In the Supreme Court of the State of California

In re

NATHAN POPE,

Petitioner,

On Habeas Corpus.

S160930

Third Appellate District, No. C051564
Sacramento County Superior Court No. 05F05526
The Honorable Greta Curtis Fall, Judge

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

Statutes

TABLE OF AUTHORITIES (continued)

ISSUE PRESENTED

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-earning limitation nonetheless apply to the prisoner's sentence?

STATEMENT OF THE CASE AND FACTS

Nathan Pope, under the influence of alcohol and cocaine, careened his car into another car causing it to burst into flames, killing the driver. (Clerk's Transcript on Appeal (C.T.A.) at p. 47.)

Pope pled guilty to three felonies: gross vehicular manslaughter, driving while under the influence with a great bodily injury enhancement, and driving with an unlawful blood alcohol level with a great bodily injury enhancement. (C.T.A. at pp. 42-43.) Due to the prohibition against multiple punishment, the trial court imposed the longest possible sentence, which was the manslaughter sentence, and stayed the sentences for the Vehicle Code convictions with the great bodily injury enhancements. (C.T.A. at pp. 42-43.)

Following Pope's incarceration, the Department of Corrections and Rehabilitation (Department) imposed section 2933.1(a)'s credit-earning limitation based on Pope's convictions with the great bodily injury enhancements. (C.T.A. at pp. 1-6.) In a petition for writ of habeas corpus, Pope challenged the Department's actions, alleging that section 2933.1(a) did not apply to him because the sentences for his violent offenses were

stayed. (C.T.A. at pp. 1-6.) The superior court granted Pope's petition. (C.T.A. at pp. 73-74.) In granting the petition, the superior court concluded it was bound by the First District Court of Appeal's decision, *In re Phelon* (2005) 132 Cal.App.4th 1214, which held that section 2933.1(a) does not apply when the sentence for the violence offense has been stayed. (C.T.A. at p. 74)

The Department appealed. The Third District Court of Appeal reversed the superior court and agreed that Pope is subject to the violent offender credit-earning limitation because he was convicted of an enumerated violent offense.

On April 9, 2008, this Court granted Pope's and the Department's petitions for review.

SUMMARY OF THE ARGUMENT

A prisoner convicted of a violent felony is limited in the amount of credits he may earn. (Pen. Code, § 2933.1, subd. (a).) Based on the Penal Code's plain language and the intent of the Legislature, section 2933.1(a) applies to an inmate convicted of multiple crimes for the same criminal act whose sentence for the violent conviction is stayed. This conclusion is not altered by the holding of *In re Reeves* (2005) 35 Cal.4th 765, which addressed the different situation of an inmate serving unrelated concurrent sentences for separate criminal acts — one a violent felony and the other not — after the sentence for the violent felony was completed.

Additionally, changes in the statutes defining enumerated violent felonies to which section 2933.1(a) applies are incorporated into the general body of law defining violent felonies, and thus section 2933.1(a) applies to violent felonies added subsequent to its enactment. Finally, applying section 2933.1(a) to prisoners with multiple convictions for the same offense does not violate the prohibition against multiple punishment. Therefore, this

Court should affirm the decision of the Third District Court of Appeal that held that section 2933.1(a) limits credit earning for a prisoner convicted of multiple offenses for the same act where the sentence for the violent felony conviction is stayed.

ARGUMENT

I.

THE VIOLENT OFFENDER CREDIT-EARNING LIMITATION APPLIES TO AN INMATE CONVICTED OF MULTIPLE OFFENSES FOR THE SAME CRIMINAL ACT WHEN THE SENTENCE FOR THE QUALIFYING CONVICTION IS STAYED.

A. Violent Offenders' Credit-earning Ability Is Limited.

Prisoners may earn worktime credits to reduce their term of imprisonment by participating in a qualifying program. (Pen. Code, § 2933.) Regardless of a prisoner's participation in a qualifying program, however, the Legislature has limited the amount of worktime credits certain classes of prisoners can earn. (Pen. Code, §§ 2933.1, subd. (a) [specified violent felony; 15 percent limit], 2933.2, subd. (a) [murder; no worktime credit available]; see also Pen. Code, § 667, subd. (c)(5) [recidivist offenders; 20 percent limit].)

At issue here, section 2933.1(a)[1/] limits violent offenders to earning 15 percent of their sentence in worktime credits. (Pen. Code, § 2933.1, subd. (a).) Section 2933.1(a) defines a violent offender as "any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5." (*Ibid.*) Pope's convictions of driving under the influence with a great bodily injury enhancement and driving with an unlawful blood alcohol level with a

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1. All section references refer to the Penal Code unless otherwise indicated.

great bodily injury enhancement are felonies listed in section 667.5, subdivision (c). (Pen. Code, § 667.5, subd. (c)(8) ["Any felony in which the defendant inflicts great bodily injury on any person . . . ."].) Thus, Pope is subject to section 2933.1(a)'s credit-earning limitation based on his convictions with great bodily injury enhancements.

Pope argues that section 2933.1(a) does not apply to him because the trial court stayed the sentences for the felonies with the great bodily injury enhancements, and thus, he is not actually serving time for a qualifying violent felony. Pope's analysis, however, ignores the language of the statute as well as the legislative intent behind it. Moreover, to impose such a restriction on the statute would be to impermissibly judicially add a provision to the statute.

B. The Language of Section 2933.1(a) Applies the Credit-earning Limitation to Violent Offenders Where the Sentence for the Violent Offense Is Stayed.

When interpreting statutes, the goal is to ascertain the Legislature's intent so as to effectuate the purpose of the law. (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) To determine intent, a reviewing court examines the language of the statute, giving the words their usual, ordinary meaning. (*Id.* at p. 1063.)

Here, the statute is unambiguous; the limitation applies to anyone convicted of an enumerated violent felony. (Pen. Code, § 2933.1, subd. (a) ["any person who is convicted of a felony offense listed in subdivision (c) of Section 667.5 shall accrue no more than 15 percent of worktime credit"].) Thus, the operative condition is whether a person is a "convicted of" a violent offense, not whether the person is serving a sentence for a violent offense.

In a variety of contexts, courts have concluded that the meaning of the word "convicted" is the fact of conviction, rather than both the conviction and the corresponding sentence. Most relevant to this case is *In re Pacheco* (2007) 155 Cal.App.4th 1439. There, the petitioner claimed that section 2933.1(a) did not apply to him because the trial court had stricken the punishment attached to the great bodily injury enhancement he had admitted. The court found that section 2933.1(a) did apply, because "[i]t is the conviction, not the punishment, that is determinative." (*Id.* at pp. 1444–1445.) In a different context, the court determined that a defendant had suffered a prior conviction for purposes of a statute barring an ex-felon from possessing a firearm, although the prior sentence had been suspended and he had been placed on probation. (*People v. Loomis* (1965) 231 Cal.App.2d 594, 596.) Finally, in *People v. Kirk* (2006) 141 Cal.App.4th 715, 721, the court denied drug diversion to an offender based on his prior drug conviction, despite the fact that he had not yet been sentenced for the prior conviction.

Thus, "convicted of" in section 2933.1(a) means simply the fact of a conviction.

C. The Legislative Intent Supports the Interpretation that "Convicted of" Means Simply the Fact of Conviction.

Respondent contends that section 2933.1(a) is clear on its face. But to the extent there is any ambiguity in "convicted of," it should be interpreted in light of the statute's purpose. (*People v. Murphy* (2001) 25 Cal.4th 136, 142 [to the extent ambiguity exists, a reviewing court examines the context of the language, keeping in mind the nature and obvious purpose of the statute, adopting the construction that best harmonizes the statute internally and with related statutes].) Section 2933.1(a)'s purpose is "to protect the public by delaying the release of prisoners convicted of violent offenses." (*In re Reeves* (2005) 35 Cal.4th 765, 771.) Thus, interpreting the phrase

"convicted of" to mean simply the fact of conviction comports with the Legislature's intent to delay the release of persons convicted of violent acts.

In an analogous context the court reached a similar conclusion. In *People v. Shirley* (1993) 18 Cal.App.4th 40, the court considered whether a prior felony conviction, for which the sentencing court struck the great bodily injury enhancement, could be used as a prior serious felony for purposes of increasing the offender's sentence in a later proceeding. (*Id.* at p. 42.) Without the enhancement, the prior felony conviction was not a serious felony. (*Id.* at pp. 44-45.) In interpreting the word "conviction," the *Shirley* court was guided by the purpose of the sentencing statute, which was to deter recidivism by imposing more severe penalties for subsequent offenses. (*Id.* at p. 46.) In that context, "'conviction' means the ascertainment of guilt, whether by plea or verdict," which comports with the legislative purpose. (*Ibid.*)

In contrast, to adopt Pope's interpretation of the statute would contravene the legislative intent of section 2933.1(a). It would mean that the credit-earning limitation would apply to someone convicted only of driving under the influence with a great bodily injury enhancement, but not to Pope, who was convicted of the same offense in addition to gross vehicular manslaughter. Such a result turns the legislative intent on its head.

Thus, interpreting the phrase "convicted of" to mean simply the fact of the conviction comports with this purpose of delaying the release of offenders who are convicted of violent acts, regardless of whether offenders serve the corresponding sentence. (*Pacheco, supra*, 155 Cal.App.4th at p. 1445.)

D. This Court May Not Add a Requirement to Section 2933.1(a).

Because section 2933.1(a) applies on its face to anyone convicted of an enumerated offense, and does not include a requirement that the offender is also serving the corresponding sentence, this Court may not add that additional requirement to the statute. (Code Civ. Proc., § 1858 [when construing a statute, the court may not insert terms that have been omitted]; *People v. Guzman* (2005) 35 Cal.4th 577, 587.) Adding "language into a statute violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes." (*Id.* at p. 587 [internal quotations omitted].)

In *Guzman*, this Court considered a defendant's challenge to the application of the Substance Abuse and Crime Prevention Act of 2000. (*Guzman, supra*, 35 Cal.4th at p. 583.) The act provides that offenders convicted of qualifying drug related offenses should receive treatment rather than incarceration. (*Ibid.*) Under its terms, offenders on parole for any offense, including a non-qualifying offense, would remain on parole after a conviction for a qualifying drug related offense. (*Id.* at p. 586.) But as to offenders on probation, the act only provided for offenders on probation for a qualifying offense to remain on probation following a conviction for a new qualifying offense, and did not extend this right to offenders on probation for a non-qualifying offense. (*Ibid.*) The defendant, who was on probation for a non-qualifying offense, argued that he should not have his probation revoked based on a new qualifying conviction, but instead should be eligible for drug diversion. (*Id.* at pp. 583-584.) Essentially, the defendant requested that this Court "add a provision to the Act that brings him within its scope." (*Id.* at p. 587.) This Court rejected that request, holding that "insert[ing] additional

language into a statute violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes." (*Ibid.* (internal quotations omitted).)

In this case, section 2933.1(a) does not state that the offender must be serving a sentence for a violent offense before the credit-earning limitation is applicable. (See *People v. McNamee* (2002) 96 Cal.App.4th 66, 70 [when analyzing an analogous credit-earning limitation for murderers, the court held that "section 2933.2, subdivision (c) states without qualification that 'no credit' pursuant to section 4019 may be earned by a person convicted of murder. It does not say such a person may earn . . . 'no credit against the sentence for murder'"].) Rather, Pope is asking this Court add a provision to section 2933.1(a), namely that he must also be serving a sentence for a violent offense before the limitation applies. Because that provision is not in the statute, this Court should not add that additional requirement.

In sum, the usual, ordinary meaning of "convicted of" is the fact of a conviction. It does not mean an offender must be both convicted of and serving a sentence for a violent offense. This interpretation comports with the legislative intent of delaying release of violent offenders, and this Court should not accept the invitation to insert an additional requirement into the statute that would contravene this intent.

II.

THIS COURT'S DECISION IN *REEVES* DOES NOT HOLD SECTION 2933.1(a) INAPPLICABLE WHERE THE PRISONER IS CONVICTED OF MULTIPLE OFFENSES FOR THE SAME CRIMINAL ACT AND THE SENTENCE FOR THE VIOLENT OFFENSE IS STAYED.

Pope's argument that section 2933.1(a) does not apply when the sentence for a violent offense is stayed hangs largely on this Court's decision in *In re Reeves*, an approach adopted by the court of appeal in *In re Phelon.*

(*Reeves, supra,* 35 Cal.4th at p. 771; *In re Phelon* (2005) 132 Cal.App.4th 1214.) But this Court in *Reeves* considered a significantly different factual scenario, and Pope's argument succeeds only by ignoring this difference and taking selected quotations out of context. In fact, the reasoning of *Reeves* supports the conclusion that section 2933.1(a) applies even where the sentence for a violent offense is stayed.

In *Reeves*, this Court considered the applicability of section 2933.1(a) to a prisoner convicted of two crimes stemming from two separate criminal acts. (*Reeves, supra*, 35 Cal.4th at p. 769.) The first conviction was for possessing a controlled substance, a non-violent felony. The second, entirely separate, conviction was for assault with a deadly weapon with a great bodily injury enhancement, a violent felony subject to section 2933.1(a). Reeves's five-year sentence for the violent offense ran concurrently with the 10-year sentence for the non-violent offense. (*Ibid.*)

Thus, the issue in *Reeves* was whether section 2933.1(a)'s credit-earning limitation continued to apply to Reeves once he had completed his five-year violent felony term and was incarcerated solely on the basis of the unrelated, non-violent felony. This Court held that it did not. Rather:

> [s]ection 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. 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.

(*Reeves, supra*, 35 Cal.4th at p. 780.)

Pope takes this passage out of context, arguing that this Court's statements that section 2933.1(a) only applies to prisoners "serving time for a

violent offense" and not to prisoners "not serving a sentence for a violent offense," means that section 2933.1(a) does not apply where the court has stayed the sentence for a violent offense. But the fact that this Court was addressing two unrelated convictions explains the use of this terminology. It strains credibility to argue that the same reasoning applies where the prisoner was convicted of three different crimes all stemming from a single criminal act.

This Court found that the issue in *Reeves* "turn[ed] on the meaning of the phrase 'any person who is convicted of a [violent] felony offense . . . .'" (*Reeves, supra*, 35 Cal.4th at p. 770.) Noting that the Legislature did not intend the credit-earning limitation to be a permanent credit-earning disability, this Court concluded that the credit-earning limitation only applies while the prisoner is presently serving a term for a violent offense. (*Id.* at pp. 771, 780.) After the expiration of a violent felony term, the prisoner cannot be considered to have the status of "'is convicted' of a violent offense," and thus, the violent offender credit-earning limitation is inapplicable. (*Id.* at p. 777.) Consequently, section 2933.1(a) does not apply simply because the offender "was convicted of" a violent offense sometime in the past, because that violent conviction is simply a matter of historical fact. (*Reeves, supra*, 35 Cal.4th at pp. 771-772, 777.)

But that does not mean that a prisoner currently serving a term based on a crime that is a violent offense can escape section 2933.1(a) merely because the sentence attached to the enumerated violent felony is stayed. When a court stays the lesser sentence under the prohibition against multiple punishment, the stay is not permanent until after the offender completes his sentence on the greater offense. (*People v. Pearson* (1986) 42 Cal.3d 351, 359-360.) In the event that unstayed conviction is overturned before the offender completes his sentence for that offense, he remains in custody until

he completes the sentence for the previously stayed lesser offense. (*Id.* at p. 360.) The offender's term, however, for the lesser offense does not start at the point when the greater offense was overturned. Instead, the offender may attribute the time served on the greater offense towards his service on the lesser offense because both offenses arise from the same conduct. (Pen. Code, §§ 2900.1, 2900.5, subd. (b); *In re Rojas* (1979) 23 Cal.3d 152, 156.) Thus, this Court's statement that "we 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, supra*, 35 Cal.4th at p. 780, fn. 18, can fairly be applied to Pope because he is serving time for a violent offense, despite the fact that the sentence on the enumerated violent felony convictions are stayed.

Because the issues in *Reeves* and this case are different, applying the credit-earning limitation to Pope does not violate this Court's holding in *Reeves*. (See *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 ["it is axiomatic that cases are not authority for propositions not considered"].) Moreover, the reasoning in *Reeves* supports that section 2933.1(a) does apply to a prisoner serving time for a violent offense even where the sentence on the enumerated violent felony is stayed.

Similarly, Pope also relies on *In re Tate* (2006) 135 Cal.App.4th 756. In *Tate*, the court considered whether section 2933.1(a) applied to a conviction for a non-violent, in-prison offense that is fully consecutive to the prisoner's term for his violent commitment offense. (*Id.* at pp. 759, 761.) The court held that the non-violent offense did not merge with the prisoner's term for the violent offense. (*Id.* at pp. 764-765.) As a result, once the prisoner completed his term for the violent 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.'" (*Id.* at p. 765.)

As in *Reeves*, the *Tate* court held that once the conviction for a violent offense became a matter of historical fact, section 2933.1(a) does not apply. (*Id.* at p. 765.) But a prisoner convicted of multiple offenses for the same criminal act whose violent offense sentence is stayed is subject to imprisonment for a violent offense. Thus, *Tate* does not hold that section 2933.1(a) does not apply when the sentence for the violent offense is stayed.

In sum, *Reeves* and *Tate* both addressed situations where the prisoners were no longer in prison for an act defined as a violent felony. Under that scenario, section 2933.1(a) should not apply because it was not intended to be a permanent credit-earning disability. But here, where the prisoner is imprisoned based on an act defined as a violent felony, though the sentence on the violent felony conviction is stayed, section 2933.1(a) should limit the credits earned.

III.

THE RULE OF STATUTORY INCORPORATION BY REFERENCE DOES NOT BAR DEFINING A PRISONER WITH A GREAT BODILY INJURY ENHANCEMENT AS A VIOLENT OFFENDER.

In addition to challenging the applicability of section 2933.1(a) where the sentences for the violent convictions are stayed, Pope, based on the timing of various statutory amendments, challenges the premise that section 2933.1(a) applies to his specific Vehicle Code convictions with the great bodily injury enhancements.[2/]

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2. Respondent agrees that issue of whether section 2933.1(a) applies to Pope's specific Vehicle Code convictions with great bodily injury enhancements analytically precedes the issue of whether section 2933.1(a) applies where a violent conviction is stayed. This issue, however, was not raised in the Court of Appeal below. It is this Court's policy not to consider issues that were not raised is the Court of Appeal. (*People v. Braxton* (2004) 34 Cal.4th 798, 809.) There is no reason for the Court to disregard its policy in this case.

Section 2933.1(a)'s application is based on the violent felonies enumerated in section 667.5(c). The subdivision specifically applicable to Pope is section 667.5(c)(8), which in turn references the great bodily injury enhancement codified in section 12022.7. When section 667.5(c) was enacted, section 12022.7 required the prosecutor to plead and prove intent to cause great bodily injury. Section 12022.7 was later amended to eliminate that intent requirement, and Pope was convicted under this later version.

Pope argues that the violent crimes enumerated in 667.5(c) are frozen in time and he does not fall within the ambit of 667.5(c)(8) because the prosecutor did not plead and prove intent to cause great bodily injury. But this analysis is flawed because section 667.5(c)'s definition of violent crimes incorporates any changes to the statutes referenced within.

A. Because Section 667.5(c) Provides a General Body of Law Defining Violent Offenses, It Incorporates Any Changes to the Definition of Violent Offenses.

Pope's argument is based on the rule of statutory incorporation by reference, which states 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." (*Palermo v. Stockton Theaters* (1948) 32 Cal.2d 53, 58-59.)

There is a companion rule to the general rule of statutory incorporation by reference. It states that "where the incorporating 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." (*Id.* at p. 59.) Under this companion rule, section 667.5(c) is a general body of law, and so, section 2933.1(a) incorporates any changes to the definitions of violent crimes.

The focus of the companion rule is to determine whether the Legislature incorporated a general body of law, or a time-specific statute. The Legislature did not specifically address whether section 2399.1(a)'s incorporation of section 667.5(c), defining violent felonies, was specific or general. The fact that section 2933.1(a) expressly refers to section 667.5(c) does not conclusively establish that the incorporation is specific. For instance, in *Jones*, this Court considered whether a narcotics offender serving a civil commitment could receive conduct credits as if he were a prisoner after the Legislature repealed the statute authorizing those credits for prisoners. (*People v. Jones* (1995) 11 Cal.4th 118, 123-124.) The statute authorizing conduct credits for narcotics offenders referred to the statute authorizing conduct credits for prisoners and cited to it "all but expressly." (*Id.* at p. 123.) This Court held, however, "that does not effect adoption by specific reference." (*Id.* at p. 123; see also *Doe v. Saenz* (2006) 140 Cal.App.4th 960, 981 [when analyzing exemption statutes, the court rejected the argument that a statute's incorporation was specific simply because it referred to a particular section and subdivision of the Penal Code"].)

Here, section 667.5(c)'s definition of violent crimes is a general body of law incorporating changes over time because that interpretation supports the common purpose of the statutes at issue, avoids incongruous results, and harmonizes it with related statutes. Moreover, to remain a general body of law, section 667.5(c) must incorporate any changes to the statutes it refers to, including section 12022.7 governing great bodily injury enhancements. Otherwise, portions of section 667.5(c) would evolve and change while

other parts would be frozen at various points in time depending on when and how the referred to sections were amended — a result inconsistent with the concept of incorporating general bodies of law.

1. The Commonality of Purpose in the Statutes Supports the Conclusion that Section 2933.1(a) Incorporates Any Changes to the Definition of Violent Offenses Contained in Section 667.5(c).

First, the commonality of purpose in the three statutes supports the conclusion that section 2933.1(a) incorporates any changes to the definition of violent crimes. (*People v. Van Buren* (2001) 93 Cal.App.4th 875, 880, overruled on other grounds in *People v. Mosby* (2004) 33 Cal.4th 353.) In *Van Buren*, the court held that section 2933.1(a)'s purpose was "to delay the parole of violent felons, a common purpose it shares with section 667.5, subdivision (c) and was enacted as a counterpart to the Three Strikes law sentencing scheme." (*Van Buren, supra,* 93 Cal.App.4th. at p. 880.) Section 2933.1(a)'s credit-earning limitation "complements the purpose of the Three Strikes law to ensure longer prison sentences and greater punishment for those who commit serious or violent felonies." (*Ibid.*)

In amending section 12022.7, the Legislature's purpose in removing the intent requirement was to broaden the reach of the enhancement by imposing additional punishment on anyone who inflicts a serious injury. (Assem. Com. on Pub. Safety, on Assem. Bill No. 928 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1995; Sen. Com. on Crim. Proc., on Assem. Bill No. 928 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1995.) Amending section 12022.7 eliminated "a loophole that prevented prosecution of individuals who injured others during the commission of a felony, but stated that they had not intended harm." (Assem. Com. on

Appropriations, on Assem. Bill No. 928 (1995-1996 Reg. Sess.) as introduced Feb. 22, 1995.) Thus, all three sections reflect the Legislature's condemnation of those whose inflict violent injuries.

Legislative intent governs the application of the rules regarding incorporation by reference. (*Van Buren, supra*, 93 Cal.App.4th at p. 879.) Unless section 2933.1(a) incorporates the changes to definitions of violent crimes, newly enacted violent crimes will not be subject to the credit-earning limitation. It would make little sense for the Legislature to amend the definitions of violent crimes to be more inclusive, as it did with section 12022.7 governing great bodily injury enhancements, without intending that the new violent offenders be subject to section 2933.1(a)'s credit-earning limitation where it has expressed the intent that violent offenders serve longer sentences. Pope's specific situation further illuminates the issue. After the amendment eliminating the intent requirement from section 12022.7, the prosecution has no reason to offer evidence of this intent at trial, nor will the judge or jury make a finding regarding intent. Thus, no new convictions under section 12022.7 would qualify for section 2933.1(a)'s credit-earning restriction.

It does not serve any of the three statutes' purposes to impose a lesser punishment simply because a violent conviction is based on a later enacted statute. Instead, the common purpose in these statutes can "be fully effectuated only if section 2933.1 incorporates offenses defined as 'violent felonies' at the time of enactment and thereafter." (*Van Buren, supra*, 93 Cal.App.4th at p. 880.)

2. Interpreting Section 667.5(c) as a General Body of Law Avoids Incongruous Results.

Not only will interpreting section 667.5(c)'s definition of violent crimes as a general body of law fulfill the common purposes of the three statutes involved here, it more generally comports with the widespread statutory reliance on section 667.5(c) to define violent crimes. Section 667.5's definition of violent crimes is referred to in a number of statutes:

1. Education Code sections 44237, subdivision (h); 44332.6, subdivision (c); 44346.1, subdivision (c); 44830.1, subdivision(c)(1); and 45122.1, subdivision (c)(1) [prohibiting schools from credentialing or employing persons with violent convictions];
2. Welfare and Institutions Code section 361.5, subdivision (b)(12) [disqualification for reunification services for violent parents];
3. Welfare and Institutions Code section 1370.1, subdivision (a)(1)(E) and (F) [limiting the placement to qualifying facilities for violent developmentally disabled persons who are incompetent to stand trial];
4. Health and Safety Code sections 1522, subdivision (g)(1)(A)(i); 1568.09, subdivision (f)(1)(A); 1569.17, subdivision (f)(1)(A); and 1596.871, subdivision (f)(1)(A) [limiting a violent felon's access to a license to operate care facilities]; and

5. Welfare and Institutions Code section 11732.6, subdivision (a) [disqualification for placement in the California Youth Authority for violent juveniles].

Since section 667.5(c)'s enactment, the definition of violent crimes has been amended multiple times. It is unlikely that the Legislature intended that each of the above statutes incorporated different definitions of violent crimes depending upon the year each was enacted. For example, in 1983, when the Legislature enacted the statute prohibiting violent persons from operating a community care facility, the definition of violent crimes did not include attempted murder as a violent offense. However, in 1990, when the Legislature enacted the statute prohibiting violent persons from operating a chronic care facility, the definition included attempted murder. (*Saenz, supra,* 140 Cal.App.4th at p. 983.) Thus, following Pope's analysis, attempted murderers could operate a community care facility but not a chronic care facility. There is nothing in the statutes or legislative history to indicate that Legislature intended such a result. (*Ibid.*) Similarly, there is no support that the Legislature intended section 2933.1(a)'s credit-earning limitation to apply only those offenses defined as violent crimes when the limitation was enacted. (*Van Buren, supra,* 93 Cal.App.4th. at pp. 881-882.)

3. Interpreting Section 667.5(c) as a General Body of Law Harmonizes It With the Statute Defining Serious Offenses.

Pope argues that construing both sections 667.5 and 1192.7, which defines serious felonies, to include felonies in which the defendant inflicts great bodily injury without intent nullifies the distinction between those sections. (A.O.B. at pp. 61-63.) Not so. Construing section 667.5 as a general body of law harmonizes it with section 1192.7.

Section 1192.7 defines offenses that are considered serious felonies. (Pen. Code, § 1192.7, subd. (c)(1).) Section 1192.7 is not a list of crimes separate and distinct from those in section 667.5. (Compare, Pen. Code, §§ 667.5 and 1192.7.) Instead, section 1192.7 is a broader statute, incorporating the crimes listed in section 667.5 and including others. For example, some of the offenses listed in section 1192.7 do not even have the potential for violence. (See, e.g., Pen. Code, §§ 1192.7, subd. (c)(24) [selling a controlled substance to a minor], subd. (c)(14) [arson of an uninhabited structure or forest], subd.(c)(18) [first degree burglary of an unoccupied residence].) The crimes listed in section 665.7, however, by definition share the characteristic of potential or actual violence inflicted by one person on another. (Pen. Code, § 667.5, subd. (c); *Saenz, supra,* 140 Cal.App.4th at p. 987 [inclusion of occupied burglary as a violent felony is due to the potential for violence].)

Pope builds his argument contrasting sections 667.5 and 1192.7 around the example of battery with a serious injury, which is a serious, but not a violent, offense. This reliance is misplaced. The great bodily injury enhancement cannot be applied when serious injury is an element of the underlying offense. Serious injury is an element of battery with serious injury. (Pen. Code, § 243, subd. (d); *People v. Hawkins* (2003) 108 Cal.App.4th 527, 530-531.) For this reason, battery with a serious injury is not subject to the great bodily injury enhancement, regardless of whether the offender intended to injure the victim. (*Hawkins, supra,* 108 Cal.App.4th at pp. 530-531.) Indeed, there is another crime included within section 667.5 in which intent to injure is not an element. (See e.g. Pen. Code, § 667.5 (c)(21) [burglary of an occupied residence]; *Saenz, supra,* 140 Cal.App.4th at p. 987 [holding that the crime of occupied burglary does not require the offender to have contact with the occupant or even knowledge that the

residence is occupied].) Thus, removing the intent requirement from the great bodily injury enhancement does not destroy the distinction between sections 667.5 and 1192.7.

In conclusion, the common purpose and its wide spread use by other statutes supports the conclusion that section 667.5(c)'s definition of violent crimes is a general body of law. Further, this conclusion does not result in disharmony with other statutes. Therefore, any changes in the definition of violent crimes, including the change that made Pope's Vehicle Code convictions with the great bodily injury enhancements violent felonies, are incorporated into section 2933.1(a).

IV.

APPLYING SECTION 2933.1(a) WHERE THE VIOLENT FELONY SENTENCE IS STAYED DOES NOT VIOLATE THE PROHIBITION AGAINST MULTIPLE PUNISHMENT.

Applying section 2933.1(a)'s credit-earning limitation to a prisoner convicted of multiple offenses for the same criminal act where the violent felony sentence is stayed does not violate the prohibition against multiple punishment.

A. Because the Limitation Is Based on the Nature of the Offender, Applying the Limitation Does Not Violate the Prohibition Against Multiple Punishment.

First, applying the credit-earning limitation does not violate the prohibition against multiple punishment because the credit-earning limitation is like the recidivist enhancements for prior convictions in that the penalty is based on the nature of the offender, rather than on the offense. This Court in *People v. Coronado* (1995) 12 Cal.4th 145, considered the implication of section 654's prohibition against multiple punishment on sentence enhancements based on prior prison terms. (*Id.* at p. 149.) In conducting the

analysis, this Court categorized enhancements into two types: "(1) those which go to the nature of the offender; and (2) those which go to the nature of the offense." (*Id.* at p. 156.) This Court then held that an enhancement that goes to the "nature of the offender" is not a penalty provision that punishes an "act or omission." Thus, those enhancements do not violate section 654's prohibition against multiple punishment. (*Id.* at p. 157.)

Section 2933.1(a)'s credit-earning limitation also goes to the nature of the offender rather than to the offense. (*People v. Ramos* (1996) 50 Cal.App.4th 810, 817 ["by its terms, section 2933.1 applies to the offender not to the offense"].) Thus, like the penalty provision this Court considered in *Coronado*, section 2933.1(a) is also not subject to prohibition against multiple punishment.

B. The Legislature Created an Exemption from the Prohibition Against Multiple Punishment.

Second, even assuming that applying section 2933.1(a) to a prisoner whose violent felony sentence has been stayed does constitute multiple punishment for the same criminal act, the Court of Appeal properly found that section 2933.1(a) is exempt from the prohibition against multiple punishment. (Slip opn. at p. 9.) It is well settled that the Legislature may create an exemption to the prohibition against multiple punishment by stating a specific intent to impose additional punishment. (*People v. Benson* (1998) 18 Cal.4th 24, 29.) For example, in *Benson*, this Court considered the effect of the prohibition against multiple punishment on the "Three Strikes" law. (*Id.* at p. 30.) This Court held that the language "[n]otwithstanding any other provision of law . . .," as well as a provision that the Three Strikes law is applicable to stayed or suspended sentences, created an exemption from the prohibition against multiple punishments. (*Id.* at pp. 31-32.)

Although violent offender credit-earning limitation does not explicitly refer to the prohibition against multiple punishment, unlike the Three Strikes law, this omission is insignificant. (See *People v. Hicks* (1993) 6 Cal.4th 784, 791-792 [holding that section 667.6 is exempt from section 654].) Instead, what is significant is whether the statute's purpose is to increase the penalty on the offender. (See *People v. Ramirez* (1995) 33 Cal.App.4th 559, 573 [holding, with regard to section 667, subdivision (e), that "[a] statute which provides that a defendant shall receive a sentence enhancement in addition to any other authorized punishment constitutes an express exception to section 654"].)

Section 2933.1(a) should also be found exempt from the prohibition against multiple punishment. As with the Three Strikes law considered in *Benson*, section 2933.1(a) contains the language "[n]otwithstanding any other law . . . ." (See *Benson, supra*, 18 Cal.4th at pp. 31-32.) Section 2933.1(a) also has the express purpose of increasing the penalty for violent offenders. (*Reeves, supra,* 35 Cal.4th at p. 771.) This is similar to other Penal Code sections that increase penalties for offenders based on prior criminal conduct, which have been found to create an exemption to the prohibition against multiple punishment. (See, e.g., *Ramirez, supra,* 33 Cal.App.4th at p. 573.) Therefore, section 2933.1(a) should be deemed exempt from the prohibition against multiple punishment.

C. If Section 2933.1(a) Is Inapplicable Because of a Stayed Sentence, Absurdity Results.

Finally, if section 2933.1(a)'s credit-earning limitation is not applied where the sentence for the violent felony conviction is stayed, absurdity results. The only reason Pope's violent offense sentences were stayed is because he was also found guilty of gross vehicular manslaughter, an offense arising from the same criminal act. Offenders may not be sentenced for

multiple convictions arising from the same conduct. (Pen. Code, § 654.) Instead, the offender must be sentenced for the conviction with the greatest punishment and the sentences for the other offenses are stayed. (Pen. Code, § 654.)

Here, the Court of Appeal noted that not applying section 2933.1(a) to Pope's six-year vehicular manslaughter sentence would result in Pope serving only three years. (Pen. Code, § 2933 [permitting prisoners to earn six months off their sentence for every six months served in a qualifying program]; Slip opn. at p. 9.) If Pope had only injured his victim, he would have been convicted only of the Vehicle Code violations with enhancements for causing great bodily injury, and sentenced to five years. (Slip opn. at p. 9.) Because those convictions are violent felonies, Pope's credits would be limited to 15 percent under section 2933.1(a). (*Ibid.*) Consequently, Pope would serve just over four years, which is more time than he would serve on the vehicular manslaughter count unfettered by 2933.1(a). (*Ibid.*)

Because the Legislature could not have intended this incongruous result, section 2933.1(a) must be applied where the prisoner is convicted of a violent felony and serving time for the same criminal act, even where the sentence on the violent felony conviction is stayed.

CONCLUSION

Accordingly, respondents respectfully request that the Court of Appeal's judgment be affirmed.

Dated: January 29, 2009

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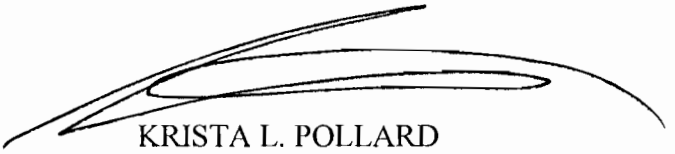

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 3400 words.

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Nathan Pope**
No.: **S160930**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 29, 2009, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 29, 2009, at Sacramento, California.

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Signature

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