022.7. Nor does it contain an intent to injure requirement in any other words. Rather, it applies more broadly to "any felony in which the defendant personally inflicts great bodily injury on any person . . ." It always has, since its enactment in 1982.

Section 1192.7(c)(8) is construed to mean what it says – it has no requirement of intent to inflict injury. (*People v. Gonzales* (1994) 29 Cal.App.4th 1684, 1691-1694; *People v. Brown* (1988) 201 Cal.App.3d 1296, 1300-1303.) In like manner, a statute which does have a requirement of intent to inflict injury is also construed to mean what it says. (*Gonzales,* 29 Cal.App.4th at pp. 1696-1698.)

Had the Legislature wanted § 667.5(c)(8) to apply broadly to any felony conviction for a crime which the defendant inflicted great bodily injury, it knew how, as it did in § 1192.7(c)(8).

By contrast, the 1977 Legislature did include in § 667.5(c)(8) what the 1982 Legislature didn't include in § 1192.7, the restriction that infliction of great bodily injury must be pled and proved "as provided for in Section 12022.7." That restriction must be construed to have meaning. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22.)

Construing it to have meaning also makes sense because otherwise, the great bodily injury provisions in § 1192.7(c)(8) and § 667.5(c)(8) would be the same, when they are worded quite differently. It must be presumed that the Legislature intended a difference in meaning by its choice of materially different language. (*People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 717; *People v. Trevino* (2002) 26 Cal.4th 237, 242.)

The statutory incorporation rule does exactly that. The § 12022.7 restriction was not enacted into § 1192.7(c)(8) because no intent to injure was required. The § 12022.7 restriction *was* enacted into § 667.5(c)(8) because an intent to injure was required. The extra restriction would be meaningless without the statutory incorporation rule.

4. Fourth Confirming Indicium: *People v. Kirk*

Another confirming indicium is found in *People v. Kirk* (1990) 217 Cal.App.3d 1488, which held that the incorporation by reference in Penal Code section 667.6(c) – another statute covering violent offenses – was a specific incorporation.

Kirk concluded that § 667.6(c)'s reference to § 289 was a specific incorporation of the version of § 289 in effect at the time § 667.6 was enacted in 1980, and didn't incorporate any subsequent (post-1980) amendments to section 289. In *Kirk*, the defendant's only

§ 289 conviction was for a nonforcible violation of § 289(j), a subdivision which didn't exist at the time § 667.6 was enacted in 1980; at the time of § 667.6's enactment in 1980, § 289 covered only forcible acts. The Court held that though the defendant committed many acts of molestation, the statutory incorporation governed, and Kirk could not be given a full consecutive sentence for a nonforcible violation of § 289(j) because that provision didn't exist when § 667.6(c) was enacted. (*Id.* at pp. 1498-1499.)

Section 667.6(c), like § 667.5(c), is a provision designed for extra punishment of specified particularly violent offenses. (*E.g., People v. Jones* (1988) 46 Cal.3d 585, 595.) Especially in light of the discussion in this section, Mr. Pope is unaware of any principled basis to hold that *Kirk* applies to § 667.6(c), but somehow § 667.5(c) should be construed differently.

5. Fifth Confirming Indicium: Common Sense, And Keeping The Statutory Scheme Harmonious

Then, there is common sense. § 667.5 was enacted as an harmonious statutory scheme, imposing significant extra criminal consequences upon people who intended to commit one of the acts of violence as defined in § 667.5(c). Statutes should always be construed harmoniously within themselves and among the various provisions of the statutory scheme. (*People v. Murphy* (2001) 25

Cal.4th 136, 142.) This was true in 1977 as well. (*E.g., Select Base Materials, Inc. v. Board of Equalization* (1959) 51 Cal.2d 640, 645.)

In 1977, under every other provision of section 667.5, there was no such thing as a "negligent violent felony" or "strict liability violent felony," by which the defendant need not have any intent to commit or threaten an act of violence.[13] Every one of those provisions required at least the general intent to commit the act that constitutes the crime of violence. That is, in fact, still true to this day.

By contrast, reading an intent to injure requirement out of § 667.5(c)(8) would mean the 1977 Legislature intended that any negligent or strict liability felony which results in personal infliction of great bodily injury, even if neither the felony nor the injury were intended, would still be deemed a violent felony. This would be true for even an unintentional crime with unintentionally inflicted injuries like swelling, bruises and lacerations that were merely transitory. (*See, e.g., People v. Sanchez* (1982) 131 Cal.App.3d 718, 733-734.)

That wouldn't make sense in light of the overall statutory scheme, as discussed above.

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[13] A violation of section 288, subdivision (a) is for these purposes considered to be a crime of violence, because it can cause "extraordinary psychological or emotional harm" – i.e., nonphysical violence. (*People v. Hetherington* (1984) 154 Cal.App.3d 1132, 1139-1140.)

Furthermore, it wouldn't make sense in light of the Legislature's stated purpose of the violent felony provisions of § 667.5(c), which was also enacted in 1977 and has remained constant to this day. That purpose is: "The Legislature finds and declares that these specified crimes merit special consideration when imposing a sentence to display society's condemnation for these extraordinary crimes of violence against the person." (§ 667.5, subd. (c)(23) [underscoring added]; *accord, e.g., People v. Henson* (1997) 57 Cal.App.4th 1380, 1386.) Particularly in light of the rest of the statute, an unintentional crime resulting in unintentional injuries is hardly an "extraordinary crime of violence against the person" akin to the other subdivisions in the statute.

That is all the more highlighted by the fact that not even unintentional crimes of violence resulting in the worst injuries, i.e. manslaughter crimes resulting in death (involuntary or vehicular manslaughter), are specified as violent felonies in § 667.5(c). Indeed, vehicular manslaughter has been specified as a serious felony (*see* §§ 1192.7(c)(8), 1192.8), but never as a violent felony.

A recent published opinion further underscores the major problems with creating a "back door" violent felony for vehicular manslaughter, when the Legislature kept the front door closed by not including it in § 667.5(c):

> [T]he Legislature has provided a specific penalty for a conviction of manslaughter occurring as a result of driving while intoxicated . . . . "The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply." (People v. Jenkins (1980) 28 Cal.3d 494, 505 [170 Cal. Rptr. 1, 620 P.2d 587]; see People v. Coronado (1995) 12 Cal.4th 145, 153–154 [48 Cal. Rptr. 2d 77, 906 P.2d 1232].) In addition, the great bodily injury enhancement alleged in this case under section 12022.7 for the death of [the victim] is inapplicable to a conviction for section 192, subdivision (c)(3). (See § 12022.7, subd. (g) [this enhancement "shall not apply to murder or manslaughter"].) Sentencing appellant on the lesser included offense of Vehicle Code section 23153, with a great bodily injury enhancement under section 12022.7 . . . for the injuries sufferedef by the deceased victim . . . circumvents the statutory scheme for vehicular manslaughter.

(*People v. Binkerd* (2007) 155 Cal.App.4th 1143, 1149-1150.)

Application of the statutory incorporation rule is the only means of keeping the statutory scheme intact, by ensuring that the category of violent felonies does not inadvertently sweep in crimes of inadvertence with injuries of inadvertence.

6. Sixth Confirming Indicium: Subsequent Addition Of Section 12022.9, But Not Section 12022.8

While post-enactment amendments might not be direct evidence of what the Legislature meant by a statute at the time of its enactment, they may at least be indicia of what a later Legislature thought the statute meant at the time of the amendment.

Effective January 1, 1989, § 667.5(c)(8) was amended to add § 12022.9 alongside of § 12022.7 in its great bodily injury provisions. Section 12022.9 had been enacted in 1986 to add a five-year enhancement for personal infliction of injury, with intent to inflict injury, resulting in termination of a pregnancy on a woman whom the defendant knew or should have known was pregnant. As the discussion in subsection (2) above ("*noscitur a sociis*") also shows, this addition of § 12022.9 still meant that all of the great bodily injury provisions of § 667.5(c) required intent to inflict injury.

Notably, however, the Legislature did not then add § 12022.8 to the list of great bodily injury enhancements incorporated within § 667.5(c)(8). It obviously had every opportunity to do so, since it had to review those enhancements in determining to add § 12022.9. Section 12022.8 was on the books a lot longer than § 12022.9 (it was enacted in 1980), and it too dealt with forms of great bodily injury – in particularly heinous crimes, no less, since § 12022.8 applied to the infliction of great bodily injury in specified sex crimes by force or fear. However, § 12022.8 lacked the requirement of intent to inflict injury that was part of §§ 12022.7 and 12022.9. (*People v. Martinez* (1993) 13 Cal.App.4th 23, 28-29.)

That also answers why the 1989 Legislature may have added § 12022.9, but not § 12022.8, to the list of great bodily injury violent

felonies: Section 12022.9 had an intent to injure requirement, § 12022.8 did not, and of course § 12022.7 did at that time.

The 1977 statutory scheme was therefore construed harmoniously by the 1989 Legislature as requiring intent to injure. The Legislature's addition of § 12022.9 but not § 12022.8 indicates that the characteristic which § 12022.9 had but § 12022.8 did not – a requirement of intent to injure – was considered to be part and parcel of the 1977 statutory scheme, and the Legislature was keeping that statutory scheme intact. *Expressio unius est exclusio alterius*. (*See* authorities *ante*, p. 61.)[14]

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[14] Section 12022.8 did not become incorporated into § 667.5(c)(8) until January 1, 2007. (If it mattered, which it shouldn't, the 2007 amendments to § 667.5(c)(8) were long after the offenses of conviction in this case.) Although legislative inaction is generally a poor indicator of legislative intent (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117), it is at least noteworthy that § 12022.8's incorporation into § 667.5(c)(8) didn't happen until some 10 years after the intent to injure requirement was deleted from § 12022.7. Had the statutory incorporation rule been inapplicable to § 667.5(c)(8), it would have been illogical for § 12022.8 – which implicates far more specific (and usually more heinous) criminal *acta reii* than the much more general § 12022.7 – to be left out of § 667.5(c)(8), until some 10 years after the 1997 amendment to § 12022.7. If intent to injure had been no longer within § 667.5(c)(8) as of 1997, why should it have taken 10 years for § 12022.8 to make it into that statute?

The addition of § 12022.8 to § 667.5(c)(8) as of January 1, 2007 was part of a piece of legislation that also added § 12022.3, both of which broadened § 667.5(c)(8) beyond its prior boundaries but solely for specified sex crimes. Section 12022.3's inclusion broadened § 667.5(c)(8) by including for the first time personal use

(continued...)

F. Because The Pleading And Proof Requirements Of Section 667.5(c)(8) Are Not Satisfied, There Can Be No Proper Violent Felony Finding

Here, there is no suggestion that Mr. Pope ever admitted, or even was charged with, an intent to inflict great bodily injury. Nor would that be logical, since an intent to inflict great bodily injury in a homicide case would be murder. In any event, the record does not show any such admission.

As this Court held in *People v. Mancebo* (2002) 27 Cal.4th 735, an extra form of punishment violates federal and state due process requirements and is legally unauthorized when it is imposed in derogation of a statute which contains an express pleading requirement, and an essential element of the sentence augmentation is not pled. (*Id.* at pp. 744-747.) Moreover, as *Mancebo* held, the error cannot be deemed "harmless." (*Ibid.*) There would be no basis for "harmless error" anyway; the requirements of § 667.5(c)(8) are not met, period. (*See, e.g., People v. Hawkins* (2003) 108

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[14](...continued)
of deadly weapons other than firearms. In like manner, § 12022.8's inclusion broadened § 667.5(c)(8) beyond its prior boundaries for specified sex crimes (though a slightly smaller list), by including for the first time non-intentional infliction of bodily injury. The 2007 Legislature's decision to deviate from its prior § 667.5(c)(8) paradigm (requiring intent to injure), but only for these types of particularly heinous sex offenses, doesn't change Mr. Pope's analysis of the statutory incorporation rule for the enactment of § 667.5(c)(8) in 1977.

Cal.App.4th 527, 530-532; *People v. Beltran* (2000) 82 Cal.App.4th 693, 697-698.) Moreover, to impose violent felony status despite this would be a paradigmatic deprivation of federal and state due process, for punishment under a law that has never been alleged or found to apply to this defendant. (*See, e.g., Cole v. Arkansas* (1948) 333 U.S. 196, 201; *In re Hess* (1955) 45 Cal.2d 171, 175.)

Since the essential elements of the 1977 version of § 12022.7 were never pled, proved or admitted, § 667.5, subdivision (c)(8) cannot properly be invoked here as to any count. Accordingly, § 2933.1 cannot properly be invoked either, and a 15% postsentence credits limitation is unauthorized.

CONCLUSION

For all of the reasons above, Mr. Pope respectfully asks that the judgment of the Court of Appeal be reversed, and that of the Superior Court be reinstated.

Respectfully submitted this 24th day of October, 2008.

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND, Executive Director

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Counsel for Nathan Pope
Under Appointment by the Supreme Court

CERTIFICATION OF WORD COUNT

As counsel for the appellant, I certify under Rule 33(b), California Rules of Court, that this brief contains 16,386 words according to the word count of the computer program used to prepare the brief.

I declare under penalty of perjury of the laws of the State of California that the above is true and correct, and that this document was executed on the date below.

Respectfully submitted this 24th day of October, 2008.

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND, Executive Director

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DECLARATION OF SERVICE BY MAIL

I, S. MICHELLE MAY, declare as follows:

I am an active member of the State Bar of California, over the age of 18 years and not a party to the within action. My business address is 2407 J Street, Suite 301, Sacramento CA 95816. On October 24, 2008, I caused to be served the foregoing

APPELLANT'S OPENING BRIEF ON THE MERITS in No. S160930

by directing in the ordinary course of business that a true copy thereof be placed in an envelope addressed to the persons named below at the address set out immediately below each respective name, and said envelopes sealed and deposited in the United States Mail, with postage thereon fully prepaid:

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A copy was also sent to the petitioner, Nathan Pope.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Executed this 24th day of October, 2008.

S. MICHELLE MAY