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In the Supreme Court of the State of California

In re

NATHAN POPE,

Petitioner-Appellee,

On Habeas Corpus.

S 160930

S_____

Third Appellate District, No. C051564
Sacramento County Superior Court, No. 05F05526

PETITION FOR REVIEW
AND
REQUEST FOR CONTINUED PUBLICATION

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

James Tilton, Secretary of the California Department of Corrections and Rehabilitation (Department), appellant in the court below, hereby petitions this Honorable Court to grant review, pursuant to California Rules of Court, rules 8.500 and 8.516, following a published decision by the California Court of Appeal, Third Appellate District filed on January 8, 2008 (Appen. A, *In re Pope*, Slip Opn.). The Department also requests, pursuant to California Rules of Court, rule 8.1105(e)(2), that the Court order that the Court of Appeal opinion remain published pending review.

ISSUE FOR REVIEW

The Issue Presented is:

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

STATEMENT OF THE CASE

Appellee Nathan Pope is serving a prison term for gross vehicular manslaughter. While driving under the influence of alcohol and cocaine, Pope struck another car, killing the other driver. (Slip Opn. at p. 2.) Pope pled guilty to one count of gross vehicular manslaughter (Pen. Code, § 191.5 subd. (a)), and two counts of felony driving while under the influence

(Veh. Code, § 23153, subds. (a)-(b)) with corresponding enhancements for causing great bodily injury (Pen. Code, § 12022.7, subd. (a)). (Slip Opn. at p. 2.) Pope was sentenced to six years for vehicular manslaughter, and five years for each count of driving while under the influence. (*Id.* at p. 3.) Pursuant to Penal Code section 654's prohibition against multiple punishments, the trial court stayed the sentences on Pope's driving-under-the-influence convictions with the corresponding enhancements for causing great bodily injury. (*Ibid.*)

While Pope was serving his sentence, the Department determined that Pope's driving-under-the-influence convictions with the enhancements, which qualify as violent felonies under Penal Code section 667.5, subdivision (c), triggered the 15 percent credit earning limitation of Penal Code section 2933.1. (Slip Opn. at p. 3.) Absent the credit earning limitation, Pope could earn up to 50 percent worktime credits towards his sentence. (Pen. Code, § 2933, subd. (a).) Pope challenged the Department's interpretation by filing a petition for a writ of habeas corpus in the Sacramento County Superior Court. (Slip Opn. at pp. 3-4)

While that petition was pending, the First District Court of Appeal issued *In re Phelon* (2005) 132 Cal.App.4th 1214, which held that the worktime credit earning limitation does not apply when the violent offense has been stayed. (Slip Opn. at p. 4.) Consequently, the superior court granted Pope's petition citing *Phelon*. (*Id.* at pp. 1-2.) The Department appealed, and the Third District Court of Appeal held that, contrary to *Phelon*, the Department properly applied the worktime credit earning limitation. (*Id.* at p. 2.)

REASONS FOR GRANTING REVIEW

THIS COURT SHOULD GRANT REVIEW TO SECURE UNIFORMITY OF DECISION REGARDING CREDIT EARNING LIMITATIONS ARISING FROM CONVICTIONS WITH STAYED SENTENCES.

There is a conflict between appellate districts on how sentence credits are applied to convicted violent felons whose sentence for the violent offense is stayed. Under Penal Code section 2933.1, a person convicted of a violent felony defined by Penal Code section 667.5, subdivision (c), may only earn 15 percent worktime credits towards their sentence. Here, Pope was convicted of qualifying violent felonies, but the sentence for those convictions were stayed. After examining the language and purpose of the credit earning limitation statute, the California Court of Appeal, Third District concluded that Penal Code section 2933.1 applies to prisoners convicted of a violent offense, even if the sentence for the violent offense is stayed. (Slip Opn. at p. 2.) The First District Court of Appeal held just the opposite. (*Phelon, supra*, 132 Cal.App.4th 1214.)

The Third District concluded that the First District had mistakenly relied on this Court's holding in *In re Reeves* (2005) 35 Cal.4th 765 as the basis for its decision. (Slip Opn. at p. 7.) As the Third District noted, this Court in *Reeves* never considered whether Penal Code section 654 rendered inapplicable the 15 percent credit earning limitation arising from a stayed violent conviction. (*Ibid.*) The Third District also noted that the First District had failed to consider whether the Legislature had created an exemption from Penal Code section 654 in drafting Penal Code section 2933.1. (*Ibid.*)

The Legislature may create an exception to Penal Code section 654's prohibition against multiple punishments by stating a specific intent to impose additional punishment. (Slip Opn. at pp. 7-8.) In reviewing the language and the intent of the Legislature in drafting Penal Code section 2933.1, the Third District concluded that the Legislature had created such an exception. (*Id.* at pp. 7-9.) The Third District reached this conclusion by analogizing the language in Penal Code section 2933.1 with the Three Strikes provisions this Court considered in *People v. Benson* (1998) 18 Cal.4th 24. (*Ibid.*)

In *Benson*, this Court considered the effect of Penal Code section 654 on the Three Strikes law. (*Benson, supra,* 18 Cal.4th at p. 30.) In that case, this Court held that the language "[n]otwithstanding any other provision of law ... ." as well as a provision that the Three Strikes law is applicable to stayed or suspended sentences created an exemption from Penal Code section 654's prohibition against multiple punishments. (*Id.* at pp. 31-32.) Penal Code section 2933.1 also has the phrase "[n]otwithstanding any other provision of law." (Pen. Code, § 2933.1, subd. (a).) Thus, the Third District concluded that "the language of section 2933.1(a) is clear and unambiguous- its application withstands any other law and applies to 'any person who is convicted' of a violent felony." (Slip Opn. at p. 9.)

In support of its holding, the Third District observed that by not applying the 15 percent credit earning limitation to Pope's six year sentence, Pope would only serve approximately three years in prison. (Pen. Code, § 2933 [permitting prisoners to earn six months off their sentence for every six months served in a qualifying program]; Slip Opn. at pp. 9-10.) If Pope had only injured his victim, he could not have been convicted of vehicular manslaughter, but would have only been convicted and sentenced to five years for one of the felony counts of driving while under the influence with

enhancements for causing great bodily injury. (*Ibid.*) Because those convictions are violent felonies, Pope's credits earned to reduce either of those five year sentences would be limited to 15 percent. (*Ibid.*) Consequently, Pope would serve just over four years for the non-lethal convictions, which is more than the unrestricted sentence for his vehicular manslaughter conviction. (*Ibid.*) Because the Legislature could not have intended this incongruous result, applying the 15 percent credit earning limitation to Pope makes sense. (*Ibid.*)

The Department is thus faced with two opposing interpretations of the credit earning statute's applicability to prisoners whose violent offenses have been stayed. Each interpretation is of equal validity, and may be relied on by a court adjudicating a prisoner's challenge to the credit calculation. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 456 [inferior tribunals may choose between conflicting appellate court decisions].) The Department's current practice is in compliance with the holding in *Pope*. Without the 15 percent credit earning limitation for violent offenders, prisoners like Pope could earn up to 50 percent worktime credits to reduce their sentence.

This leaves the Department unsure of how to calculate an inmate's credits and can result in the disparate treatment of inmates. The Department is reviewing approximately 30,000 inmate credit calculations to ensure compliance with the holdings in *Reeves* and *In re Tate* (2006)135 Cal.App.4th 756 [holding that the credit earning limitation for an in-prison violent offense does not merge into the original sentence]. Following these reviews, there is a potential for multiple challenges regarding the Department's reliance on *Pope*, as opposed to *Phelon,* by those prisoners seeking to reduce their time in prison. There is also the potential for conflicting decisions, especially in the superior courts in the First and Third

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1), I certify that the Petition for Review is:

✓ Proportionately spaced, has a typeface of 13 points or more, contains 1,825 words.

Dated: February 19, 2008

Respectfully submitted,

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APPENDIX A

Filed 1/8/08

CERTIFIED FOR PUBLICATION

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re NATHAN POPE, On Habeas Corpus.	C051564 (Super. Ct. No. 05F05526)

APPEAL from the grant of a petition for writ of habeas corpus by the Superior Court of Sacramento County, Greta Fall, J. Reversed with directions.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, James M. Humes and Robert R. Anderson, Chief Assistant Attorneys General, Frances T. Grunder and Julie L. Garland, Senior Assistant Attorneys General, Stephen P. Acquisto and Jennifer A. Neill, Supervising Deputy Attorneys General, and Krista L. Pollard, Deputy Attorney General, for Petitioner the People.

Deborah Prucha, under appointment by the Court of Appeal, for Respondent Nathan Pope.

The People appeal from an order of the Sacramento County Superior Court granting defendant Nathan Pope's petition for writ of habeas corpus directing the California Department of Corrections and Rehabilitation (CDCR) to recalculate his Penal

Code section 2933[1] worktime credit without regard to the 15 percent limitation on such credit provided by section 2933.1, subdivision (a) (hereafter section 2933.1(a)) for persons convicted of a violent felony.[2] The superior court's ruling was based on a decision of the Court of Appeal, First Appellate District, Division Two. (*In re Phelon* (2005) 132 Cal.App.4th 1214 (*Phelon*).) The superior court was required to follow *Phelon*. We are not so restrained. In our view, *Phelon* was wrongly decided. Concluding that section 2933.1(a) is applicable to defendant, we shall direct the superior court to vacate its order denying the petition.

PROCEDURAL HISTORY AND FACTS

In January 2002, while driving under the influence of alcohol and cocaine, defendant struck another vehicle, causing the death of the driver. Defendant pled guilty to gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)), which is not a violent felony, and to two felony counts of alcohol-related driving with admissions as to each of great bodily injury (Veh. Code, § 23153, subds. (a), (b); Pen. Code, § 12022.7, subd. (a)), each of which is a violent felony (Pen. Code, § 667.5, subd. (c)(8) [any felony in which the

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

[2] Violent felonies are crimes specified in section 667.5, subdivision (c).

defendant inflicts great bodily injury in violation of § 12022.7]).

Defendant was sentenced to state prison for the middle term of six years for the gross vehicular manslaughter conviction and to five years for each of the alcohol-related driving offenses (two-year middle term plus three years for the associated enhancement). However, the latter two sentences were stayed pursuant to section 654, which prohibits multiple punishments for a single act.[3]

Once defendant was delivered to CDCR, the latter determined that because defendant had been convicted of two violent felonies he was subject to section 2933.1(a)'s limitation of 15 percent for worktime credit earned pursuant to section 2933,[4] notwithstanding defendant's argument that section 2933.1(a) was

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[3] Penal Code section 654 provides, in pertinent part: "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." Since gross vehicular manslaughter carries a maximum term of 10 years (Pen. Code, § 191.5, subd. (c)) and each of the alcohol-related driving offenses coupled with the great bodily injury enhancement carries a maximum term of six years (Veh. Code, § 23558; Pen. Code, § 12022.7, subd. (a)), the court was required to impose sentence on the vehicular manslaughter offense and to stay the sentences on the alcohol-related offenses.

[4] Section 2933.1 provides, in pertinent part: "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." (Italics added.)

not applicable to him because the sentences for those offenses had been stayed. In June 2005, after exhausting his administrative remedies, defendant renewed his argument in the Sacramento County Superior Court by filing a habeas corpus petition.

In September 2005, while defendant's habeas corpus petition was pending, the Court of Appeal, First Appellate District, filed its opinion in *Phelon*, *supra*, 132 Cal.App.4th 1214, which supported defendant's position. In October 2005, in reliance on *Phelon*, the superior court granted defendant's petition and ordered CDCR to recalculate defendant's section 2933 credit free of section 2933.1(a)'s 15 percent limitation on such credit.

The People argue that *Phelon* was incorrectly decided because it failed to recognize that section 2933.1(a) constitutes a legislatively enacted exception to section 654. Thus, defendant is not entitled to section 2933 credit. We agree with the People's position.

DISCUSSION

Insofar as is relevant to the analysis herein, the facts of *Phelon* are as follows: The defendant was convicted of kidnapping with intent to commit rape, which was not a violent offense, and with assault with intent to commit rape and assault by means of force likely to produce great bodily injury, which are violent offenses. (*Phelon*, *supra*, 132 Cal.App.4th at p. 1216.) Because the kidnapping conviction carried the longest term of potential imprisonment, the trial court sentenced the defendant to an unstayed term of 11 years for that offense, and

stayed the sentences imposed on the other counts pursuant to section 654. (*Phelon*, at p. 1216.) The trial court also awarded the defendant full section 4019 presentence custody credit.[5] (*Phelon*, at p. 1217.)

CDCR took the position that since the defendant had been convicted of violent felonies, his ability to earn section 2933 credit was limited by section 2933.1(a)'s 15 percent limitation. (*Phelon*, *supra*, 132 Cal.App.4th at p. 1217.)

The defendant sought habeas corpus relief and the matter made its way to the California Supreme Court. Although the defendant had challenged only CDCR's ruling regarding postsentence credit, the California Supreme Court issued an order to show cause, returnable before the Court of Appeal, as to "'(1) why petitioner's presentence credits should not exceed 15 percent of his actual period of confinement, pursuant to Penal Code, section[] 2933.1, subdivisions (a) and (c) (see *People v. Ramos* (1996) 50 Cal.App.4th 810, 817, 58 Cal.Rptr.2d 24 [(*Ramos*)]; and (2) why petitioner's postsentence credits should not be limited to 15 percent by Penal Code section 2933.1, subdivision (a), when his sentences on violent offenses listed in Penal Code section 667.5, subdivision (c) were stayed pursuant to Penal Code section 654.'" (*Phelon*, *supra*, 132 Cal.App.4th at p. 1217.)

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[5] Section 2933.1, subd. (c) applies a 15 percent limitation to presentence credit awarded pursuant to section 4019.

As to postsentence credit, the parties in *Phelon* conceded that *In re Reeves* (2005) 35 Cal.4th 765 (*Reeves*) was "determinative" of that issue. (*Phelon, supra*, 132 Cal.App.4th at p. 1218.) The court's acceptance of the concession was a mistake.

Reeves had concluded that where an inmate is serving concurrent sentences for a violent and a nonviolent crime, and the inmate completes his sentence for the violent crime before completing the sentence for the nonviolent crime, the inmate is no longer subject to section 2933.1(a)'s 15 percent limitation. (*Reeves, supra*, 35 Cal.4th at p. 769.) In drawing this conclusion, *Reeves* stated: "*[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.*" (*Reeves*, at p. 780, fn. omitted, italics added.)

Seizing upon the italicized language, *Phelon* concluded that "[u]nder *Reeves*, [defendant Phelon'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." (*Phelon, supra*, 132 Cal.App.4th at p. 1219.) In other words, where a sentence is stayed under section 654, the defendant "is not actually serving a sentence" for that conviction. Later, in addressing section 2933.1, subdivision (c)'s application to the defendant's presentence custody credit, *Phelon* gave additional support for its conclusion regarding postsentence credit when it observed that

the California Supreme Court had held in *People v. Pearson* (1986) 42 Cal.3d 351 (*Pearson*) that a defendant may not be subject to "any" punishment or "disadvantage" from a conviction where the sentence is stayed pursuant to section 654. (*Phelon, supra*, 132 Cal.App.4th at pp. 1220-1221, citing *Pearson, supra*, 42 Cal.3d at pp. 361-362.)

We believe *Phelon* was wrongfully decided. First, since *Reeves* did not involve a sentence stayed pursuant to section 654 and section 654 is never mentioned in *Reeves*, *Phelon* should never have accepted the parties' stipulation that *Reeves* was dispositive. "[I]t is axiomatic that cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176.) Second, and more importantly, *Phelon* failed to consider whether section 2933.1(a) could be considered an exception to section 654, a suggestion that was clearly set forth in *Pearson* -- "[C]onvictions for which service of sentence was stayed may not be so used unless the Legislature explicitly declares that subsequent penal or administrative action may be based on such stayed 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." (*Pearson, supra*, 42 Cal.3d at p. 361.)

Proper resolution of the instant issue is found by analogy to the reasoning of *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*), wherein the Supreme Court concluded that a prior serious or violent felony conviction that had been stayed pursuant to section 654 could nevertheless be used as a strike

within the meaning of the "three strikes" law (§§ 667, subds. (b)-(i), 1170.12). (*Benson, supra*, 18 Cal.4th at pp. 26-27.)

In arriving at its conclusions, the *Benson* court reasoned: "Section 1170.12, subdivision (b), part of the Three Strikes law enacted by the electorate, provides in pertinent part: '*Notwithstanding any other provision of law* . . . a prior conviction of a felony shall be defined as: [¶] (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. . . . *None of the following dispositions shall affect the determination that a prior felony conviction is a prior felony* . . . : [¶] . . . [¶] (B) *The stay of execution of sentence.*' (Italics added; see also § 667, subd. (d) [legislative version].)" (*Benson, supra*, 18 Cal.4th at p. 28.)

Applying the well-settled rule of statutory construction that "'[w]hen statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it'" (*Benson, supra*, 18 Cal.4th at p. 30), *Benson* concluded that section 1170.12, subdivision (b)'s "notwithstanding" language, coupled with language that a "stay of execution of sentence" shall not affect a conviction's status as a prior felony, rendered section 1170.12, subdivision (d) clear and unambiguous 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. (*Benson*, at p. 36.)

Reasoning similar to that employed in *Benson* is applicable in the present circumstances. Section 2933.1(a) states that its 15 percent limitation applies "[n]otwithstanding any other law" to "any person who is convicted of a felony offense listed in Section 667.5 . . . ," i.e., to any violent felony. Section 2933.1(a) does not provide for its application to be subject to section 654. (Cf., e.g., section 1170.1, subdivision (a), governing consecutive sentencing, which provides that its application is "subject to Section 654.") Like the language at issue in *Benson*, the language of section 2933.1(a) is clear and unambiguous -- its application withstands any other law and applies to "any person who is convicted" of a violent felony.

The wisdom of such a construction is illustrated by the present case. If left to stand, the result of the court's decision would be that defendant, after having been given full section 2933 credit on his six-year sentence, would serve less time than he would have served had he not caused the death of the victim. Specifically, defendant could receive either a 30 or 50 percent reduction against his nonviolent vehicular manslaughter sentence pursuant to sections 2931 or 2933, resulting in a reduction of either 1.8 years (§ 2931) or 3 years (§ 2933) and a resulting imprisonment of either 3 or 4.2 years. Applying section 2933.1(a)'s 15 percent limitation to

defendant's violent alcohol-related sentences yields a reduction of .75 years and therefore an imprisonment term of 4.25 years.

We thus conclude that section 2933.1(a) constitutes an exception to section 654 and therefore applies to defendant's vehicular manslaughter conviction.

DISPOSITION

The superior court's order granting defendant's petition for writ of habeas corpus is vacated, and the superior court is directed to enter an order denying the petition.

RAYE, J.

We concur:

SCOTLAND, P.J.

NICHOLSON, J.

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re Nathan Pope**

No.: **C051564**

I declare:

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

On February 19, 2008, I served the attached **PETITION FOR REVIEW AND REQUEST FOR CONTINUED PUBLICATION** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 19, 2008, at Sacramento, California.

R. Carey
Declarant

R. Carey
Signature

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