No. S224599

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	Appeal No. B255894
Plaintiff and Appellant,	
vs.	Los Angeles No. BA421048
STEVEN WADE,	
Defendant and Respondent.	

PETITION FOR REVIEW

Petition for Review following Published Opinion
of the Second District Court of Appeal, Div. 5, B255894
Appeal from the Superior Court, Los Angeles County, BA421048
Hon. Clifford L. Klein, Judge

Jean Ballantine, SBN 93675
12405 Venice Boulevard, #139
Los Angeles, CA 90066
Tel. (310) 398-5462
Email: ballantine093675@gmail.com

Attorney for Respondent Steven Wade
By Appointment of the Court of Appeal

Topical Index

Topical Index (cont.)

Table of Authorities

Cases **Page**

Table of Authorities (cont.)

Cases **Page**

Table of Authorities (cont.)

Cases **Page**

Table of Authorities (cont.)

Table of Authorities (cont.)

Constitutions **Page**

Other Authorities

No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. STEVEN WADE, Defendant and Respondent.	Court of Appeal No. B255894 Superior Court No. BA421048

PETITION FOR REVIEW
After Published Decision of the Court of Appeal,
Second Appellate District, Division Five
Reversing Judgment in Superior Court No. BA421048
Hon. Clifford L. Klein, Judge

To the Honorable Chief Justice, and to the Honorable Associate Justices of the California Supreme Court:

Pursuant to rule 8.500, California Rules of Court, defendant-respondent Steven Wade (defendant) seeks review of the published opinion of the Court of Appeal, Second Appellate District, Division Five, filed in appeal number B255894 on February 10, 2015 (Exhibit A hereto), which reverses the judgment of the trial court dismissing the case on a finding that defendant did not carry a firearm on his person within the meaning of Penal Code section

25850, subdivision (a) as construed in *People v. Pellecer* (2013) 215 Cal.App.4th 508. The opinion is contrary to federal due process principles that it is for the Legislature, and not the courts, to define criminal activity, and established rules of statutory construction that require courts to avoid constructions that render words superfluous and to resolve perceived ambiguities in favor of a criminal defendant.

Review is sought pursuant to rule 8.500, subdivision (b)(1), to secure uniformity of decision and to settle the important questions of law presented in this case.

ISSUES PRESENTED FOR REVIEW
(Rules 8.500 and 8.504)

1. Does the appellate court's construction of Penal Code section 25850, subdivision (a) violate federal due process under the Fourteenth Amendment to the United States Constitution, because it is for the Legislature, and not the court, to define criminal activity?

2. Does "on the person" as used in Penal Code section 25850, subdivision (a), which criminalizes carrying a loaded firearm "on the person or in a vehicle while in any public place..." mean that the firearm must be in direct contact with the person or in the clothing the person is wearing, or does "on the person" have a broader meaning and include a firearm within a container carried by the person, such as a backpack?

NECESSITY FOR REVIEW

Review is necessary to secure uniformity of decision, and to settle and clarify existing law on the issues stated herein. (California Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE

An information filed March 4, 2014 charged Wade in count 1 with carrying a loaded unregistered handgun on the person in violation of Penal Code section 25850(a)[1], a felony. Count 2 charged misdemeanor resisting arrest and is not at issue herein. (CT 20-21) Wade pleaded not guilty. (CT 24) After the preliminary hearing (CT 1B-18), the trial court granted Wade's motion to dismiss count 1. (CT 1B-18, 42; RT, B3-4) The prosecution appealed. (CT 86-88)

STATEMENT OF FACTS

The following factual summary is based on the evidence adduced at the preliminary hearing.

At 2:45 p.m. on February 2, 2014, LAPD officer Sforzini and his partner were on patrol in a marked police car at 55th Street and Normandie in Los Angeles. (CT 3-4) Sforzini saw Wade walk out of a liquor store. (CT 4) Sforzini had prior contacts with Wade and decided to conduct a consensual

---

[1]Further unspecified statutory references are to the Penal Code.

encounter with him. (CT 4) As Sforzini exited his patrol car, Wade ran down a nearby alley. Sforzini gave chase, ordering Wade to stop. (CT 4) Wade was wearing a blue and gray backpack. As he ran, he removed the backpack, threw it over a fence, and continued running. (CT 5) Sforzini lost sight of Wade. (CT 14) The officers set up a perimeter and called in backup and a canine unit. About an hour later, Wade was located and taken into custody. (CT 5-6)

About five minutes after Sforzini saw Wade throw the backpack, he and his partner retraced their route and recovered a black and gray backpack from the yard of a residence. The backpack's zipper was halfway open. Inside was an unregistered loaded .38 Smith & Wesson revolver. (CT 6-7, 15)

ARGUMENT

I. The Statute at Issue.

Section 25850(a) makes it unlawful for an individual to carry a loaded firearm "on the person or in a vehicle while in any public place ..." Section 25850 took effect January 1, 2011, as part of the Deadly Weapons Recodification Act (the Act.) (Stats. 2010, ch. 711, effective Jan. 1. 2012, see §§ 16000 et seq.) Section 25850(a) is a continuation of former section 12031(a)(1), without substantive change. (§§ 16005, 16010.) Like the present statute, section 12031, subdivision (a)(1) (hereafter, § 12031(a)(1)) made it

unlawful for an individual to carry a loaded firearm "on his or her person or in a vehicle while in a public place." (Former § 12031(a)(1).)

The District Attorney correctly points out that in reorganizing the deadly weapon statutes in 2010, the Legislature stated in section 16020: "(a) A judicial decision interpreting a previously existing provision is relevant in interpreting any provision of [the 2010 reorganization], which restates and continues that previously existing provision. (AOB 6) However, the District Attorney fails to note that the Legislature also specifically stated in section 16020 that its reorganization of the statutes did not constitute any evaluation or approval of prior judicial decisions interpreting the weapons statutes:

> (b) However, in enacting the Deadly Weapons Recodification Act of 2010, the Legislature has not evaluated the correctness of any judicial decision interpreting a provision affected by the act.
>
> (c) The Deadly Weapons Recodification Act of 2010 is not intended to, and does not, reflect any assessment of any judicial decision interpreting any provision affected by the act."

(§ 16020, subds. (b) & (c).)

The Law Revision Commission Comments to section 16020, operative January 1, 2012, confirm that:

> Subdivision (a) of Section 16020 makes clear that case law construing a predecessor provision is relevant in construing its successor in the Deadly Weapons Recodification Act of 2010.
>
> Subdivisions (b) and (c) make clear that in recodifying former Section 12000-12809, the Legislature has not taken any

> position on any case interpreting any of those provisions. [38 Cal.L.Rev.Comm. Reports 217 (2009).]

(West's California Penal Code (2011 ed.), § 16020, Law Revision Commission Comments, p. 1548.)

Thus, the Legislature's recodification of former section 12031(a)(1) at current section 25850 does not demonstrate an approval of prior or existing judicial practices and interpretations of section 12031(a)(1).

II. Relevant Principles of Statutory Construction.

A. Effectuate the Purpose of the Law.

Penal Code section 4 states: "The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."

B. The Statute's Plain Meaning Controls.

To effectuate the law's purpose, courts look to the statute's words and give them their usual and ordinary meaning. The statute's plain meaning controls the court's interpretation unless its words are ambiguous. (*People v. Arias* (2008) 45 Cal.4th 169, 177.) If the language contains no ambiguity, the court presumes the Legislature meant what it said, and the plain meaning of the statute governs. (*People v. Robles* (2000) 23 Cal.4th 1106, 1111, citing *People v. Castenada* (2000) 23 Cal.4th 743, 747.) In this regard, the

California Supreme Court has said that it "does not lightly assume drafting error by the Legislature. (*People v. Robles, supra,* 23 Cal.4th 1106, 1114.)

C. Avoid Constructions that Render Words Superfluous.

In construing statutory language, courts must avoid a construction which renders the language superfluous or unnecessary. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 459; *People v. Frawley* (2000) 82 Cal.App.4th 784, 789.) A statute cannot be enlarged by inserting or deleting words. "Such a practice makes it impossible for anyone to rely on the written word of the Legislature and only adds confusion to the already difficult task of drafting statutes." (*People v. Baker* (1968) 69 Cal.2d 44, 50.)

D. Where there are True Ambiguities, Resolve Them by Examining Legislative History and the Statutory Scheme as a Whole in an Attempt to Harmonize its Provisions.

If statutory language is susceptible of more than one reasonable construction, the court can look to legislative history in aid of ascertaining legislative intent. (*People v. Robles, supra,* 23 Cal.4th at 1111.) And if the words in the statute do not, by themselves, provide a reliable indicator of legislative intent, "[s]tatutory ambiguities often may be resolved by examining the context in which the language appears and adopting the construction which best serves to harmonize the statute internally and with related statutes." (*People v. Arias, supra,* 45 Cal.4th 169, 177.)

E. Resolve Ambiguities in Favor of a Criminal Defendant.

Under the "rule of lenity," when statutory language is truly ambiguous and there is no extrinsic indicia of legislative intent, courts are required to construe a criminal law "as favorably to the defendant as its language and intent will reasonably permit." (*People v. Horn* (1998) 68 Cal.App.4th 408, 419.) " 'The defendant is entitled to the benefit of every reasonable doubt, whether it arise out of a question of fact, or as to the true interpretation of words or the construction of language used in a statute.' " (*People v. Davis* (1981) 29 Cal.3d 814, 828.) This "rule of lenity" is an appropriate "tie-breaker" when there are two equally plausible interpretations of a law that is truly ambiguous. (*People v. Douglas* (2000) 79 Cal.App.4th 810, 815.) In *Burrage v. United States* (2014) __U.S.__ [134 S.Ct. 881, 891, L.Ed.3d], the United States Supreme Court recently applied the rule of lenity, noting that where legislators could have written the law in one way, but chose instead to use more restrictive language, "we cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant."

III. The Purpose of the Deadly Weapons Act in General and of Section 25850(a) in Particular.

The overriding general purpose of the Act as a whole is to protect public safety. (*People v. Melton* (1988) 206 Cal.App.3d 580, 589.) The Act controls both what types of weapons may be possessed by anyone (see, e.g., § 16590 defining generally prohibited weapons), and the possession of weapons by certain classes of persons or under certain conditions (e.g., § 25300, carrying a firearm in public while masked; § 25400, carrying a concealed firearm; § 25850, carrying a firearm on the person or in a vehicle in public). (*In re Martinez* (1978) 86 Cal.App.3d 577, 581.)

By criminalizing the carrying of a loaded weapon on the person in public in section 25850(a), the Legislature demonstrated its intent to protect the public from individuals having immediate access to a firearm carried directly on the person or in the individual's clothing. The statutory language is clear and our Legislature knows how to criminalize "possession" or being "armed" with a weapon, as distinguished from carrying a weapon "on the person." Section 25850(a) and its predecessor, section 12031(a)(1), criminalize only carrying loaded weapons directly on the person or in the person's clothing.

A. Section 25850(a) Was Not Enacted as Part of a Comprehensive Legislative Plan with a Broad Statutory Purpose of Outlawing *All* Public Possession of Firearms.

The statute is contained in the "Deadly Weapons Recodification Act of 2010" ("the Act"), which recodifies the provisions of former Title 2 (commencing with Section 12000) of Part 4 of the Penal Code, which was originally enacted in 1953 as the Dangerous Weapons' Control Law (former §§ 12000-12520). (See, § 16000; *People v. Vaughn* (2014) 230 Cal.App.4th 322, 330.)

The 2010 Act specifically did not purport to evaluate the existing statutory provisions or the case law interpreting them. (§ 16020, subds. (b) & (c).) The Act did not create a new, comprehensive plan to regulate firearms or to outlaw all public possession of firearms. Rather, the Act was "solely intended to make the provisions governing control of deadly weapons more user-friendly." (West's Pen. Code, § 16005, Law Revision Commission Comments.) The statutes within the Act have been amended numerous times over the decades, by the addition and amendment of statutes as the need is perceived by the Legislature and in response to certain events and the perceived needs of society. (*People v. Vaughn, supra,* 230 Cal.App.4th 322, 330; *Warden v. State Bar* (1999) 21 Cal.4th 628, 644 ["Evils in the same field may be of different dimensions and proportions, requiring different remedies.

Or so the legislature may think. ... Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."])

For example, the statute at issue here, former section 12031 (now § 25850), was enacted by the 1967 Legislature as an urgency measure after members of the Black Panther organization entered the Assembly Chambers openly carrying in their hands, " 'pistols, rifles and at least one sawed-off shotgun,' all to the great alarm of the members of the Assembly." (51 Ops.Cal. Atty.Gen. 197, 198 (1968). Other firearms and weapons statutes have been added or amended as the Legislature perceives the necessity. (See, e.g., § 12022.53, added in 1997 in response to a perceived need to treat firearms offenses more harshly than the same crimes committed by other means [*People v. Martinez* (1999) 76 Cal.App.4th 489, 497-498].)

It is true the firearms statutes as a whole serve a legitimate state interest in regulating firearms to increase public safety. (*People v. Perez* (2001) 86 Cal.App.4th 675, 678.) Yet, "identification of the laudable purpose of a statute alone is insufficient to construe the language of the statute. 'To reason from the evils against which the statute is aimed in order to determine the scope of the statute while ignoring the language itself ... is to elevate substance over necessary form. The language ... confines and channels its purpose.'" (*People*

v. Nelson (2011) 200 Cal.App.4th 1083, 1096, citing *Cortez v. Purolator Air Filtration Products* (2000) 23 Cal.4th 163, 176, fn. 9.) Thus, a legitimate state interest in controlling firearms does not support the conclusion that the Legislature, in enacting section 25850(a) or any other statute in the Act, meant something other than what it said in the statute.

Statutes are not to be read in isolation, but must be construed with related statutes. (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437.) But where different words or phrases are used in the same connection in different parts of a statute, it is presumed the Legislature intended a different meaning. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117; and see *People v. Francis* (1969) 71 Cal.2d 66, 78 ["the Legislature manifestly could have different intents with respect to different sections contained in one chapter"].) The firearms statutes demonstrate the Legislature's recognition that there is a difference between possessing a firearm, carrying a firearm, and carrying a firearm on the person or in a vehicle.

Under established principles of statutory construction, where the words of the statute are clear, the judiciary may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) Instead, whenever

possible, the judiciary must give effect to every word in a statute and avoid a construction making a statutory term surplusage or meaningless. (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 638.) The courts cannot create an offense by enlarging a statute, by inserting or deleting words, or by giving terms false or unusual meanings. (*People v. Baker* (1968) 69 Cal.2d 44, 50.)

B. Sections 25505 and 25610 are Exemptions Which Relate to Carrying a Concealed Firearm (Chapter 2 of Pen. Code, Part 6, Title 4, §§ 25400-25700), and Do Not Demonstrate a Legislative Plan to Override the Plain Language of the Statutes Prohibiting Carrying a Loaded Firearm (Chapter 3 of Pen. Code, Part 6, Title 4, §§ 25800-16100).

A broad construction of "on the person or in a vehicle" in section 25850(a), to include weapons not carried either on the person or in a vehicle, is not supported by other statutes. For example, section 25505, exempting firearms "under this article" which are being transported unloaded, in a locked container, with no deviations in the course of travel, and section 25610, allowing the transporting or carrying of "any pistol, revolver, or other firearm capable of being concealed upon the person" within a motor vehicle either locked in the trunk or in a locked container, or when carried by the person directly to and from any motor vehicle contained within a locked container, are both contained in Part 6, Title 4, Chapter 2, concerning concealed firearms. These specific statutes, contained in Chapter 2, concerning the carrying of concealed firearms, do not demonstrate a legislative plan to ignore the plain

language of the statutes contained in Chapter 3, concerning carrying loaded firearms. The Chapter 2 exemptions do not show that "on the person" as used in Chapter 3, section 25850(a), should be broadly construed to add words such as "on or about the person" or "on the person or in a container carried by the person."

The various statutes within the Act were enacted over time and address specific needs as addressed by the Legislature. Sections 25505 and 25610 were originally enacted in 1987 as sections 12026.2(b) and 12026.1(a) respectively, and specifically related to concealed firearms then, as they do now. In contrast, section 25850(a) (formerly, § 12031) was enacted 20 years earlier, in 1967, in direct response to Black Panther members entering the California Assembly Chambers openly carrying firearms in their hands. (51 Ops.Cal. Atty.Gen. 197, 198 (1968).) Sections 25505 and 25610 do not demonstrate a comprehensive, overriding legislative plan that would allow the courts to disregard the specific limiting language found in the various firearm statutes.

IV. Section 25850(a) is Clear on its Face as Written. "On the Person" is Restrictive Language Which Distinguishes the Conduct Criminalized in Section 25850(a) from Being "Armed" or Carrying a Weapon in a Container.

"On the person" is restrictive language. It criminalizes having a firearm on the person where it is instantaneously accessible. By contrast, carrying a firearm in a backpack requires the individual to take the backpack off, open it, and remove the firearm before it is available for use. Our Legislature knows how to criminalize having a weapon available for use as opposed to having it immediately available for use, i.e., on the person. If the Legislature had meant to proscribe carrying a loaded firearm in a backpack or other container, it could have done so in several different ways.

First, the Legislature could have drafted section 25850(a) to provide that it is unlawful "to be personally armed with a loaded firearm in any public place or to carry a loaded firearm in a vehicle in any public place...." Such language would cover an individual's carrying of a weapon in a container, as well as the carrying of a loaded firearm in a vehicle. Being "personally armed" has an established meaning under California statutory law which is broader than carrying a weapon "on the person," because being personally armed includes having the weapon in any place where it is "available for use." (*People v. Bland* (1995) 10 Cal.4th 991, 997 [*arming* under § 12022, subd. (c) "does not require that a defendant utilize a firearm *or even carry one on the*

body." A defendant is *armed* within the meaning of the sentence enhancement statute if the defendant has the specified weapon *available for use*, either offensively or defensively" (emphasis added)]; *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1012-1013 [under §12022, subd. (c), a person is "personally armed" with a firearm if he has the specified weapon available for use; the statute "does not require that the defendant physically carry the firearm on his or her person"].)

Our courts have long recognized a clear distinction between physically carrying a firearm on the person, which gives the individual immediate access to the firearm, and otherwise having a firearm available for use. *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 314 points out that carrying a firearm on the person or in a vehicle permits a person "immediate access to the firearm...." *People v. Smith* (1992) 9 Cal.App.4th 196, 204, also states that the words "personally armed" in section 12022, subdivision (c) do not require that the firearm be physically carried on the defendant's person. *People v. Superior Court (Pomilia)* (1991) 235 Cal.App.3d 1464, 1472 holds that with respect to a section 12022, subdivision (c) firearm enhancement, a defendant may have firearms "available for use in offense or defense at the time of his arrest, although *none of the firearms was on his person*." (Emphasis added.) *Pomilia* makes clear that the statutory language of being "armed" includes all

individuals who have ready access to firearms – such as in a container they carry – and not just individuals who have firearms upon their persons. (*Pomilia, supra,* 235 Cal.App.3d 1464, 1471.) Most recently, the appellate court in *People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1015, stated: "As commonly understood, the state of being furnished or equipped with weapons is broader than carrying a weapon on one's person."

Here, if the Legislature intended a similar broad application to all persons with access to a loaded firearm in public, it would have used the word "armed" instead of "carry on the person." The Legislature's choice of words must be given effect. Disregarding a statute's literal language and inserting additional language into a statute is a "drastic tool of construction" to be used only "when it has been obvious that a word or number had been erroneously used or omitted." and that ability is "extraordinarily narrow." (*People v. Guzman* (2005) 35 Cal.4th 577, 587.) Inserting additional language into a statute "violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. [Citations.] This rule has been codified in California as [Code of Civil Procedure] section 1858, which provides that a court must not 'insert what has been omitted' from a statute.' (*Ibid.*, citing *Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 998, internal quotation marks omitted.) Otherwise, the court risks acting as a super-

Legislature by rewriting statutes to find an unexpressed legislative intent. (*People v. Guzman, supra,* 35 Cal.4th 577, 586.)

To ignore the restrictive language "on the person" would render those words mere surplusage, superfluous or unnecessary, a construction which must be avoided. (*People v. Frawley, supra,* 82 Cal.App.4th 784, 789.) The court cannot create an offense by enlarging a statute, by inserting or deleting words. (*People v. Gohdes* (1997) 58 Cal.App.4th 1520, 1526.) The restrictive language demonstrates that by including the phrase "on the person," the Legislature indicated its intention that the loaded firearm be carried directly on the individual or in his or her clothing.

Second, had the Legislature wished to proscribe the possession of a loaded firearm in a backpack or other container, it could have proscribed carrying a loaded firearm "on or about the person or in a vehicle in any public place...." (*People v. Pellecer, supra,* 215 Cal.App.4th 508, 517 ["If the Legislature had wanted to criminalize possession of a dirk or dagger that is concealed inside a carried container, it could have expressly referred to dirks or daggers inside carried containers or replaced the phrase 'upon his or her person' with 'on or about his or her person'"].)

"On or about the person" has a broader meaning than "on the person." (*Ibid.*) In another context, *People v. McDonald* (2006) 137 Cal.App.4th 521,

examined section 374.4(c), defining "litter" as objects "ordinarily carried on or about the person," noting:

> The common, ordinary meaning of the words "on" and "about" bears out our conclusion. One leading dictionary defines "on" as follows: "**1a** – used as a function word to indicate position *in contact with and supported by the top surface of* <the book is lying ~ the table> **b** – used as a function word to indicate position in or in *contact with an outer surface* <the fly landed ~ the ceiling> <I have a cut ~ my finger> <paint ~ the wall>...." (Webster's 10th New Collegiate Dict. (2001) p. 809, italics added.) The same dictionary defines "about" as "1: in a circle around: on every side of: AROUND 2 a: *in the immediate neighborhood of: NEAR b: on or near the person of....*"

(*Id.* at 532, fn. 5, emphasis in original and added.)

Under the dictionary definitions cited in *McDonald, supra,* "on" means touching the surface, and "about" means nearby. Under such definitions, "on the person" is clearly more restrictive than "on or about the person." "On the person" requires the firearm to be in direct contact with the person – carried in the defendant's hands or arms, or in his clothing – while "on or about the person" means it is nearby, i.e., perhaps in a backpack, briefcase, purse, or other like container.

Similarly, dictionary definitions of "person" demonstrate that the usual and ordinary meaning of the phrase "on the person" is that the firearm must be directly in contact with the person or in clothing the individual is wearing. Among Webster's many definitions of "person," the most appropriate is:

"[T]he body of a human being as presented to public view usu[ally] with its appropriate coverings and clothing," as in "an unlawful search of the [person]." (Webster's 3d New Internat. Dict. (1993) p. 1686.)

Black's Law Dictionary defines "on the person" as: "In common parlance, when it is said that someone has an article on his person, it means that it is either in contact with his person or is carried in his clothing." (Black's Law Dict. (5th ed. 1979), p. 983.)

In addition, sections 25400 and 29610, prohibiting adults and minors from carrying a weapon "capable of being concealed upon the person," further demonstrate that "upon the person" is restrictive language requiring that the firearm be in direct contact with the person's body or in his clothing. Section 16530, subdivision (a) defines "firearm capable of being concealed upon the person" as one that has a barrel "less than 16 inches in length." In contrast, a firearm that could be carried outside an individual's clothing, in a container, could be far larger. To carry "on the person" or "upon the person" is more restrictive than merely "to carry" or to carry in a container.

V. "Carries" Should Not Be Liberally Construed to Ignore the Restrictive Modifier, "On the Person."

The conduct proscribed in section 25850(a) is the carrying of a loaded firearm upon the person. "Upon the person" modifies or limits the meaning of the word "carries." The prosecution's argument that "carries" should be

broadly construed (AOB 10-13) ignores the restrictive language. At issue here is not "carries" at large, but "carries a firearm on the person."

People v. Overturf (1976) 64 Cal.App.3d Supp. 1, cited in the Opinion at p. 5, is inapposite to this case. There, the defendant was charged with illegally carrying a loaded firearm on his person in public under former section 12031(a) and argued he was exempted from liability under subdivision (f) of the statute, which allowed "having" a loaded firearm at his place of business, a three-building apartment complex he owned and managed. (*Overturf, supra,* 64 Cal.App.3d Supp. 1, 3.) The defendant carried the firearm out to the driveway where he feared three men were tampering with his automobile, and fired it. (*Id.* at p. 4.) The appellate department noted the distinction between "carrying" a weapon and "having" it. Its analysis has no application to the case at bench, which does not involve section 12031, subdivision (f), allowing a business owner to "have" a weapon on the business premises.

In re Bergen (1923) 61 Cal.App. 226 and *People v. Smith* (1946) 72 Cal.App.2d Supp. 875, also cited in the Opinion at p. 5, are also inapposite. These cases examined whether "carry" requires movement of the firearm. *Bergen* concluded that "carry" conveys the thought of "going about armed" (61 Cal.App. 226, 228), and *Smith* concluded a weapon is "carried" if locomotion of the body would carry the weapon with it (72 Cal.App.2d Supp.

875, 878). Locomotion is not at issue in the present case. *Bergen* and *Smith* add nothing to the analysis whether carrying a weapon "on the person" extends beyond the person to a weapon carried in an outside container.

The Opinion also appears to misread *Muscarello v. United States* (1998) 524 U.S. 125 [118 S.Ct. 1911, 141 L.Ed.2d 111]. (Opinion, p. 6.) In *Muscarello*, the high court examined 18 U.S.C. §924(c)(1)(a), imposing a mandatory prison term on any person who "uses or carries a firearm" during and in relation to a drug trafficking crime, "or who, in furtherance of any such crime, possesses a firearm." The question before the court was whether the phrase "carries a firearm" was limited to the carrying of firearms on the person. The court held that it was not. (*Muscarello,* 524 U.S. 125, 126.) Importantly, and quite differently from the case at bench, the statute in *Muscarello* did not include the modifier, "on the person." (18 U.S.C. § 924(c)(1)(a).) Thus, the high court concluded that "neither the statute's basic purpose nor its legislative history support circumscribing the scope of the word 'carry' by applying an 'on the person' limitation." (*Muscarello, supra,* 524 U.S. 125, 132.) *Muscarello* properly refused to add words to the statute that the Legislature had not used.

The present case is clearly different. In section 25850(a), our Legislature *did* circumscribe the scope of the word "carry" by applying an "on

the person" limitation. The statute is not ambiguous. But to the extent it could be construed as such, two established principles govern. First, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. (*United States v. Bass* (1971) 404 U.S. 336, 347 [92 S.Ct. 515, 30 L.Ed.2d 488]; *People v. Douglas* (2000) 79 Cal.App.4th 810, 815.) The rule of lenity ensures the fair warning required by the due process clauses of the federal and state constitutions. A failure to apply the rule violates the criminal defendant's right to due process under the state and federal constitutions. (U.S. Const., Amend. 14; Ca. Const., Art. 1, § 7; *People v. Hagedorn* (2005) 127 Cal.App.4th 734, 745-746.)

Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, it is for the Legislature, and not the courts, to define criminal activity. (*United States v. Bass, supra,* 404 U.S. 336, 348.) Application of this principle is likewise required by federal and state due process. (*People v. Superior Court (American Standard)* (1997) 14 Cal.4th 294, 313; U.S. Const., Amend. 14; Ca. Const., Art. 1, § 7.)

VI. *People v. Dunn* (1976) 61 Cal.App.3d Supp. 12, Was Incorrectly Decided.

The trial court herein dismissed the firearms charge on the basis of *People v. Pellecer* (2013) 215 Cal.App.4th 508, which disapproved of and

overruled *People v. Dunn, supra,* 61 Cal.App.3d Supp. 12. The Opinion herein agrees with *Dunn* as being "indistinguishable from that presented in this case." (Opinion, p. 4.) Defendant disagrees. In *Dunn*, the defendant was charged with violating former section 12025(b) which prohibited a person from carrying "upon his person any pistol, revolver, or other firearm capable of being concealed upon the person ...." (*Dunn, supra,* 61 Cal.App.3d Supp. 12, 13.) The defendant in *Dunn* took his suitcase to the airport, intending to store it in a locker overnight. The airport x-ray equipment detected a handgun in the suitcase. Dunn's sole contention on appeal was that the handgun was not concealed upon his person, because the phrase "upon the person" was limited to a man's clothing, exclusive of handbags, attache cases, suitcases, and the like. (*Ibid.*) Curiously, Dunn argued that "upon the person" for a woman was something different and would include a woman's purse or handbag. (*Id.* at 13-14.) The prosecution argued this would lead to a "bizarre result." (*Id.* at 14.) Without undertaking any analysis of the restrictive phrase, "on the person," the appellate department of the superior court held that the Legislature intended to proscribe carrying concealed weapons by both men and women, and that a "handgun concealed in a suitcase and carried by appellant is sufficiently 'upon his person' to constitute a violation of section 12025." (*People v. Dunn, supra,* 61 Cal.App.3d Supp. 12, 14.)

The appellate department in *Dunn* stated that it had found no California case on point, and based its decision on a New York search and seizure case, *People v. Pugach* (1964) 15 N.Y.2d 65 [255 N.Y.S.2d 833, 204 N.E.2d 176]. (*People v. Dunn, supra,* 61 Cal.App.3d Supp. 12, 14.) While the defendant in the New York *Pugach* case was convicted of carrying a firearm "upon his person," the issue before the New York appellate court did not involve construction of that phrase or the New York firearm statute in any respect. Rather, *Pugach* addressed the propriety of the search conducted by police officers after they detained the defendant in the back seat of their squad car and, after frisking him, took from him the closed briefcase which he had on his lap. After taking the briefcase into the front seat, an officer then unzipped the briefcase and found a pistol. (*Pugach, supra,* 15 N.Y.2d 65, 67-68.) The New York court concluded (over a strongly worded dissent) that the police officers' unzipping, opening, and searching the defendant's briefcase was part of a constitutionally permissible "frisk" incident to detention. (*Id.* at 69.)

The New York court in *Pugach* did not determine that a statute criminalizing carrying a weapon "on the person" included a weapon carried in a closed briefcase or similar container. Yet, it was on *Pugach's* questionable reasoning and conclusion that the Los Angeles appellate department relied in *Dunn, supra.* The Court of Appeal in *Pellecer, supra,* correctly disagreed with

Dunn's conclusion, finding that it was incorrectly decided and that its reliance on *Pugach* was misplaced. (*Pellecer, supra,* 215 Cal.App.4th 508, 516-517.)

The Opinion states that *Dunn* is consistent with decisions in other states interpreting similar statutes. (Opinion, p. 5.) The out-of-state cases cited in the Opinion are not persuasive, for several reasons. In *DeNardo v. State* (Alaska Ct.App.1991) 819 P.2d 903, the Alaska Court of Appeal construed a statute prohibiting knowing possession of "a deadly weapon, other than an ordinary pocket knife, that is concealed on the person." (*Id.* at 905.) In *DeNardo*, law enforcement officers detained the defendant and asked him to accompany them to the state troopers' office, where they observed him remove a long-bladed knife from his jacket and put it in the briefcase he was carrying. The officers seized and searched the briefcase. The Alaska appeals court held that the statutory language "on the person" was broad enough, even without the additional word "about," to encompass "weapons concealed either in clothing or in purses, briefcases, or other hand-carried containers." (*Id.* at 906.) This conclusion was based on three faulty premises:

First, the Alaska court in *DeNardo* cited "case law from around the country" that "a person who carries a deadly weapon in a purse, a briefcase, or even a paper bag commits the offense of carrying a concealed weapon." (*Id.* at 905.) Notably, this was <u>not</u> a finding that case law from around the

country construes "on the person" to include items carried in containers. In fact, each of the out-of-state cases cited in *DeNardo* dealt with a statute prohibiting the carrying of a weapon "on or about the person," not a statute with the more restrictive language, "on the person." See, *People v. Foster* (1961) 32 Ill.App.2d 462 [178 N.Ed.2d 402, 404] [defendant indicted for unlawfully carrying concealed firearms "on or about his person"]; *State v. Britt* (1978) 200 Neb. 601, 607-608 [264 N.W.2d 670, 674] [carrying revolver in gym bag falls within statutory prohibition against carrying concealed weapon "on or about his person"]; *Bell v. State* (1986) 179 Ga.App. 790 [347 S.E.2d 725, 726-727] [police officer authorized to arrest defendant who started to pull a loaded revolver out of his shaving kit instead of providing identification; case did not consider or decide any issue concerning whether firearm was carried on, or on or about the person]; *Schaaf v. Commonwealth* (1979) 220 Va. 49, 429-430 [258 S.E.2d 574] [statute prohibited carrying weapon "on or about [the] person"]; *State v. Molins* (1982) 424 So.2d 29, 30 [Fla.App.] [same]; *Rogers v. State* (1976) 336 So.2d 1233, 1234 [Fla.App.] [same]; *State v. Straub* (1986) 715 S.W.2d 21 [Mo.App.] [same]; *People v. Williams* (1973) 15 Ill.App.3d 823, 824-825 [305 N.E.2d 186, 187] [same]. (Opinion, at p. 5.)

As shown, all of the out-of-state cases relied on by the Alaska court in *DeNardo* and cited in the Opinion construed statutes prohibiting carrying weapons on or about the person. "On or about the person" is broader than the statutory language "on the person" at issue here. The cases thus do not support *DeNardo*'s conclusion (nor the conclusions of the California court in *Dunn* and the New York court in *Pugach*) that the phrase "on the person" should be broadly construed and means the same thing as "on or about the person."

Second, the *DeNardo* court supported its conclusion by referring to the trial court's reliance, in a court trial, on a definition from Black's Law Dictionary. (*DeNardo, supra,* 819 P.2d 903, 906.) The Alaska appeals court said: "Judge Anderson relied upon the definition of 'on the person' found in *Black's Law Dictionary*. See *Black's Law Dictionary*, (5th ed. 1979), p. 983. According to *Black's*, 'on the person' encompasses items 'in contact with [the defendant's] person or ... carried in his clothing." (*DeNardo, supra,* 819 P.2d 903, 904.) Thus, although *Black's Law Dictionary* defines "on the person" as encompassing items in contact with the person or in his or her clothing, both the trial court and the reviewing court in *DeNardo* made a leap from items in contact with the person or carried in his clothing to items carried in containers that are in contact with the person. *Black's Law Dictionary* does not refer to containers or give that broad definition. Broadening the reach of "on the

person" to items in containers carried by the person ignores both the restrictive statutory language and *Black*'s definition, and violates the rule of lenity.

Third, *DeNardo* relied on *Dunn* and *Pugach*, which construed "on the person" to include containers carried by the person. (*DeNardo, supra,* 819 P.2d 903, 906.) But, as shown above, *Pugach* was a search and seizure case which did not construe the New York statute's language, "on the person," or make any determination whether that language included a weapon carried in a closed briefcase or similar container. And, as shown above, the *Dunn* court's reliance on *Pugach* was misplaced.

The Oregon cases cited in the Opinion (opn., p. 6), *State v. Anfield* (1992) 313 Ore. 554, 556-557 [836 P.2d 1337] and *State v. Finlay* (2002) 179 Ore.App. 599, 601-602 [942 P.2d 326], are also unpersuasive. Like *DeNardo*, these cases also rely on *Dunn* and *Pugach* without undertaking any analysis of the difference between an item that is "upon the person" and one which is carried in a container. Nor do the Oregon cases undertake a statutory construction analysis, under which the court must avoid rewriting a statute to find an unexpressed legislative intent or a construction which renders statutory language superfluous or unnecessary. (*People v. Frawley, supra,* 82 Cal.App.4th 784, 789.)

The Opinion states that "for 37 years, the holding in *Dunn* [citation] went unquestioned in California and courts in other states." (Opinion, p. 6.) However, it is notable that *Dunn* is a superior court appellate division case, since its publication in 1976 no published California decision has cited *Dunn* with approval, and only two published cases have cited it even in passing: (1) *People v. Mitchell* (2012) 209 Cal.App.4th 1364, rejected a constitutional challenge to Penal Code section 12020(a)(4), prohibiting carrying a concealed dirk or dagger, and specifically refrained from deciding whether carrying a weapon "upon the person" is necessarily committed "even when the instrument is in some type of carrying container rather than carried directly on the person's body." (*Mitchell, supra,* 209 Cal.App.4th 1364, 1377, fn. 5.) (2) *People v. Squadere* (1978) 88 Cal.App.3d Supp. 1, another case decided by the appellate division of the superior court, is the only other published case which cites to *Dunn*. *Squadere* examined Vehicle Code section 23122, providing that "no person shall have in his possession on his person, while in a motor vehicle upon a highway," an open container of alcoholic beverage. (*Squadere, supra,* 88 Cal.App.3d Supp. 1, 2.) Relying on *People v. McElroy* (1897) 116 Cal. 583, the court in *Squadere* held that an open container in the car in which appellant was riding was not "on his person" because it was not "connected to the person of the defendant" as required by the language "on his person." Both

Squadere and *McElroy* declined to give "on the person" the broad construction of "on the person" adopted by the Opinion.

VII. *People v. Pellecer* (2013) 215 Cal.App.4th 508, While Distinguishable from the Present Case on its Facts, Correctly Rejected and Overruled *Dunn*.

As shown above, *Dunn* was incorrectly decided. That *Pellecer* is distinguishable on its facts (Opinion, pp. 8-9) does not change that.

First, the Opinion distinguishes *Pellecer* on the basis that in that case, the defendant was merely adjacent to and leaning on the subject backpack, whereas in this case the defendant was wearing the backpack. (Opinion, p. 8.) However, as the facts show, the defendant here was not detained with a backpack on his back, immediately followed by a search revealing a firearm. The firearm was found later in the backpack, which was unzipped and located in a residential yard. (CT 6-7, 15)

Second, the Opinion distinguishes *Pellecer* on grounds that concealed knives and firearms represent varying degrees of danger; therefore the statutory language "upon the person" can be read differently in the statute involving knives . (Opinion, pp. 8-9.) There is no reason to construe "on the person" any differently in section 25850. Similar statutes should be construed in light of one another. (*People v. Nelson, supra,* 200 Cal.App.4th 1083, 1099; *People v. Coker* (2004) 120 Cal.App.4th 581, 588.) Because the Legislature

has employed the same precise term, "on the person" in similar statutes which are similarly aimed at controlling carrying weapons in public, use of the term in section 25850 cannot be squared with an argument or conclusion that the language can simply be ignored because firearms represent a varying degree of danger. (*Nelson, supra,* 200 Cal.App.4th at 1099.)

CONCLUSION

The limiting language "on the person" in section 25850(a) should not be ignored and the statute should not be rewritten by the Court of Appeal. Defendant requests that review be granted to correct this error.

Dated: February 19, 2015

By: Jean Ballantine

Jean Ballantine, SBN 93675
Appointed Counsel for
Defendant-Respondent Steven Wade.

CERTIFICATE OF WORD COUNT

I certify that the word count for Respondent's Petition for Review herein is 7,439 words, as counted by the WordPerfect computer program which was used to produce this brief.

Jean Ballantine

Jean Ballantine, Attorney for Respondent.

Filed 2/10/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Appellant, v. STEVEN WADE, Defendant and Respondent.	B255894 (Los Angeles County Super. Ct. No. BA421048)

APPEAL from an order of the Superior Court of Los Angeles County. Clifford L. Klein, Judge. Reversed.

Jackie Lacy, District Attorney, Phyllis C. Asayama and Scott D. Collins, Deputy District Attorneys, for Plaintiff and Appellant.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Respondent.

Exhibit A - Court of Appeal Opinion, B255894

Defendant Steven Wade was held to answer on a charge of carrying a loaded firearm on his person (Pen. Code, § 25850, subd. (a)).[1] Preliminary hearing testimony established that defendant was wearing a backpack containing a loaded revolver while being pursued by a police officer. The trial court granted defendant's section 995 motion to dismiss, finding that defendant did not carry the firearm on his person under the reasoning in *People v. Pellecer* (2013) 215 Cal.App.4th 508 (*Pellecer*), which held that a knife contained in a backpack is not carried "on the person."

On appeal by the People, we reverse. A defendant wearing a backpack containing a firearm carries the firearm on his or her person. We decline to apply the reasoning in *Pellecer, supra*, 215 Cal.App.4th 508, to possession of a firearm concealed in a backpack in light of the historical interpretation of "carries a loaded firearm on the person" in California, which is in accord with decisions from other jurisdictions considering language similar to section 25850, subdivision (a).

DISCUSSION

Section 25850, subdivision (a) provides as follows: "A person is guilty of carrying a loaded firearm when the person carries a loaded firearm on the person or in a vehicle while in any public place or on any public street." The issue presented is whether a person wearing a backpack containing a loaded firearm "carries a loaded firearm on the person."

Standard of Review

"Insofar as the Penal Code section 995 motion rests on issues of statutory interpretation, our review is de novo. (*People v. Superior Court* (*Ferguson*) (2005) 132

---

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

Cal.App.4th 1525, 1529.)" (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1072.) "'Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. (*Dyna–Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) We must look to the statute's words and give them their usual and ordinary meaning. (*DaFonte v. Up–Right, Inc.* (1992) 2 Cal.4th 593, 601.) The statute's plain meaning controls the court's interpretation unless its words are ambiguous.' (*Green v. State of California* (2007) 42 Cal.4th 254, 260.)" (*People v. Robinson* (2010) 47 Cal.4th 1104, 1138.)

The Relevant Statutes

Section 25850, subdivision (a), is the successor statute to former section 12031, subdivision (a)(1), which was repealed in 2010 as part of the Deadly Weapons Recodification Act of 2010 (The Act).[2] (§ 16000 et seq.) The Act is not intended to substantively change the law relating to deadly weapons and "is intended to be entirely nonsubstantive in effect." (§ 16005.) Provisions of the Act are intended to be restatements and continuation of prior statutes in the absence of the appearance of a contrary legislative intent. (§ 16010.) "A judicial decision interpreting a previously existing provision is relevant in interpreting any provision of" the Act, although "the Legislature has not evaluated the correctness of any judicial decision interpreting a provision affected by the act" and it "is not intended to, and does not, reflect any assessment of any judicial decision interpreting any provision affected by the act." (§ 16020.)

"'"The general purpose of The Dangerous Weapons[ ] Control Law ([former] § 12000 et seq.) is to control the threat to public safety in the indiscriminate possession and carrying about of concealed and loaded weapons."' (*Garber v. Superior Court* (2010) 184 Cal.App.4th 724, 730.)" (*People v. Vaughn* (2014) 230 Cal.App.4th 322, 332.)

---

[2] The earlier version of the Deadly Weapons Control Law is found in former section 12000 et seq.

"[C]arrying a concealed firearm presents a recognized 'threat to public order'" because immediate access to the firearm impedes others from detecting its presence. (*People v. Yarbrough* (2008) 169 Cal.App.4th 303, 314, citing *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357, and *People v. Hale* (1974) 43 Cal.App.3d 353, 356.)

California courts apply this broad legislative purpose in interpreting statutes regulating the possession of firearms. For example, courts have refused to impose an element of operability to statutes regulating firearms use and possession. "The Dangerous Weapons' Control Law ([former] § 12000 et seq.) provides for various penalties and enhancements for use of firearms. Following the legislature's amendment of Penal Code section 12001, no court has held operability of a firearm to be an element of the Dangerous Weapons' Control Law. Thus Penal Code section 12022, subdivision (a) (enhancing a sentence when a felony is committed while armed), (*People v. Nelums* (1982) 31 Cal.3d 355), [former] section 12020 (possession of a sawed-off shotgun), (*People v. Favalora* (1974) 42 Cal.App.3d 988, 991), [former] section 12021 (possession of a concealable firearm by an ex-felon), (*People v. Thompson* (1977) 72 Cal.App.3d 1), Penal Code section 12022.5 (enhancement for use of a firearm during commission of a felony), (*People v. Jackson* [(1979)] 92 Cal.App.3d 899), and Penal Code section 4574 (possession of a firearm while confined in jail), (*People v. Talkington* (1983) 140 Cal.App.3d 557) all were held not to require operability of the firearm." (*People v. Taylor* (1984) 151 Cal.App.3d 432, 437; see also *People v. Marroquin* (1989) 210 Cal.App.3d 77, 80-82 [former §12025 prohibiting carrying a concealed firearm does not require operability].)

The issue in *People v. Dunn* (1976) 61 Cal.App.3d Supp. 12 (*Dunn*) is indistinguishable from that presented in this case. In *Dunn*, the defendant had a firearm in his suitcase at the airport, and was convicted of violating former section 12025, which provided as follows: "(b) Any person who carries concealed upon his person any pistol, revolver, or other firearm capable of being concealed upon the person without having a license to carry such firearm . . . is guilty of a misdemeanor . . . ." The former Appellate

Department[3] of the Los Angeles Superior Court rejected the defendant's argument that he did not carry the handgun on his person because it was in a suitcase, as opposed to being carried in a woman's purse, which the defendant conceded would violate the statute. "We hold that the Legislature intended to proscribe the carrying of concealed weapons by both men and women and that a handgun concealed in a suitcase and carried by appellant is sufficiently 'upon his person' to constitute a violation of [former] section 12025." (*Dunn, supra*, at p. 14; see also *People v. Overturf* (1976) 64 Cal.App.3d Supp. 1, 6 ["in the context of statutes concerned with firearms, 'carry' or 'carrying' has been said to be used in the sense of holding or bearing arms"]; *People v. Smith* (1946) 72 Cal.App.2d Supp. 875, 878 [""'carries" or the words "to carry," as used in the statutes defining the offense . . ., are used in the sense of to have concealed about the person, or to bear concealed about the person; and it is necessary to a conviction of this offense only that the concealed weapon be so connected with the person that the locomotion of the body would carry with it the weapon as concealed'"].)

These California authorities are consistent with decisions in other states interpreting statutes similar to section 25850, subdivision (a). (See *De Nardo v. State* (Alaska Ct.App. 1991) 819 P.2d 903, 908 [De Nardo's act of carrying a long-bladed knife in a briefcase constituted the concealment of a dangerous weapon "'on his person'"].) "Case law from around the country supports the proposition that a person who carries a deadly weapon in a purse, a briefcase, or even a paper bag commits the offense of carrying a concealed weapon. (See, e.g., *People v. Foster* (Ill. App.Ct. 1961) 178 N.E.2d 402, 404 [handgun in a zippered athletic bag]; *State v. Britt* (Neb. 1978) 264 N.W.2d 670, 673 [handgun in a gymnasium bag]; *Bell v. State* (Ga. Ct.App. 1986) 347 S.E.2d 725, 726 [handgun in a zippered shaving kit carried in the defendant's hand]; *Schaaf v. Commonwealth* (Va. 1979) 258 S.E.2d 574 [handgun in a purse]; *State v. Molins* (Fla. Dist.Ct.App. 1982) 424 So.2d 29, 30 [handgun in a zippered gun case within a zippered canvas suitcase]; *Rogers v. State* (Fla. Dist.Ct.App. 1976) 336 So.2d 1233, 1234

---

[3] The former Appellate Department is now referred to as the Appellate Division.

[handgun in a briefcase]; *State v. Straub* (Mo. Ct.App. 1986) 715 S.W.2d 21, 22 [handgun in a paper bag]; *People v. Williams* (Ill. App.Ct. 1973) 305 N.E.2d 186, 187 [sawed-off rifle in a paper bag])." (*De Nardo v. State, supra*, at pp. 905-906, fn. omitted; see also *State v. Anfield* (Or. 1992) 836 P.2d 1337, 1340 [agreeing "with the analysis of other courts that have concluded that the language, 'upon the person,' includes purses, handbags, bags, and their contents, when they are carried in the manner that defendant was carrying this bag"]; *State v. Finlay* (Or. Ct.App. 2002) 42 P.3d 326, 328-329 [suitcase containing firearm at the airport was on the person of the defendant]; 43 A.L.R.2d 492 ["the majority of the cases support the statement that the defendant's carrying of a weapon hidden in a bag, bundle, lunch basket, traveling bag, or other similar article which is held in the hand or placed under the arm, is generally sufficient to constitute a transgression of the statute"].)

The decision of the United States Supreme Court in *Muscarello v. United States* (1998) 524 U.S. 125 reaches the same result as the decisions of the state courts. The court held that "carries a firearm" is not limited to carrying it on the person. "No one doubts that one who bears arms on his person 'carries a weapon.' But to say that is not to deny that one may *also* 'carry a weapon' tied to the saddle of a horse or placed in a bag in a car." (*Id.* at p. 130.)

People v. Pellecer

For 37 years, the holding in *Dunn, supra*, 61 Cal.App.3d Supp. 12, went unquestioned in California and courts in other states. *Dunn's* acceptance ended in 2013 with *Pellecer, supra*, 215 Cal.App.4th at pages 510-511, which held that the prohibition against carrying a concealed dirk or dagger on the person in former section 12020 (now section 21310[4]) did not apply where the defendant was found leaning on a backpack

---

[4] Section 21310 provides in pertinent part as follows: "[A]ny person in this state who carries concealed upon the person any dirk or dagger is punishable by imprisonment

containing three knives, because "the knives in his backpack were not carried on his person." The trial court in this case concluded it was bound by *Pellecer*, because in this case, as in *Pellecer*, the prohibited weapon was found inside a backpack.

"The ordinary meaning of 'upon his or her person' is on the body or in the clothing worn on the body," as distinguished from being "on or about the person," according to dictionary definitions cited in *Pellecer*, *supra*, 215 Cal.App.4th at page 513. "The knives in defendant's backpack may have been on or about defendant's person, but the statute does not criminalize carrying a dirk or dagger on or about the person, only carrying a dirk or dagger 'upon' the person." (*Ibid.*) The *Pellecer* court emphasized that the statutory language applies to a defendant "only if he or she '[*c*]*arries* concealed *upon his or her person* any dirk or dagger'" and if the legislature intended to criminalize carrying a dirk or dagger in a backpack or other container "it could have fully expressed it by phrasing former subdivision (a)(4) as 'carries any concealed dirk or dagger.'" (*Ibid.*)

The *Pellecer* analysis relied heavily on a rejected 1997 amendment to former section 12020, which would have modified the statute to expressly state that it is not unlawful to carry a dirk or dagger in a backpack. (*Pellecer*, *supra*, 215 Cal.App.4th at pp. 514-515.) According to the cited legislative history, the amendment was considered unnecessary because such conduct was not criminal under existing case law. (*Id.* at p. 515.) Significantly, that purported case law is not cited in either the legislative history, or in *Pellecer*.

Pellecer, *supra*, 215 Cal.App.4th at pages 516-517, rejected the Attorney General's[5] reliance on *Dunn*, *supra*, 61 Cal.App.3d Supp. 12, for the proposition that a weapon carried in a backpack is carried concealed upon the person. *Pellecer* criticized

---

in a county jail not exceeding one year or imprisonment pursuant to subdivision (h) of Section 1170."

[5] The Attorney General did not petition the California Supreme Court for review of the decision in *Pellecer*. The instant appeal is brought by the District Attorney of Los Angeles County.

the *Dunn* court's citation to *People v. Pugach* (1964) 255 N.Y.S.2d 833 (*Pugach*), which the *Pellecer* described as a search and seizure case. (*Pellecer, supra,* at p. 516.) In determining the legality of the search in *Pugach*, New York's highest court affirmatively described substantive New York law as follows: "The loaded firearm concealed in the brief case carried in the hands of the defendant was in the language of the statute 'concealed upon his person' (Penal Law, § 1897.)" (*Pugach, supra,* at p. 836.) A discussion of substantive New York law was required in *Pugach* to resolve the search and seizure issue, and we disagree with *Pellecer*'s unduly narrow reading of the case. As added criticism of *Dunn*, the *Pellecer* court stated that while *Pugach* may reflect the intent of the New York Legislature as to the meaning of the statutory phrase "concealed upon his person," that "intent cannot be automatically imputed to the California Legislature" and *Dunn* did not examine the legislative history of former section 12025 "to determine whether 'carries concealed upon his persons' included a container such as Dunn's suitcase." (*Id.* at pp. 516-517.) But the *Dunn* court never suggested that *Pugach* described California's legislative intent. The interpretation of a similar statute by a highly regarded court of another state was persuasive authority that assisted in interpreting California law.

In our view, the holding in *Dunn* is consistent with the purpose of the Act, which is to prevent a person from carrying a readily accessible concealed firearm. We have no difficulty in concluding that defendant's immediate access to the revolver within the backpack he wore created the type of clear threat to the general public and the pursuing officer that is prohibited by section 25850, subdivision (a).

Furthermore, *Pellecer* is distinguishable on two bases. First, the defendant in *Pellecer* was leaning on his backpack, as opposed to defendant, who wore the backpack containing the revolver while fleeing from the officer. The factual basis for the "carries" aspect of section 25850, subdivision (a), is readily apparent in this case. Second, although not acknowledged by the *Pellecer* court, concealed knives and firearms represent varying degrees of danger, and the legislature treats the public possession of firearms and knives differently. While "[a] knife carried in a sheath that is worn openly

suspended from the waist of the wearer is not concealed within the meaning of Section . . . 21310" (§ 20200), a firearm may not be worn openly in a public place or in a vehicle (§ 26350, subd. (a)(1).) Thus, assuming *Pellecer* correctly defines the scope of former section 12020, involving knives, it does not follow that the same interpretation applies to section 25850, subdivision (a).

Finally, we reject defendant's reliance on the rule of lenity. The rule of lenity applies where there is an "egregious ambiguity" as to the meaning of a statute. (*People v. Avery* (2002) 27 Cal.4th 49, 58.) Section 25850, subdivision (a), is not egregiously ambiguous. Courts of this state and other states that have considered the meaning of similar statutes consistently conclude that a person carrying a concealed firearm in an object such as a suitcase, purse, or bag, carries the weapon concealed on the person. The only uncertainty in this area is the result of the decision in *Pellecer*, which does not control the interpretation of section 25850, subdivision (a).

DISPOSITION

The order setting aside the charge of violating Penal Code section 25850, subdivision (a), is reversed.

KRIEGLER, J.

I concur:

MOSK, Acting P. J.

Goodman, J., Concurring

I fully concur. I add this statement to emphasize that Wade had immediate and full control of the backpack and of the (loaded) firearm he carried inside it, as demonstrated by both his wearing the backpack and taking it off and discarding it as the officer pursued him. It would have been just as easy for Wade to have opened the backpack and fired the weapon as it would have been for him to have taken the gun from a holster or from a fastened (or unfastened) inside pocket of a jacket he might have been wearing. The element common to all of these circumstances is immediate access to the firearm.

GOODMAN, J.*

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

I, Jean Ballantine, declare and say that:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 12405 Venice Boulevard, #139, Los Angeles, CA 90066.

On February 19, 2015 I served the foregoing document described as PETITION FOR REVIEW on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope, postage prepaid, first class mail, with the U.S. Postal Service, addressed as follows:

CAP-LA
Attention: Richard Lennon, Esq.
520 S. Grand Avenue, Fourth Floor
Los Angeles, CA 90071

Clerk, Los Angeles Superior Court
For: Hon. Clifford L. Klein, Judge
210 West Temple Street
Los Angeles, CA 90012

Los Angeles District Attorney
Attention: Scott D. Collins
320 West Temple Street, Suite 540
Los Angeles, CA 90012

Steven Wade
(address on file)

Office of the Public Defender
DPD Shelan Y. Joseph
210 West Temple Street, 19th Floor
Los Angles, CA 90012

AND BY ELECTRONIC SERVICE on the same date from my email address, ballantine093675@gmail.com, to: CLERK, COURT OF APPEAL, 2ND Appellate District, Div. 5, @ www.courts.ca.gov.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed February 19, 2015 at Los Angeles, California.

Jean Ballantine

Jean Ballantine