IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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

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

APPELLANT'S REPLY 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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INTRODUCTORY STATEMENT

Appellant, James Edward Duff, Jr., hereby submits this reply brief to respond to the arguments and authorities raised in respondent's answer brief on the merits. However, appellant continues to rely on the arguments advanced in his opening brief and incorporates such arguments 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.

Respondent argues that the plain language of Penal Code section 2933.2[1] "unambiguously" demonstrates that the Legislature intended to preclude anyone convicted of murder from earning presentence conduct credits, even where, as here, the defendant is not serving a sentence for murder because it was stayed pursuant to section 654. (RB 3, 5-10.) Appellant disagrees.

B. Respondent's Analysis Ignores The Longstanding Rule Against Repeal By Implication.

Respondent is correct that the guiding principle in statutory construction is that the Legislature's intent is paramount. (RB 5.) An appellate court's role in statutory construction is to ascertain the Legislature's intent in order to effectuate the statute's purpose. In doing so, a court must first look to the words of the statute itself. (*People v. Birkett*

[1] All further statutory references are to the Penal Code unless otherwise indicated.

(1999) 21 Cal.4th 226, 231.) If the statute's language is clear, unambiguous and serves a rational purpose, no need exists for further statutory construction. (*People v. Braz* (1998) 65 Cal.App.4th 425, 431.)

Respondent contends that the foregoing well-settled rules of statutory construction should be the end of the analysis, stating that the "unambiguous language of the statute – '[n]otwithstanding Section 4019 or *any other provision of law*' – evinces the Legislature's clear intent to preclude an award of presentence conduct credit to anyone convicted of murder, regardless of how the person is ultimately sentenced." (RB 5-6, citing § 2933.2, subd. (c) [italics in respondent's brief].) However, nothing in this "unambiguous language of the statute" explicitly refers to section 654. With regard to this glaring omission, respondent states that, "[t]o create an exception to section 654, a statute need not explicitly refer to section 654." (RB 5, citing *People v. Benson* (1998) 18 Cal.4th 24, 32, "and cases cited therein" ("*Benson*"); see also RB 9.) Respondent's approach, however, is mistaken because it ignores the longstanding rule against repeal by implication.

In *People v. Siko* (1988) 45 Cal.3d 820, 824, ("*Siko*"), the People contended that the Legislature, by adopting subdivision (c) of section

667.6,[2] "impliedly repealed the prohibition in section 654 on multiple punishment for violations based on the 'same act or omission' insofar as that prohibition might otherwise apply to the sex offenses listed in the subdivision." (*Ibid.*) This Court rejected that contention, stating:

> "The People's theory would lead to the remarkable conclusion that the Legislature creates exceptions to a specific code section merely by failing to mention it. The normal rules of statutory construction however, dictate a contrary presumption: *section 654, like any other statute, is presumed to govern every case to which it applies by its terms – unless some other statute creates an express exception.* We have invoked section 654 to ban multiple punishment in many contexts, and we have never held that it applies only if the Legislature expressly makes the other statute subject to it. [Citations.]"

(*People v. Siko, supra,* 45 Cal.3d at pp. 824-825 [italics added].)

This Court then went on to state:

> "As a general rule of statutory construction, of course, repeal by implication is disfavored. [Citation.] Such repeal is particularly disfavored when, as here, the statute allegedly repealed expresses a legal principle that has been a part of our penal jurisprudence for over a century. [Citation.]"

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[2] Subdivision (c) read in relevant part as follows: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person *whether or not the crimes were committed during a single transaction.*" (*People v. Siko, supra,* 45 Cal.3d at p. 824, fn.2 [italics added].)

(*People v. Siko, supra,* 45 Cal.3d at p. 824 [citations omitted]; see also *In re M.S.* (1995) 10 Cal.4th 698, 726-727.) The *Siko* court then concluded:

> "Had the Legislature intended to override the century-old ban of section 654 on multiple punishment of violations based on the 'same act or omission,' it would have made that purpose explicit. (*People v. Greer* (1947) 30 Cal.2d 589, 603.)"

(*People v. Siko, supra,* 45 Cal.3d at p. 824.)

Here, nothing in the express language of section 2933.2 indicates the Legislature intended to create an exception to section 654 to preclude the award of presentence conduct credits where a defendant's sentence for a murder conviction has been stayed pursuant to section 654. Certainly, "[h]ad the Legislature intended to override the century-old ban of section 654 on multiple punishment of violations based on the 'same act or omission,' it would have made that purpose explicit." (*People v. Siko, supra,* 45 Cal.3d at p. 824.)

To the extent this Court determines that section 2933.2 is ambiguous regarding the applicability of section 654, the rule of lenity compels courts to resolve true statutory ambiguities in a defendant's favor where two equally reasonable interpretations of the statute exist. (*People v. Anderson* (2002) 28 Cal.4th 767, 780.)

C. Case Law Supports The Conclusion That Section 2933.2 Is Subject To Section 654's Prohibition Of Multiple Punishment For A Single Act.

Respondent does not contend that the limitation on presentence conduct credits set forth in section 2933.2, subdivision (c), is not a form of punishment. Indeed, respondent could not advance such an argument because punishment demonstrably includes limits on conduct credit-earning. For example, retroactive retraction of previously available sentence credits constitutes punishment in violation of the prohibition on ex post facto laws. (*In re Lomax* (1998) 66 Cal.App.4th 639; *In re Winner* (1996) 56 Cal.App.4th 1481; *Lynce v. Mathis* (1997) 519 U.S. 433 [17 S.Ct. 891; 137 L.Ed.2d 63]; *Flemming v. Oregon Board of Parole* (9th Cir. 1993) 998 F.2d 721; see also *People v. Palacios* (1997) 56 Cal.App.4th 242 [applying ex post facto analysis to section 2933.1 issue].) Thus, the limitation on earning conduct credits contained in section 2933.2 is a form of punishment.

Here, rather than argue that credit limitation does not constitute punishment, respondent contends that the credit limitation set forth in section 2933.2 does not constitute prohibited multiple punishment under section 654 because it does not attach to any particular count, but instead is based upon a defendant's status as a convicted murderer. (RB 6-7.)

Respondent's reasoning is not persuasive since the limitation on presentence credits – if applied to appellant's case – is directly attributable to the conviction of murder for which the execution of sentence was stayed.

In *People v. Pearson* (1986) 42 Cal.3d 351, this Court considered whether both convictions stemming from the same act could be used to impose a sentence enhancement in the future. (*Id.* at pp. 358-363.) This Court concluded:

> "Convictions for which service of sentence was stayed [pursuant to section 654] may not be so used unless the Legislature explicitly declares that subsequent penal or administrative action may be based on such convictions. Without such a declaration, it is clear that section 654 prohibits defendant from being disadvantaged in any way as a result of the stayed convictions."

(*Id.* at p. 361.) In support of this conclusion, the *Pearson* court cited *People v. Avila* (1982) 138 Cal.App.3d 873.

In *Avila*, an adult proceeding, the trial court stayed service of sentence on an offense punishable by life imprisonment and committed the defendant to the California Youth Authority ("CYA," now known as the Division of Juvenile Justice) pursuant to former Welfare and Institutions Code section 1731.5. (*People v. Avila, supra,* 138 Cal.App.3d at pp. 875-876.) Imprisonment for life was a disqualifying sentence under that section. (*Id.* at p. 876.) The appellate court found that section 654 prohibited the defendant from being disqualified from a CYA commitment based on the

stayed sentence because disqualification constituted impermissible "incremental punishment." (*Id.* at p. 879.) In *Pearson,* this Court specifically stated that "if defendant here were subjected to future sentence enhancements based on his stayed convictions, this would also constitute the type of 'incremental punishment' that section 654 forbid." (*People v. Pearson, supra,* 42 Cal.3d at p. 362.)

The *Pearson* decision further clarified that sentence enhancements are permitted "to the full extent that they are authorized by the Legislature. [Citation.]" (*People v. Pearson, supra,* 42 cal.3d at p. 363.) In such cases, however, the Legislature's authorization is explicit and makes reference in some form to section 654. For example, in *People v. Benson, supra,* 18 Cal.4th at p. 24, a case heavily relied upon by respondent, this Court concluded that "the plain language, legislative history, and legislative purpose of the Three Strikes law" require section 1170.12 to be interpreted as permitting "a qualifying prior conviction to treated as a strike even if the sentence on the conviction has been stayed pursuant to the provisions of section 654." (*Id.* at pp. 26, 36.) The *Benson* court found the statutory language defining a strike "notwithstanding any other provision of law" and expressly stating that a "stay of execution of sentence" would not "affect the determination that a prior conviction is a prior felony" to be particularly

compelling. (*Id.* at pp. 28, 30-31; see §1170.12, subd. (b); see also *People v. Ramirez* (1995) 33 Cal.App.4th 559, 572-573.)

In *People v. Hicks* (1993) 6 Cal.4th 784, this Court held that "imposition of a sentence for the burglary conviction, in addition to the consecutive full-term sentences imposed for the related enumerated sexual offenses, was authorized by section 667.6(c), notwithstanding section 654's general proscription against multiple punishment for offenses committed during an indivisible course of conduct." (*Id.* at p. 797.) The basis for this decision, however, appears in large part to have been the explicit statutory language that referenced section 654 ("whether or not the crimes were committed during a single transaction"). (*Id.* at pp. 792-797.)

Yet another example of an exception to section 654 based on the explicit language of the statute can be found in *People v. Gangemi* (1993) 13 Cal.App.4th 1790, 1800, where the Court of Appeal determined that separate penal fines for each filing of a false deed of trust on a single family residence did not violate section 654. As in the other cases cited above, the appellate court focused on the statutory language of section 115, which provided in relevant part: "(d) For purposes of prosecution under this section, *each act* of procurement or of offering a false or forged instrument to be filed, registered, or recorded *shall be considered a separately*

punishable offense." (Italics added.) The court concluded that the Legislature had "unmistakably authorized the imposition of separate penalties for each prohibited act even though it may be part of a continuous course of conduct and have the same objective." (*People v. Gangemi, supra,* 13 Cal.App.4th at p. 1800.)

As noted by both appellant and respondent, 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 thereby limited the defendants' 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.4th 1423, 1432 [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.4th 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.4th 1353, 1366-1367 [defendants were convicted of murder, attempted murder and associated enhancements for firearms and gangs].) According to respondent, the foregoing cases support

the conclusion that section 2933.2 is not subject to section 654. (RB 6, citing also *People v. Ramos* (1996) 50 Cal.App.4th 810.) Appellant disagrees.

First, in each of the foregoing cases, the conviction triggering the application of section 2933.2 or section 2933.1 was not stayed pursuant to section 654, so the courts deciding those cases had no reason to decide the applicability of section 654. Further, the idea that section 2933.2 "applies to the offender, not the offense," (*People v. Wheeler, supra,* 105 Cal.App.4th at p. 1432), does not necessarily preclude the application of section 654.

Indeed, with regard to enhancements, this Court has similarly distinguished between "(1) those which go to the nature of the offender; and (2) those which go to the nature of the offense." (*People v. Coronado* (1995) 12 Cal.4th 145, 156.) Those enhancements attributable to the offense "arise from the circumstances of the crime and typically focus on what the defendant did when the offense was committed." (*Id.* at p. 157.) Because the repeat offender, or status, enhancement imposed in *Coronado* did not implicate the multiple punishment of an act or omission as it did not relate to an act or omission, this Court determined that section 654 did not apply.

(*Id.* at pp. 157-158.) The credit preclusion set forth in section 2933.2 is no different.

By its terms, the credit preclusion set forth in section 2933.2 is not triggered by a defendant's status. Rather, the credit preclusion arises precisely because of the circumstances of the crime and "what the defendant did when the offense was committed" – the commission of murder. (*People v. Coronado, supra,* 12 Cal.4th at p. 157.) In the instant case, a single act gave rise to appellant's stayed sentence for murder, as well as the sentence imposed for violating section 273ab. Thus, the murder is an "act or omission" within the meaning of section 654, not a status, and appellant cannot suffer multiple punishment in the form of credit preclusion as a result.

D. The *Phelon* Case Was Not Wrongly Decided.

Respondent contends that the appellate court in *In re Phelon* (2005) 132 Cal.App.4th 1214 was wrongly decided, and that it improperly relied on upon this Court's decision in *In re Reeves* (2005) 35 Cal.4th 765 ("*Reeves*"). (RB 8.) Respondent is mistaken.

In *In re Phelon, supra,* 132 Cal.App.4th at p. 1214, the appellate court held that, under *Reeves*, section 2933.1 applied only to the sentence

that the defendant was actually serving. Since the punishment for Phelon's violent felonies was stayed because section 654 applied, Phelon was not serving a sentence for a violent felony. Thus, if the sentence on a conviction is stayed, and the defendant is not serving the sentence, section 654 prohibits the use of the conviction for any punitive purpose and prohibits a "defendant from being disadvantaged in any way as a result of the stayed convictions." (*In re Phelon, supra,* 132 Cal.App.4th at p. 1220.) Thus, section 2933.1 did not apply, and contrary to respondent's contention, *Phelon* was not incorrectly decided, and the *Reeves* analysis applies to the section 654 issue presented here.

Reeves held that unless a defendant is actually serving the sentence for a violent felony, he is not subject to section 2933.1, a statute closely analogous to section 2933.2. When, as here, a sentence is stayed pursuant to section 654, the defendant is not serving the sentence and is therefore not subject to the conduct credit limitation set forth in section 2933.2. To permit the limitation of section 2933.2 against a defendant who is not serving a sentence for murder is contrary to *Reeves* and violates section 654.

Further, respondent's reliance on *Benson* is exactly the type of faulty reliance it complains that the court committed in *In re Phelon, supra,* 132 Cal.App.4th 1214. (RB 9.) *Benson* considered the interplay between the 3-

strikes sentencing scheme, not a conduct time-credit scheme and, as such, is not applicable to the issue raised in appellant's case.

Further, even if *Benson* was useful by analogy, respondent seems not to recognize the importance of section 1170.12, subdivision (b), which – by its plain language – would appear to explicitly include within its terms a sentence stayed by section 654. Respondent focuses on the introductory phrase of section 2933.2, "*Notwithstanding 4019 or any other provision of law*," (RB 9 [italics in RB]), to contend that with these words the Legislature declared an exception within section 2933.2 to the protection of section 654. But, the *Benson* court focused on the statutory language defining a strike "notwithstanding any other provision of law" and **expressly** stating that a "stay of execution of sentence" would not "affect the determination that a prior conviction is a prior felony" to be particularly compelling and meant that a prior serious or violent felony conviction for which sentence had been stayed under section 654 was still available for purposes of the three strikes law. (*Id.* at pp. 28, 30-31, 36.)

What defeats respondent's analogy is that, unlike the explicit declaration of section 1170.12, subdivision (b), regarding the applicability of section 654, section 2933.2 contains no such declaration. The Legislature has demonstrated that it knows how to be explicit, as it was in

section 1170.12. As noted in *Reeves*, if the Legislature intended it to do so, it is "free to amend the section if and as it chooses." (*In re Reeves, supra*, 35 Cal.4th at p. 781.)

So, while respondent is correct that a statute need not expressly refer to section 654 in order to override its prescription against multiple punishment (see *People v. Benson, supra,* 18 Cal.4th at pp. 31-33), section 2933.2 contains nothing more than a reference to the murder of which appellant was convicted, but for which his sentence was stayed. Nothing in the explicit language of section 2933.2 suggests that the Legislature intended an exception to section 654.

"It is assumed that the Legislature has in mind existing laws when it passes a statute. [Citations.]" (*Estate of McDill* (1975) 14 Cal.3d 831, 837 [citations omitted]; see also *People v. Cruz* (1996) 13 Cal.4th 764, 775.) In adopting legislation, the Legislature is further presumed to know of existing judicial decisions and to have enacted and amended statutes in the light of decisions bearing directly upon those enactments. (*Estate of McDill, supra,* 14 Cal.3d at p. 839.) Therefore, it is presumed that the Legislature was familiar with section 654 and knew that some legislative language was necessary to override its proscription against multiple punishment.

Finally, contrary to respondent's contention, construing section 2933.2, subdivision (c) as being subject to section 654 does not "lead to absurd results." (RB 9-10.) First, had the Legislature intended that persons convicted of section 273ab be precluded as a matter of course from accruing presentence conduct credits, it could have explicitly included that statute within the purview of section 2933.2. As it stands, a person convicted of section 273ab receives a sentence of 25 years to life, and is eligible to earn presentence conduct credits pursuant to section 2933.1.

Further, it is the prosecution's choice to determine which crimes to charge given the underlying act or omission. Here, the prosecution chose to charge appellant with both murder and with assault on a child resulting in death. Because appellant was convicted of both crimes, the court imposed the much longer sentence and stayed appellant's sentence for murder pursuant to section 654. Had it been more important to the prosecution for appellant's credits to have been precluded entirely, then it could have chosen to charge him only with murder. The prosecution did not make that choice, and the consequence is that appellant is now entitled to conduct credits in the amount of 85 days pursuant to section 2933.1.

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: June 2, 2008

TORRES & TORRES

TONJA R. TORRES
Attorney for Defendant and
Appellant James Edward Duff, Jr.

CERTIFICATION OF WORD COUNT

The text of this brief consists of 3,448 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 2nd day of June, 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 June 3, 2008, I served the foregoing **Appellant's Reply Brief On The Merits** by mail upon the following interested parties in this action:

SEE ATTACHED SERVICE LIST

I declare on this 3rd day of June, 2008, under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

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