SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of: NATHAN POPE, On Habeas Corpus	)	S160930

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

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION AND OVERVIEW

In his opening brief on the merits, Mr. Pope analyzed in detail the fundamental logical flaw in the opinion below – its reliance on a "notwithstanding" clause in § 2933.1(a) that directs *which* law applies to a defendant known to be covered by that law, without addressing the foundational question of *whether* the defendant is covered by that law in the first place. (AOBM 16-23.) He also analyzed in detail why in that effort, the opinion below erred in its reliance on *People v. Benson* (1998) 18 Cal.4th 24. (AOBM 21-26.)

The People offer virtually nothing to challenge Mr. Pope's analysis of these matters in this Court. Their only discussion of either point is buried in three paragraphs on pp. 21-22 of their brief (their Part IV(B)). Even then, the People not only don't address Mr. Pope's analysis here, they don't mention it. They also rely on *Benson*, without mentioning Mr. Pope's discussion of it. (RABM 21-22.) In fact, their three-paragraph discussion is lifted almost verbatim from their lone Court of Appeal brief (Ct. App. AOB 12-14), which obviously didn't address anything Mr. Pope said in this Court.

These omissions should be strong evidence that Mr. Pope got it right. If the People had a solid basis to refute Mr. Pope's analysis in this Court of the opinion below, surely they would have offered it.

By contrast, the People's primary analysis in this Court looks like their analysis in the Court of Appeal, which the opinion below did not adopt. For good reason – it is directly contrary to this Court's opinion in *In re Reeves* (2005) 35 Cal.4th 765 ["*Reeves*"] in multiple ways, which Mr. Pope discussed in his opening brief, and will again in reply. Most prominently, its basic premise was rejected explicitly by *Reeves*, and the People's cited cases are easily distinguished.

The People also try a fallback that a sentence stayed under Penal Code section 654 is actually service of a term in prison, which is contrary to all published authority and common logic. Their rationale is based on what happens when a previously stayed sentence is *un*stayed, which is irrelevant here.

Though the above is dispositive, the People also offer nothing to refute Mr. Pope's second Argument, including its reviewability in this Court. They have contested neither Mr. Pope's plain-language analysis nor his six indicia of legislative intent, and the authorities they cite are plainly inapposite for reasons Mr. Pope will discuss.

If Mr. Pope prevails in his second argument, that would be dispositive of his first argument: If there are no violent felonies in this case, the question on which this Court granted review disappears. However, this Court may exercise discretion to decide it anyway. (*People v. Eubanks* (1996) 14 Cal.4th 580, 584, fn. 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 [AOB, Arg. I, pp. 7-38]

A. Analysis [AOB, Arg. I(A), pp. 7-14]

The People appear to make two separate claims to bypass *Reeves* – (1) all defendants who have been convicted of any violent felony are subject to section 2933.1(a), irrespective of any other circumstances, and (2) a defendant who has a sentence stayed under section 654 is "serving a prison sentence" for the conviction with the section 654-stayed sentence. The first is contrary to *Reeves*; the second is contrary to long-established caselaw and common sense.

1. Is A Defendant Automatically Subject To Section 2933.1(a), Solely By Virtue Of Having Been Convicted Of Some Violent Felony?

The Court of Appeal opinion in *In re Phelon* (2005) 132 Cal.App.4th 1214 ["*Phelon*"] treated the legal question before this Court as a straightforward application of *Reeves*:

> Only subdivision (a) [of section 2933.1] was at issue in *Reeves*, which the court interpreted 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 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. [Citation to *Reeves*.]"
>
> 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 . . . .

(*Id.* at pp. 1218-1219.)

This is also how Mr. Pope addressed the question. (AOBM 7-10, 11-12 [discussing *Phelon*], 12-14 [discussing *In re Tate* (2006) 135 Cal.App.4th 756 ["*Tate*"]].)

The People quote in large part the key passages from *Reeves* on which Mr. Pope relies:

> [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] [quoted in AOBM 8, and quoted in part at RABM 9].)

However, the People dispute *Reeves* obliquely, by contending the dispositive question "is whether a person is 'convicted of' a

violent [felony] offense, not whether the person is serving a sentence for a violent [felony] offense." (RABM 4.) That is directly contrary to the passage from *Reeves* quoted above.

It is also a type of argument that this Court expressly rejected in *Reeves*. Mr. Pope discussed this in his opening brief:

> "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].)" (AOBM 15.)

The People do not appear to address this. It is dispositive of their claim.

The People refer to "a variety of contexts" in which "courts have concluded that the meaning of the word 'convicted' is the fact of conviction, rather than both the conviction and the corresponding sentence." (RABM 5.) But the word "convicted" standing alone

cannot be at issue here, because the word can have different meanings depending on the verb or tense attached to it. (*Reeves,* 35 Cal.4th at pp. 771-772.) Here, the operative phrase in section 2933.1(a), including verb and tense, is "is convicted."

Furthermore, the phrase "is convicted" cannot be considered in the abstract, but must be construed in its full context (*Prospect Medical Group, Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 506). *Reeves* did just that. (*Id.*, 35 Cal.4th at pp. 771-772, 777.) What language might mean in other contexts is irrelevant to *this* context.

For their "other contexts" argument (RABM 5), the People cite three cases. Two of them, *People v. Loomis* (1965) 231 Cal.App.2d 594 and *People v. Kirk* (2006) 141 Cal.App.4th 715, aren't postsentence credits cases. They are therefore inapposite here.

The third, *In re Pacheco* (2007) 155 Cal.App.4th 1439, was a situation in which the trial court exercised partial leniency as to a conviction found to be a violent felony, by striking the punishment for a great bodily injury enhancement under Penal Code section 12022.7 (attached to a domestic violence conviction under section 273.5(a)), but not striking the enhancement itself. (*Compare* Pen. Code, § 1385, subd. (a) *with id.*, subd. (c)(1).) Pacheco ended up

with a three-year prison sentence for his conviction under section 273.5(a) and his enhancement under section 12022.7.

Pacheco is inapposite, because the defendant there was serving a prison term for the conviction that was a violent felony, the section 273.5(a) conviction. Therefore, on its face, the language of *Reeves* which governs Mr. Pope's case did not apply to Pacheco.

Specifically, while *Reeves* provides that "section 2933.1(a) has no application to a prisoner who is not actually serving a sentence for a violent offense" (35 Cal.4th at p. 780), Pacheco was "actually serving a sentence for a violent offense." True, Pacheco's three-year prison term might have been lower than the six-year term which would have resulted had he also been sentenced on the enhancement. But it was still a prison term for a conviction that qualified as a violent felony – in the language of *Reeves*, still a "sentence for a violent offense" – because the great bodily injury enhancement had been found true, and that was found to create a violent felony under section 667.5(c)(8).

That has nothing to do with *Reeves* or *Tate*, where the limitation of section 2933.1(a) did not apply when the defendant was no longer serving a prison sentence for a violent felony offense. And it has nothing to do with this case, where the defendant never served a prison term for a violent felony offense.

By contrast, *Reeves* and *Tate* are cases in which the word "convicted" – or more specifically, the phrase "is convicted" in the postsentence credits context of section 2933.1(a) – referred only to convictions for which the defendant was serving time in prison. (*See also In re Carr* (1998) 65 Cal.App.4th 1525, 1536 [cited in AOBM 15, 25, 35] ["is convicted" in section 2933.1(a), as referenced in subdivision (c), did not include a defendant who had such a conviction, but received probation for it].) So too here.

The People also reinterpret the phrase "is convicted of a felony offense listed in subdivision (c) of section 667.5" in a manner contrary to *Reeves,* by arguing that a court can't add language to a statute. (RABM 7-8 [citing Code Civ. Proc., § 1858].) That type of argument was also made by the dissent in *Reeves* (*id.* at p. 789), albeit as to different statutory language. It doesn't appear the dissent in *Reeves* questioned the majority's interpretation of the "is convicted..." language; notably, neither did the People. (*Id.* at p. 771.) In any event, Mr. Pope relies on the majority opinion in *Reeves*, because it is the opinion of this Court.

This Court's interpretation of the section 2933.1(a) phrase "is convicted" in *Reeves* makes perfect sense in the context of *Reeves* and *Tate*, and in the similar context of this case.

Reeves – as well as *Tate* and Mr. Pope's case – is a postsentence credits case. Postsentence credits are determined by the Department of Corrections. (*People v. Mendoza* (1986) 187 Cal.App.3d 948, 954-955.) Also, a postsentence credits case necessarily involves the existence of at least one "conviction" with a prison sentence. That is the only type of "conviction" which would matter for postsentence credits purposes, because it is the only type of "conviction" which would give the Department of Corrections a custodial interest in a defendant.

Consequently, in *Reeves* as well as *Tate*, the meaning of the phrase "is convicted of a [violent] felony offense" in section 2933.1(a) required determining whether a particular violent felony "conviction" "gives the Department [of Corrections] . . . claim to [the defendant's] physical custody." (*Reeves*, 35 Cal.4th at p. 777; *Tate*, 135 Cal.App.4th at p. 763.)

The answer was no in the contexts of both *Reeves* and *Tate*, because no prison sentence for the violent felony conviction was being served, due to that prison sentence's expiration. The answer is also no in the context of the current case, because no prison sentence for the violent felony was being served (or was ever served), due to the section 654 stay. Additionally, the answer is also no in the current case because the Department of Corrections only

has a custodial interest in a defendant for a "conviction" that constitutes criminal punishment, inasmuch as a person cannot be imprisoned if he cannot be punished (*Robinson v. California* (1962) 370 U.S. 660, 666-667), and a sentence stayed under section 654 is not criminal punishment. (*People v. DeLoza* (1998) 18 Cal.4th 585, 594; *In re Wright* (1967) 65 Cal.2d 650, 654-655.)

The People also offer a fourth case, *People v. Shirley* (1993) 18 Cal.App.4th 40. (RABM 6.) *Shirley* involved section 1192.7(c)(8), which has different language and requirements from section 2933.1(a).

Shirley construed section 1192.7(c)(8) by holding that when the current offense was a serious felony, and the court in a prior case struck a great bodily injury enhancement which the defendant had previously admitted, Penal Code section 667, subdivision (a) was still applicable. *Shirley* was correctly decided, *inter alia*, because once the defendant admitted the great bodily injury enhancement in the prior case, he admitted personally inflicting great bodily injury, so the criteria of section 1192.7(c)(8) were satisfied as to that prior case. (*Id.* at p. 47.)

That case has nothing do with this one, and certainly is not "analogous" (RABM 6). Section 2933.1(a) has its own requirements, which are far different from section 1192.7(c)(8)'s.

The People also assert, as they did in the Court of Appeal, that any construction question as to section 2933.1(a) should be resolved in favor of "delaying the release of prisoners convicted of violent offenses." (RABM 5 [quoting *Reeves*].) Mr. Pope already discussed this in his Opening Brief on the Merits, but the People reargue the same point anyway. Mr. Pope here incorporates his discussion at AOBM 33 (bottom, beginning with "The People also relied on a citation from *Reeves* . . . .") through the first full paragraph at AOBM 34 (citation to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 523-524, 528).

In short, the People's effort to avoid *Reeves* should be unavailing. The Court of Appeal in *Phelon* got it right – this case is a straightforward application of this Court's opinion in *Reeves*.

2. Is A Defendant Who Has A Sentence Stayed Under Section 654 Serving A Prison Term For The Conviction With A Stayed Sentence?

The People also argue that Mr. Pope "**is** serving time for a violent offense, despite the fact the sentence[s] on the enumerated violent felony convictions are stayed." (RABM 11 [boldface added].) They don't explain how a person can be serving prison time on a section 654-stayed sentence.

The concept is contrary to common sense. If a prison sentence is stayed, clearly it isn't being served. (*Accord People v.*

Percelle (2005) 126 Cal.App.4th 164, 178 ["If the robbery term was stayed, it cannot be said that defendant served a prison term as a result of the robbery conviction. The Attorney General provides no argument or evidence to the contrary."] [cited in AOBM 8])

Nor do the People explain how a stayed sentence could be service of a prison sentence, when a prison sentence is punishment, while a section 654-stayed sentence is not punishment. (*People v. DeLoza* (1998) 18 Cal.4th 585, 594 [cited in AOBM 9, 25]; *In re Wright, supra,* 65 Cal.2d at pp. 654-655 [cited in AOBM 2, 9, 25].)

Mr. Pope addressed all of this in his Opening Brief on the Merits. (AOBM 2-3, 8-9.) The People offer nothing in response.

The People's rationale confuses a sentence with a stay that remained intact (this case), with a sentence where the stay was lifted (not this case). A sentence where the stay was lifted is usually a prison term. But this case has no lifted stay, and the People don't argue otherwise. (If it had one, we wouldn't be here, because the question on which this Court granted review would no longer exist.)

Here, specifically, is what the People argue on this point. Mr. Pope has added bracketed and boldfaced numbers, for ease of reference to the People's premises {**[1]** and **[2]**} and conclusion {**[3]**}:

> **[1]** 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, 360.) **[2]** **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.) . . . . **[3]** 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 [citation to *Reeves*] can fairly be applied to Pope because he is serving time for a violent offense, despite the fact that the sentence[s] on the enumerated violent felony convictions are stayed.

(RABM 10-11 [boldface and underscoring added; italics in original].)

With full respect, Mr. Pope can't see how point **[2]** is supposed to support point **[3]**. Point **[2]** is generally true in cases where it is applicable, where "an unstayed conviction is overturned before the offender completes his sentence for that offense." That would generally create a prison sentence out of what was a previously stayed sentence (assuming probation is not granted on resentencing, and the unstayed sentence has not yet expired). But this is not a case where the "unstayed conviction [was] overturned," and the People don't contend it is. Consequently, the People's point **[2]** doesn't apply.

The People then try to distinguish *Tate* on the same type of explanation (RABM 11-12), though hedging their language more: "[A] prison convicted of multiple offenses for the same criminal act whose violent offense is stayed is subject to imprisonment for a

violent offense." (RABM 12 [underscoring added].) That may happen in other cases where the stay is lifted; but then, there is no stay, and the issue in this case no longer exists.

B. The Court of Appeal's Opinion Below [AOBM, Arg. I(B), pp. 14-32]

Mr. Pope considers it notable that respondent's Answer Brief on the Merits has so little in defense of the opinion below. In fact, in the People's entire 21-page legal argument (RABM 3-23), the respondent's Answer Brief mentions the opinion below in only two paragraphs – on the 19th and 21st pages of the argument. (*See* RABM 21 [bottom par.], 23 [first full par.].)

What little the People say is nothing new. Their argument that the Court of Appeal properly found section 2933.1(a) to be an exception to section 654 – including their reliance on *People v. Benson* (1998) 18 Cal.4th 24 – is lifted almost verbatim from their lone Court of Appeal brief (Ct. App. AOB 12-14), which obviously didn't address anything Mr. Pope said in this Court. Mr. Pope incorporates here his discussions at AOBM 16-26.

The People also briefly recount the opinion below's policy beliefs about the case. (RABM 22-23 [quoting slip op., p. 9].) Mr. Pope addressed those in his opening brief here (AOBM 27-32); the People do not respond.

In the event it is necessary to restate his reasons why the opinion below's policy beliefs don't change the result of this case, Mr. Pope incorporates his discussion at AOBM Arg. I(B)(4), pp. 27-32.

C. The People's Positions Below [AOB Arg. I(C), pp. 32-38]

Here as in the Court of Appeal, the People offered a contention emanating from *People v. Ramos* (1996) 50 Cal.App.4th 810, 817, that section 2933.1 "applies to the offender not to the offense." (RABM 21 [citing *Ramos*].) They fail to address or mention Mr. Pope's opening brief discussion of that subject, at AOBM 34 (last full par.) through AOBM 38 (end of section (C)). Mr. Pope incorporates that discussion here.

Similarly, the People contend their preferred theory of section 2933.1(a) "does not violate [section 654's] prohibition against multiple punishment." (RABM 20.) Mr. Pope already addressed this in detail in his opening brief. Most specifically:

"[T]his 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. . . . 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 . . . .)" (AOBM 23-24.)

For the People to say their contention doesn't violate Penal Code section 654 is somewhat like saying it doesn't violate section 187. All of that may be true, but this case doesn't turn on the meaning of section 654 (beyond the fact that a sentence subject to it doesn't involve service of a prison term) any more than it turns on the meaning of section 187. (*See* AOBM 23-24.) This case turns on the meaning of section 2933.1(a), the only statute at issue here.

D. Conclusion To Part I

Mr. Pope continues to summarize his argument in two words: Follow *Reeves*. (AOB 38.) The decision of the Court of Appeal should be reversed, and that of the Superior Court reinstated.

INTRODUCTION TO ARGUMENT II [AOB, Arg. II Intro., pp. 39-45]

In his opening brief here, Mr. Pope's Introduction to Argument II was a four-point discussion of why Argument II is reviewable here though it wasn't raised in his *pro. per.* petition in Superior Court, or in the People's appeal to the Court of Appeal.

The People agree with Mr. Pope that this issue (Argument II) "analytically precedes the issue of whether section 2933.1(a) applies where a violent conviction is stayed." (RABM 12, fn. 2.) This was part of his first argument for reviewability, in his"Introduction to Argument II," section (A). (*See* AOBM 39-40.) To that extent, it seems the People agree with at least this basis for reviewability.

Beyond that, the People offer only a scant answering footnote with two sentences of analysis. It merely says this Court's normal policy is not to consider issues that weren't raised below – which Mr. Pope already pointed out (AOBM 41) – and then closes with a single sentence untethered to any support: "There is no reason for the Court to disregard its policy in this case." (RABM 12, fn. 2.)

Perfunctorily asserted claims, without a sufficiently developed argument, generally would not warrant this Court's consideration. (*People v. Schmeck* (2005) 37 Cal.4th 240, 303, fn. 25.) Here, however, Mr. Pope recognizes this Court will consider the question

anyway – irrespective of the lack of responsive briefing – because it deals with this Court's power of review.

Still, the fact that the People offer virtually nothing to contest Mr. Pope's reviewability arguments, and have no specific response– except appearing to agree with the premise of the first one – should strongly indicate that Mr. Pope's points are well taken and supported.

II. THE RECORD DOES NOT SHOW ANY VIOLENT FELONY CONVICTIONS UNDER § 667.5, SO § 2933.1 IS INAPPLICABLE [AOB, Arg. II, pp. 46-71]

A. The People's Rewrites Of Mr. Pope's Argument

1. What Mr. Pope Did And Didn't Argue

The issue actually raised by Mr. Pope deals with the incorporation of section 12022.7 by section 667.5(c)(8), both as enacted in 1977. That is the only issue Mr. Pope has raised, and the only one he analyzes. The issue here does not deal with the incorporation of section 667.5(c) (generally) by section 2933.1(a), which is what the People have discussed. (*See* RABM 14.)

That disparity may be the fundamental basis of the parties' disagreement. Mr. Pope fully agrees with the People that section 2933.1(a) incorporates section 667.5(c) as the latter changes from time to time, as a general "body-of-laws" incorporation.

However, that doesn't address Mr. Pope's argument, which is that section 667.5(c) – specifically, section 667.5(c)(8) – has never incorporated the 1996 amendment to section 12022.7. Section 667.5(c)(8), which was enacted in 1977 and has never been amended as to the provision in question here, incorporated section 12022.7 as it too was enacted in 1977. The Legislature is free to change that if it desires.

In like manner, the People are wrong in claiming that "Pope argues that the violent crimes enumerated in [section] 667.5(c) are frozen in time . . . ." (RABM 13.) Mr. Pope argues no such thing; the Legislature is always free to change or add to the list of violent felonies in section 667.5(c). Indeed, the Legislature has done so on many occasions – section 667.5(c) currently has 23 subdivisions, but was enacted with only 8 (*see People v. Carter* (1980) 104 Cal.App.3d 370, 372, fn. 3 [text of statute as it existed then]), and even those 8 had less in them than they do now.

In no way are "the violent crimes enumerated in [section] 667.5(c) . . . frozen in time." Not even a specific statutory incorporation is "frozen in time," because the Legislature is always free to change it. But that hasn't happened to the 1977 Legislature's specific incorporation of section 12022.7 into section 667.5(c)(8). Whether it will in the future, is up to the Legislature.

2. Where The People Appear To Go From Their Rewritten Argument; Confusing Incorporat*ing* Statutes With Incorporat*ed* Statutes

From there, the People seem to try a sort of policy theory – that if section 2933.1(a)'s incorporation of section 667.5(c) is a general "body-of-laws" incorporation of the latter (which Mr. Pope agrees it is), this means that if section 667.5(c) happens to

incorporate any statutes of its own, the latter must also be a general "body-of-laws" incorporation. (RABM 14 [bottom]-15 [top].)

If that is their position, the concept is not supported by any authority, and Mr. Pope can't imagine there is any. The Legislature is free to write and incorporate statutes as it sees fit.

In any event, the People appear to be confusing apples with pineapples. They are talking about what the Legislature did and intended in 1994 in enacting section 2933.1(a). Mr. Pope is talking about what the Legislature did and intended in 1977 in enacting section 667.5(c)(8). The former is irrelevant to the latter.

It appears the People may be contending that if a statutory scheme constitutes what they call a "general body of laws" (which they don't define in this context), then no incorporation by reference within it can be a specific statutory incorporation. (*See* RABM 13 [2d par., last sentence], 14 [bottom]-15 [top], 17 [reference to "section 667.5(c)'s definition of violent crimes as a general body of law"].) This would depend on affixing a "general body of laws" label to the *incorporating* statutes, rather than to the *incorporated* statutes, when only the latter is discussed in *Palermo v. Stockton Theatres* (1948) 32 Cal.2d 53, 58-59 ["*Palermo*"] and like cases.

If that is their argument, they cite no authority for it. Nor do they come up with a definition of "general body of laws" as to the

incorporating statute that would permanently freeze out specific incorporations within it. Mr. Pope assumes the People have simply confused an incorporat*ing* statute with an incorporat*ed* statute.

In any event, there are plenty of authorities that would be contrary to such a claim – starting with *Palermo* itself, since the Alien Land Act in *Palermo* would have been a "general body of laws" as the People try to describe, but the incorporation of the treaty reference was held to be specific. (*Id.* at pp. 59-60; *see also, e.g., People v. Superior Court (Lavi), supra,* 4 Cal.4th at p. 1176, fn. 7 [Code of Civil Procedure section 170.6's incorporation of then-Rule 223, California Rules of Court, was a specific incorporation – even though the disqualification provisions of section 170.6 comprised a body of laws subject to change over time]; *People v. Kirk* (1990) 217 Cal.App.3d 1488, 1499 [Penal Code section 667.6(c)'s incorporation of Penal Code section 289(c), as it existed then, was a specific incorporation – even though the sentencing provisions of section 667.6(c) comprised a body of laws subject to change over time].)

Granted, none of these cases discussed what the People appear to be talking about, whether the incorporat*ing* statute was to be deemed a "general body of laws." They didn't discuss this newly minted concept because it has no support anywhere.

B. Introduction; Summary; Background [AOBM, Arg. II(A)-(C), pp. 46-52]

Mr. Pope agrees that the People have correctly stated both the statutory (specific) incorporation rule, and its cognate, the body-of-laws (general) incorporation rule. (RABM 13-14 [quoting *Palermo*, 32 Cal.2d at pp. 58-59].) Mr. Pope stated both in his opening brief. (AOBM 54 [quoting *Palermo*].)

If the cognate body-of-laws incorporation rule on which the People rely is applied to Mr. Pope's argument as stated in the *Palermo* case they cite, the People cannot prevail. The incorporating reference here – the incorporation of Penal Code section 12022.7 by Penal Code section 667.5(c)(8), both as enacted in 1977 – was very specific, not at all general. The incorporated statute, section 12022.7 (as enacted in 1977), also was neither "a system or body of laws" nor "the general law relating to the subject at hand." It was a single statute on a single topic.

As discussed in the previous section, the People restate the issue as if it were section 2933.1(a)'s incorporation of section 667.5(c). (RABM 14.) That is not Mr. Pope's issue. His issue is section 667.5(c)(8)'s incorporation of section 12022.7.

The People do not address Mr. Pope's point that section 667.5(c)(8) means now what it did in 1977. (AOB 50.)

C. Legal Discussion: The Statutory Incorporation Rule Applies To This Case [AOBM, Arg. II(D), pp. 53-58]

The People do not appear to address anything Mr. Pope argued here. In particular, they do not address his discussion of how the 1977 Legislature – presumed to have known and relied upon existing authority of that time – would have understood the statutory incorporation rule to be a convention of plain language, which would prevail unless there was a "clearly expressed intention to the contrary." (*See* AOB 56-57.) The People also do not point to anything in section 667.5(c)(8), or anywhere else, that could have constituted a "clearly expressed intention to the contrary."

Consequently, the argument in this section is dispositive. The Superior Court's judgment should be reinstated on this basis alone.

D. Confirming Indicia Of Legislative Intent [AOBM, Arg. II(E), pp. 58-71]

Since the discussion above is dispositive as a matter of plain-English usage that was the law known to the 1977 Legislature (*see* discussion at AOBM 55-57), there should be no need to go further. Nonetheless, Mr. Pope additionally supported his argument with six different indicia of legislative intent.

The People haven't addressed any of Mr. Pope's discussions of legislative intent. Reading their brief more generally, Mr. Pope can only find arguments that implicate two of the six.

1. First Confirming Indicium: The Statutory Incorporation Rule, As It Existed In 1977 [AOB, Arg. II(E)(1), pp. 58-59]

The People do not appear to discuss the points in this subsection.

2. Second Confirming Indicium: *Noscitur A Sociis* [AOB, Arg. II(E)(2), pp. 59-60]

The People do not appear to discuss the points in this subsection.

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 [AOB, Arg. II(E)(3), pp. 61-63]

The People do not appear to discuss the points Mr. Pope actually made in this subsection.

Instead, the People seem to rewrite Mr. Pope's argument by saying: "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." (RABM 18 [citing AOBM 61-63].) The People's citation to AOBM 61-63 refers to this subsection (3), Mr. Pope's third-discussed indicium of legislative intent, so it is discussed here.

The People have misstated Mr. Pope's point, which was based on common principles of statutory interpretation.

To begin with: "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.* This was, of course, a well-established statutory principle in 1977, when § 667.5(c)(8) was enacted." (AOBM 61 [citations omitted].) This principle has been described as "the learning of common experience" (*Arden Carmichael v. City of Sacramento* (2001) 93 Cal.App.4th 507, 515-516), and a "product of logic and common sense" as applied toward a sensible result. (*Alcaraz v. Block* (9th Cir. 1984) 746 F.2d 593, 607.) Mr. Pope applied this to the "charged and proved as provided for in section 12022.7" language of section 667.5(c)(8), by contrast to section 1192.7 which doesn't contain that language. (*See* AOBM 60-62.)

As Mr. Pope also pointed out, statutory language is construed to have meaning. Here, "[h]ad 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. [Citation.]" (AOB 62.)

And: "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. [Citations.]." (AOB 63.) Mr. Pope applied this to the fact that the People want the GBI provisions of sections 1192.7(c)(8) and 667.5(c)(8) to mean the same thing, when they are worded quite differently. (*See* AOB 63.)

The People don't respond to any of these points.

With full respect, Mr. Pope is not completely sure of what point the People wish to make at RABM 19-20, where they discuss battery with serious bodily injury. Mr. Pope certainly wasn't "build[ing] his argument" around the fact that there are distinctions between section 1192.7(c) and section 667.5(c) (*compare* RABM 20 [top]). There are many such distinctions, but section 1192.7 is not at issue here.

Rather, Mr. Pope's discussion of battery with serious bodily injury was merely an illustration of his discussion of the *expressio unius* prinicple. (*See* AOB 61-62.) If the Legislature wanted section 667.5(c)(8) to have no requirement of intent to injure, it certainly

knew how to accomplish that. As an example, Mr. Pope explained that section 1192.7(c)(8) has no requirement of intent to injure, and battery with serious bodily injury was part of that example. This was merely one means of showing that the pleading and proof requirements in section 667.5(c)(8) which are absent in section 1192.7 must be construed to have meaning, which can be accomplished by applying the statutory incorporation rule.

Mr. Pope isn't talking about "destroy[ing] the distinction between sections 667.5 and 1192.7" (RABM 20). The question isn't what would happen if the intent requirement were later to be removed from section 667.5(c)(8); the question is what the Legislature meant when it enacted section 667.5(c)(8) in 1977. Comparing section 667.5(c)(8) as it was enacted in 1977, with section 1192.7(c)(8) as it was enacted in 1982, there *is* a distinction between the great bodily injury provisions of those statutes. Whether that distinction should remain intact in the future is a question for our Legislature, and doesn't seem germane here anyway.

4. Fourth Confirming Indicium: *People v. Kirk* [AOB, Arg. II(E)(4), pp. 63-64]

The People do not appear to discuss the points in this subsection.

5. Fifth Confirming Indicium: Common Sense, And Keeping The Statutory Scheme Harmonious [AOB, Arg. II(E)(5), pp. 64-67]

The People do not appear to discuss Mr. Pope's points in this subsection (5).

However, the People offer their own view of why the general "body-of-laws" incorporation rule is necessary to "avoid[] incongruous results." (RABM 17.) Mr. Pope addresses this *post*, section (F)(4).

The People also allude to the crime listed in section 667.5(c)(21), occupied burglary, as "a[] crime included within section 667.5 in which intent to injure is not an element." (RABM 19.) This may be intended to contest Mr. Pope's showing in this subsection that section 667.5(c) – as enacted by the 1977 Legislature – was an harmonious statutory scheme encompassing crimes of particular violence that all required at least the intent to commit the act that made it a violent felony; and also, that did not extend to unintentional crimes with unintentional injuries. (*See* AOBM 65-67.)

Section 667.5(c)(21) was enacted as part of Proposition 21 in 2000. However, as Mr. Pope pointed out repeatedly in his opening brief, "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.* [(1994)] 8 Cal.4th [1041,] 1047-1048.)" (AOBM 55; *accord* AOBM 30, 41, and

supporting citations.) The 2000 enactment of section 667.5(c)(21) therefore has no relevance to the intent of the 1977 Legislature in enacting section 667.5(c)(8).

Ultimately, the People offer nothing in response to Mr. Pope's point that under the 1977 Legislature's enactment, no provision of section 667.5 created "negligent violent felonies" or "strict liability violent felonies." There is nothing to suggest the 1977 enactment of section 667.5(c)(8) was intended to permit that.

6. Sixth Confirming Indicium: Subsequent Addition Of Section 12022.9, But Not Section 12022.8 [AOBM, Arg. II(E)(6), pp. 67-69]

The People do not appear to discuss Mr. Pope's points in this subsection (6).

Based on the above, Mr. Pope would respectfully submit that all of his indicia of legislative intent have been fully established, and that each provides further support for his argument.

E. The People's Theories Of Legislative Intent

1. Section 12022.7 – The Incorporated Statute Here – Is A Single Specific Statute, Not A "System Or Body Of Laws"

The People, however, also seek to characterize the 1977 Legislature's incorporation of section 12022.7 into section 667.5(c)(8) as a general, "body-of-laws" incorporation. (RABM 13, 14-15.)

That runs into an obvious problem: What "system or body of laws" or "general law relating to the subject in hand" are the People claiming that the 1977 Legislature incorporated, by section 667.5(c)(8)'s reference to section 12022.7?

The phrase "section 12022.7" is quite specific; it cannot refer to anything other than section 12022.7. "This is not a reference to a system or body of laws or to the general law relating to the subject at hand. It is a specific and pointed reference to a [specific statute in] the Penal Code . . . ." (*In re Oluwa* (1989) 207 Cal.App.3d 439, 445; *accord, e.g., San Bernardino County Sheriff's Employees' Benefit Ass'n v. San Bernardino County Board of Supervisors* (1992) 7 Cal.App.4th 602, 610-611.) That is as specific an incorporation as the 1977 Legislature could have effected.

In sharp contrast are the two cases cited by the People, which they claim to be examples of statutory citations constituting a general "body-of-laws" incorporation. Neither is analogous to this case; one is not an incorporation of a single specific statute (unlike section 667.5(c)(8)'s incorporation of section 12022.7), while the other isn't an incorporation by reference at all.

Doe v. Saenz (2006) 140 Cal.App.4th 960, 981 [cited at RABM 14] analyzed a statute that referred generally to "a crime against an individual specified in subdivision (c) of section 667.5 of the Penal

Code." Far from a specific incorporation, that is a general description of all crimes against individuals listed in section 667.5(c) – particularly given that section 667.5(c) synonymously refers to its components in a general way, as "extraordinary crimes of violence against the person." Because the incorporation of section 667.5(c) in *Doe* was generalized rather than specific, it was a "body-of-laws" incorporation to all of section 667.5(c), rather than a specific statutory incorporation. (*See also, e.g., People v. Van Buren* (2001) 93 Cal.App.4th 875, 879-880 [section 2933.1's incorporation of section 667.5(c) is general, because it refers to the overall list of crimes within section 667.5(c), which would be expected to change from time to time] [over'd o.g. in *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3].) But that has nothing to do with the 1977 Legislature's incorporation of section 12022.7, which is a single statute and not a "system or body of laws."

People v. Jones (1995) 11 Cal.4th 118, 123-124 [cited at RABM 14] didn't involve any incorporation by reference at all. It merely discussed a statute (then-Welfare and Institutions Code section 3201, subdivision (c)) which created a statutory analogy to the provisions of a second statute (Penal Code section 2931), and concluded that because Jones and others similarly situated weren't entitled to credits under the second statute, they weren't entitled to

credits under the first statute either. That required determining how the second statute would apply to individual defendants, which was an application of the second statute, not an incorporation by reference. It therefore doesn't support the People's claim either.

Section 12022.7, as enacted in 1977, was a single statute on a discrete topic. It was not a "system or body of laws." It therefore was not a logical subject for a "body of laws incorporation." The People offer nothing – let alone the "clearly expressed intention to the contrary" required in 1997 by *Palermo* and like cases – to show the Legislature was intending to treat it as one.

2. Statutes Enacted In 1994 And 1996 Shed No Light On The Intent Of The 1977 Legislature In Enacting Section 667.5(c)(8)

The People also base a claim on their view of "the commonality of purpose in the three statutes." (RABM 15.) Their claim boils down to a theory of what, in their view, would "make . . . sense." (RABM 16.) Their "three statutes" are section 667.5(c)(8), which was enacted in 1977; the 1994 enactment of section 2933.1(a); and the 1996 amendment to section 12022.7. (RABM 15.)

The People fail to explain how a 1994 statute and a 1996 amendment support the legislative intent of a 1977 statute. Obviously they don't, because as Mr. Pope has pointed out repeatedly, "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.)" (AOBM 55; *accord* AOBM 30, 41, and supporting citations.)

In any event, the People's claim amounts to an argument that because all three statutes involve situations of injury that warrant extra punishment, they must all be construed so as to maximize punishment. This Court has repeatedly rejected claims of this nature. (*E.g., In re Reeves, supra,* 35 Cal.4th at p. 771; *People v. Garcia* (1999) 20 Cal.4th 490, 500-501; *People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 528.) The People's attempt to graft the later two statutes, onto the legislative intent behind a statute enacted nearly 20 years earlier, again fails.

3. A Sentencing Judge Can Make The Section 667.5(c)(8) Intent To Injure Determination For Purposes Of Section 2933.1, In Conjunction With Determining Presentence Credits

The People also express concern that "the prosecution has no reason to offer evidence of this intent [to injure, under section 667.5(c)(8) incorporating the 1977 section 12022.7] at trial, nor will the judge or jury make a finding regarding intent." (RABM 16.)

The concern is unfounded. The question of whether section 2933.1 applies via section 667.5(c)(8) is for a sentencing judge, not a

jury. (*People v. Garcia* (2004) 121 Cal.App.4th 271, 277-278.) If a section 12022.7 allegation is pled and found true, the sentencing judge can find intent to injure as a typical matter of sentencing with no need for formal pleadings or a trial. The sentencing judge would have to do that anyway, in determining whether presentence credits are limited by section 2933.1(c).[1] (*Id.* at pp. 277-278.)

4. The People's Cited Civil Statutes Do Incorporate Section 667.5(c) Generically As A "Body-Of-Laws" Incorporation, But They Are Irrelevant To The Question Here, Whether The 1977 Enactment Of Penal Code Section 667.5(c)(8) Incorporated Penal Code Section 12022.7 As A Specific Statutory Incorporation

Finally, the People offer their own view of why the general "body-of-laws" incorporation rule is necessary to "avoid[] incongruous results" in this case. (RABM 17.) They then list five sets of statutes from various civil statutory schemes which refer to section 667.5(c) "to define violent crimes." (RABM 17-18.)

The People's discussion here is an extension of *Doe v. Saenz, supra,* 140 Cal.App.4th 960. The civil statutes they cite, like *Doe*, all refer generically to violent felonies under section 667.5(c).[2]

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[1] Even if section 2933.1 had presented a matter of formal trial for a jury or judge, that could be accomplished, *e.g.*, by a special allegation and finding of intent to injure. (*Compare* Pen. Code, § 969f.) However, for the reasons in the text, no such special allegation or finding should be necessary.

[2] Mr. Pope presumes that the reference to "Welfare and (continued...)

Doe held that the incorporation of section 667.5(c) into Health and Safety Code section 1522, subdivision (g)(1)(A)(1) is a general, "body-of-laws" incorporation. (*Doe*, 140 Cal.App.4th at p. 983.)

As discussed earlier, Mr. Pope agrees with that analysis in *Doe*, because Health and Safety Code section 1522(g)(1)(A)(1) does indeed refer generically to the body of laws describing violent felonies (against individuals) in section 667.5(c). He would agree with the same type of analysis for all of the other statutes cited by the People too. (*See Doe*, 140 Cal.App.4th at pp. 982-984.)

But that has nothing to do with the very different and completely specific incorporation by reference of section 12022.7 within section 667.5, subdivision (c)(8). The language of one statute cannot be used to construe the nonanalogous language of a completely different statute. Not only are these two totally different incorporations by reference, they don't even involve incorporation of the same statute – *Doe* involved a general reference to section 667.5(c) as the set of incorporated statutes, while this case involves a specification of section 12022.7 as the incorporated statute.

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[2](...continued)
Institutions Code section 1370.1, subdivision (a)(1)(E) and (F)" (RABM 17), is actually intended to be a reference to the same-numbered statute in the Penal Code; and that the reference to "Welfare and Institutions Code section 11732.6, subdivision (a)" (RABM 18) is intended to refer to section 1732.6, subdivision (a) of that Code.

Since Mr. Pope agrees with *Doe*, he also disagrees with the following rewrite of his argument: "[F]ollowing Pope's analysis, attempted murderers could operate a community care facility but not a chronic care facility." (RABM 18.) That is simply not true. It is also not true that the word "similarly" can be used to link this case and *Doe* (*see* RABM 18). This case involves the specific incorporation by reference of Penal Code section 12022.7 into Penal Code section 667.5(c)(8), not the general incorporation of section 667.5(c) as a whole into any civil statutes.

F. Because The Pleading And Proof Requirements Of Section 667.5(c)(8) Are Not Satisfied, There Can Be No Proper Violent Felony Finding [AOBM, Arg. II(F), pp. 70-71]

The People do not contest this point. Therefore, if Mr. Pope is right that the 1977 Legislature's incorporation of section 12022.7 into section 667.5(c)(8) is a specific incorporation, then the 15 percent credit limitation in his case is an unauthorized sentence.

CONCLUSION

For all of the reasons above as well as those he previously stated, 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 30th day of March, 2009.

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND, Executive Director

S. MICHELLE MAY, Staff Attorney
Counsel for Nathan Pope
Under Appointment by the Supreme Court

CERTIFICATION OF WORD COUNT

As counsel for the appellant, I certify under Rule 8.520(c)(1), California Rules of Court, that this brief contains 8,198 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 30th day of March, 2009.

CENTRAL CALIFORNIA
APPELLATE PROGRAM
GEORGE BOND, Executive Director

S. MICHELLE MAY, Staff Attorney
Counsel for Nathan Pope
Under Appointment by the Supreme Court

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 March 30, 2009, I caused to be served the foregoing

APPELLANT'S REPLY 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 30th day of March, 2009.

S. MICHELLE MAY