

IN THE SUPREME COURT OF THE  
STATE OF CALIFORNIA

\_\_\_\_\_) NO. S153917  
PEOPLE OF THE STATE OF CALIFORNIA,) Appeal No. G036562  
Plaintiff and Respondent,) Orange Co. No. 04NF2414  
vs.)  
JAMES EDWARD DUFF, JR., )  
Defendant and Appellant. )

SUPREME COURT  
FILED

JAN 22 2008

Frederick K. Ohlrich Clerk

Deputy

Appeal from the Superior Court of Orange County  
Honorable James A. Stotler

**APPELLANT'S OPENING BRIEF ON THE MERITS**

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By appointment of the Supreme Court  
and the Court of Appeal under  
the Appellate Defenders, Inc.  
independent case system

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**APPELLANT'S OPENING BRIEF ON THE MERITS**

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**INTRODUCTION**

The issue to be decided here is whether Penal Code section 2933.2 precluded the trial court from awarding presentence conduct credits to appellant for his conviction of assault on a child likely to cause great bodily injury resulting in death, where appellant's sentence for second degree murder was stayed pursuant to Penal Code section 654. The Court of

Appeal below concluded that appellant was not entitled to presentence conduct credits.

### **PROCEDURAL AND FACTUAL HISTORY**

On February 28, 2005, appellant, James Edward Duff, Jr., was charged by information in connection with an incident that took place on July 3, 2004, and which resulted in the death of his son while he was in appellant's care.<sup>1</sup> Count 1 charged appellant with murder in violation of Penal Code section 187, subdivision (a). Count 2 charged appellant with assault on a child with force likely to produce great bodily injury, resulting in death, in violation of Penal Code section 273ab. (1 CT 112.)

On November 7, 2005, after a jury trial, appellant was convicted of both counts. (1 CT 263-264, 280-281.)

On January 20, 2006, the trial court imposed an indeterminate term of 15 years to life as to count 1, but then stayed the term pursuant to Penal Code section 654. As to count 2, the trial court imposed the indeterminate term of 25 years to life. (2 CT 316-317.)

Additionally, the trial court ordered petitioner to submit to DNA testing pursuant to Penal Code section 296. Further, the trial court imposed a \$1000 state restitution fine pursuant to Penal Code section 1202.4,



subdivision (b), and imposed and stayed a \$1000 parole revocation fine pursuant to Penal Code section 1202.45. Actual restitution was imposed in the amount of \$4,019.26, payable to the Victim Compensation and Government Claims Board. Finally, the trial court imposed a \$20 security fee pursuant to Penal Code section 1465.8. (2 CT 317.)

Petitioner received credit for actual time served in the amount of 567 actual days. (2 CT 317.)

On January 24, 2006, petitioner timely filed a notice of appeal. (2 CT 321.)

On May 31, 2007, the Court of Appeal affirmed the judgment and sentence as to petitioner in a published opinion. Specifically, the Court of Appeal determined that Penal Code section 2933.2 prohibited appellant from earning presentence conduct credits even though his sentence for second degree murder was stayed pursuant to Penal Code section 654. (Opn. p. 6.)

This Court granted review on October 31, 2007.

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<sup>1</sup> Given the limited nature of appellant's claim, the facts of the case need not be detailed herein.

## ARGUMENT

### I.

#### **BECAUSE THE TRIAL COURT STAYED APPELLANT'S SENTENCE FOR SECOND DEGREE MURDER PURSUANT TO PENAL CODE SECTION 654, HIS PRESENTENCE CONDUCT CREDITS SHOULD NOT BE LIMITED UNDER PENAL CODE SECTION 2933.2.**

##### **A. Introduction.**

Both the trial court and the appellate court erred when they concluded that appellant's murder conviction precluded the award of any presentence conduct credits against the sentence he currently serves for violation of Penal Code section 273ab. Rather, because appellant's sentence for second degree murder was stayed pursuant to Penal Code section 654, his presentence conduct credits should not be limited under Penal Code section 2933.2. (*In re Phelon* (2005) 132 Cal.App.4<sup>th</sup> 1214.) This court should order that appellant is entitled to presentence conduct credits under Penal Code section 2933.1.

##### **B. Both The Trial Court And The Court Of Appeal Determined That Appellant Was Not Entitled To Receive Presentence Conduct Credits.**

A jury convicted appellant of second degree murder and assault on a child with force likely to produce great bodily injury, resulting in death. (Pen. Code, §§ 187, 273ab; 1 CT 263-264, 280-281.) At sentencing,

pursuant to Penal Code section 654, the trial court imposed and stayed an indeterminate term of 15 years to life for appellant's conviction of second degree murder. As to appellant's conviction for violating Penal Code section 273ab, the trial court imposed the indeterminate term of 25 years to life. (2 CT 316-317; 4 RT 817-818.) Additionally, appellant received credit for time served in the amount of 567 actual days. (2 CT 317; 4 RT 819, 824.) Appellant did not receive presentence conduct credits under Penal Code section 2933.1, as the trial court concluded that appellant was not entitled to them.<sup>2</sup> (4 RT 819, 824.)

With regard to this issue on appeal, the Court of Appeal held as follows in its May 31, 2007, opinion:

"The language of [Penal Code] section 2933.2, subdivision (a) is ...broad and clear, and we believe it evinces an intent to preclude presentence conduct credits to anyone convicted of murder, even if that sentence is stayed pursuant to [Penal Code] section 654."

(Opinion, p. 6.) However, this holding is contrary to another Court of Appeal decision -- *In re Phelon* (2005) 132 Cal.App.4<sup>th</sup> 1214 ("*Phelon*"), a

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<sup>2</sup> Appellant argued in the Court of Appeal that the trial court erroneously based its decision to deny appellant credits on *In re Cervera* (2001) 24 Cal.4<sup>th</sup> 1073, as well as its determination that his violation of Penal Code section 273ab rendered appellant ineligible for presentence conduct credits. (AOB, pp. 26-28.) The Court of Appeal impliedly found the trial court's reasoning erroneous, but found: "Regardless of the basis the trial court used for reaching its decision, we will uphold it if the result was correct." (Opinion, p. 2, citing *People v. Trausch* (1995) 36 Cal.App.4<sup>th</sup> 1239, 1244.)

case the appellate court below determined was wrongly decided. (Opinion, p. 4.)

**C. A Conviction Of Penal Code Section 273ab Qualifies As A Violent Felony For Purposes Of Penal Code Section 2933.1, Thus Entitling Appellant To Presentence Conduct Credits.**

Because Penal Code section 273ab is punishable by an indeterminate term of 25 years to life, it constitutes a violent felony within the meaning of Penal Code section 667.5, subdivision (c)(7), which states in relevant part:

“For the purpose of this section, ‘violent felony’ shall mean any of the following: ...(7) Any felony punishable by death or imprisonment in the state prison for life.”

Thus, appellant should have received presentence conduct credits pursuant to Penal Code section 2933.1, which provides that “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...” (Pen. Code § 2933.1, subd. (a).)

As noted above, appellant received credit for 567 actual days of custody. (2 CT 317.) Had he accrued presentence conduct credits at the rate of 15% pursuant to Penal Code section 2933.1, he would have received 85 days in conduct credits, for a total of 652 days of presentence credits.

**D. Penal Code Section 654 Prohibits The Use Of A Conviction For Punitive Purposes Where The Trial Court Stays Sentence On That Conviction.**

Penal Code section 2933.2, subdivision (c) prohibits the award of presentence conduct credits to “any person specified in subdivision (a).” Penal Code section 2933.2, subdivision (a) applies to “any person who is convicted of murder, as defined in Section 187.”<sup>3</sup>

In the past, some Courts of Appeal have interpreted Penal Code section 2933.2, subdivisions (a) and (c) to mean that the credit preclusion language set forth there applies to the offender, and not to the offense itself. This interpretation thus limits a convicted murderer’s conduct credits regardless of whether or not all of his offenses were murder, and regardless of whether those other offenses resulted in determinate or indeterminate sentences. (See *People v. Wheeler* (2003) 105 Cal.App.4<sup>th</sup> 1423, 1432

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<sup>3</sup> Penal Code section 2933.2 provides in full as follow:

“(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933.

(b) The limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law.

(c) Notwithstanding Section 4019 or any other provision of law, no credit pursuant to Section 4019 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a).

(d) This section shall only apply to murder that is committed on or after the date on which this section becomes operative.”

[defendant was convicted of first degree murder, attempted voluntary manslaughter, and discharge of a firearm at an inhabited dwelling]; *People v. McNamee* (2002) 96 Cal.App.4<sup>th</sup> 66, 70-74 [defendant was convicted of second degree murder and received a firearm enhancement that resulted in a consecutive determinate term]; *People v. Herrera* (2001) 88 Cal.App.4<sup>th</sup> 1353, 1366-1367 [defendants were convicted of murder, attempted murder and associated enhancements for firearms and gangs].) However, the foregoing cases applying Penal Code section 2933.2 do not apply here.

Unlike the instant case, none of the foregoing cases involved a murder sentence stayed pursuant to Penal Code section 654. Here, the trial court stayed execution of sentence on appellant's conviction for second degree murder pursuant to Penal Code section 654, which states in relevant part as follows:

“An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision....”

(Pen. Code, § 654, subdivision (a).) According to the Court of Appeal in *In re Phelon supra*, 132 Cal.App.4<sup>th</sup> at 1221, presentence conduct credits should not be limited based on convictions where punishment is stayed pursuant to Penal Code section 654.

**1. The *Phelon* decision.**

*In re Phelon, supra*, 132 Cal.App.4<sup>th</sup> at 1219-1222, involved the analysis of the interaction between a statute analogous to Penal Code section 2933.2 – Penal Code section 2933.1<sup>4</sup> – and Penal Code section 654.

The *Phelon* court held that the defendant’s “presentence credits should not be limited under [Penal Code] section 2933.1(c) based on convictions on which punishment was stayed under [Penal Code] section 654.” (*Id.* at p. 1221.)

According to the *Phelon* court:

“[S]ection 654 prohibits the use of a conviction for any punitive purpose if the sentence on that conviction is stayed.’ [Citation.] Section 654 prohibits a ‘defendant from being disadvantaged in any

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<sup>4</sup> Penal Code section 2933.1 provides in full as follows:

“(a) Notwithstanding any other law, 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, as defined in Section 2933.

(b) The 15-percent limitation provided in subdivision (a) shall apply whether the defendant is sentenced under Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2 or sentenced under some other law. However, nothing in subdivision (a) shall affect the requirement of any statute that the defendant serve a specified period of time prior to minimum parole eligibility, nor shall any offender otherwise statutorily ineligible for credit be eligible for credit pursuant to this section.

(c) Notwithstanding Section 4019 or any other provision of law, the maximum credit that may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest and prior to placement in the custody of the Director of Corrections, shall not exceed 15 percent of the actual period of confinement for any person specified in subdivision (a).

(d) This section shall only apply to offenses listed in subdivision (a) that are committed on or after the date on which this section becomes operative.”

way as a result of the stayed convictions.’ [Citation.] Under this principle, it has been held that sentences for convictions that were stayed under section 654 may not be used as a basis for future enhancement in the absence of specific statutory authorization. [Citation.] Likewise, a prior prison term enhancement may not be imposed for an offense for which the prior term was stayed under section 654. [Citation.]”

(*In re Phelon, supra*, 132 Cal.App.4<sup>th</sup> at pp. 1220-1221 [citations omitted].)

The *Phelon* court further reasoned “that limits on credit earning are a form of punishment and that the term ‘punishment’ takes into consideration the effective sentence in light of the availability of sentence-reducing credits.” (*Id.*, at p. 1221.)

It is especially noteworthy that the *Phelon* court specifically stated as part of its reasoning that *People v. Ramos* (1996) 50 Cal.App.4<sup>th</sup> 810, was not “dispositive” in its decision to award presentence credits under Penal Code section 4019, where the sentence for a violent felony offense had been stayed pursuant to Penal Code section 654. (*In re Phelon, supra*, 132 Cal.App.4<sup>th</sup> at pp. 1220-1221.) In *Ramos* the court held that “by its terms, [former Penal Code] section 2933.1 applies to the offender not to the offense and so limits a violent felon’s conduct credits irrespective of whether or not all his or her offenses come within [Penal Code] section 667.5.” (*People v. Ramos, supra*, 50 Cal.App.3d at p. 817.) This very



language in *Ramos* was mirrored in, and formed the basis of, an analogous decision by the *Wheeler* court regarding Penal Code section 2933.2:

“By parity of reasoning, we hold that Penal Code section 2933.2 applies to the offender not to the offense and so limits a murderer’s conduct credits irrespective of whether or not all his or her offenses were murder.”

(*People v. Wheeler, supra*, 105 Cal.App.4<sup>th</sup> at p. 1432, citing *People v. Ramos, supra*, 50 Cal.App.4<sup>th</sup> at p. 817.)

“By parity of reasoning,” the *Phelon* court’s determination that “presentence credits should not be limited under section 2933.1(c) based on convictions on which punishment was stayed under section 654,” should apply with equal force to Penal Code section 2933.2, subdivision (c). Any court decisions to the contrary do not apply because, as in *Ramos*, they “did not involve sentences that were stayed under the multiple punishment prohibition of section 654.” (*In re Phelon, supra*, 132 Cal.App.4<sup>th</sup> at p. 1221.)

**2. The Court of Appeal’s analysis in the instant case is contrary to *Phelon*.**

In the instant case, the appellate court below determined that *Phelon* was wrongly decided, and that the language of Penal Code section 2933.2 did not create an exception for Penal Code section 654. (Opinion, p. 4.)

The court concluded:

“The language of section 2933.2, subdivision (a) is quite clear and leaves no ambiguity: ‘*Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit. . . .*’ (Italics added.) The legislature thus made clear its intent that other provisions of law should not prevent the application of this section.”

(Opinion, p. 6.) Further, the appellate court stated that, “The language of section 2933.2, subdivision (a) is equally broad and clear, and we believe it evinces an intent to preclude presentence conduct credits to anyone convicted of murder, even if that sentence is stayed pursuant to section 654.” (*Ibid.*)

### **3. The Court of Appeal’s decision was erroneous.**

In support of its conclusion that Penal Code section 2933.2 precluded appellant from receiving presentence conduct credits, the court relied upon *People v. Benson* (1998) 18 Cal.4<sup>th</sup> 24 (“*Benson*”). (Opinion, pp. 4-5.) In *Benson*, this Court held that a conviction stayed pursuant to Penal Code section 654 may constitute a “strike” under the “Three Strikes” law. (*Id.* at p. 36; Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) However, the Court of Appeal’s reliance on *Benson* was misplaced as it deals with the application of what is essentially a sentence enhancement, not credits. Moreover, the language of Penal Code section 1170.12 itself specifically referenced the application of Penal Code section 654 as a disposition that

must not affect the determination that a prior conviction is a prior felony. (Pen. Code, § 1170.12, subd. (b)(1)(B).) No such specific reference exists in Penal Code section 2933.2.

Moreover, contrary to the appellate court's conclusion that the language of Penal Code section 2933.2 was clear and unambiguous, this Court's decision in *In re Reeves* (2005) 35 Cal.4<sup>th</sup> 765 ("*Reeves*") indicates otherwise. In *Reeves*, this Court determined that the "seemingly plain language" of the analogous statute, Penal Code section 2933.1, "reveals ambiguities the Legislature apparently did not foresee," as the section applied to the defendant in that particular case. (*Id.* at pp. 770-771.) The *Reeves* court's finding of ambiguity was in reference to "the meaning of the phrase 'any person who is convicted of a [violent] felony offense ... .'" (*Ibid.*, citing Pen. Code, § 2933.1, subd. (a).) In *Reeves*, the defendant had completed a five-year term for the violent offense and was serving the remainder of a concurrent term he received for a nonviolent offense. (*Id.* at pp. 769-770.) This Court framed the issue, and held, as follows:

"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. Petitioner has completed a five-year term for the violent offense that made the section applicable and is now serving the remainder of a concurrent 10-year term for a nonviolent offense. We hold that section 2933.1(a) limited to 15 percent the rate at which petitioner could earn worktime credit as long as he was serving the term for the violent offense, even though the concurrently punished nonviolent offense would not by itself

have caused the section to apply; but once petitioner completed the term for the violent offense he became prospectively eligible to earn credit at a rate unrestricted by the section.”

(*Id.* at pp. 768-769.)

Similarly, in the instant case the trial court stayed execution of petitioner’s sentence for the murder conviction. He is therefore not serving the sentence as to that charge. (*People v. Percelle* (2005) 126 Cal.App.4<sup>th</sup> 164, 177-178 [Where prior robbery term was stayed pursuant to Penal code section 654, it cannot be said that the defendant served a prison term as a result of the robbery conviction.]) Because appellant is not serving a prison term for murder, he is entitled to presentence conduct credits as to his conviction of Penal Code section 273ab, given Penal Code section 654’s prohibition on the use of a conviction for any punitive purpose if the sentence for that conviction is stayed. (*People v. Pearson* (1986) 42 Cal.3d 351, 361, *In re Phelon, supra*, 132 Cal.App.4<sup>th</sup> at pp. 1220-1221.)

**E. Conclusion.**

Petitioner respectfully requests this court to award him presentence conduct credits pursuant to Penal Code section 2933.1 in the amount of 85 days.

## CONCLUSION

For all the reasons set forth above, appellant respectfully requests this court to award him presentence conduct credits in the amount of 85 days.

Dated: January 16, 2008

**TORRES & TORRES**

A handwritten signature in black ink, appearing to read "Tonja R. Torres". The signature is written in a cursive style with a horizontal line underneath the name.

**TONJA R. TORRES**

Attorney for Defendant and  
Appellant James Edward Duff, Jr.

**CERTIFICATION OF WORD COUNT**

The text of this brief consists of 2,824 words as counted by the Microsoft Office Word, version 2003, word-processing program used to generate this brief.

I declare under penalty of perjury and the laws of the state of California that the foregoing is true and correct.

Executed this 16<sup>th</sup> day of January, 2008, at Pasadena, California.

  
TONJA R. TORRES

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES

I, Tonja R. Torres, am employed in the aforesaid County, State of California; I am over the age of 18 years and not a party to the within action; my business address is PMB 332, 3579 Foothill Boulevard, Pasadena, California 91107.

On January 17, 2008, I served the foregoing **Appellant's Opening Brief On The Merits** by mail upon the following interested parties in this action:

**SEE ATTACHED SERVICE LIST**

I declare on this 17<sup>th</sup> day of January, 2008, under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

  
TONJA R. TORRES

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