IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. **STEVEN WADE,** Defendant and Respondent.

S224599

Court of Appeal, Second District, Division Five No. B255894
Los Angeles County Superior Court No. BA421048
The Honorable Clifford L. Klein, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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RESPONDENT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

Is a defendant carrying a firearm "on the person" within the meaning of Penal Code section 25850, subdivision (a), if he is wearing a backpack containing a firearm?

INTRODUCTION

Steven Wade was arrested by police for carrying a loaded revolver in a backpack and charged with carrying a loaded firearm "on the person" while in public pursuant to Penal Code[1] section 25850, subdivision (a) (hereafter, 25850(a)). The question presented on appeal is whether the

California Legislature intended "on the person" in that statute to be construed narrowly—to mean the firearm must be in direct contact with the person's body or in his or her clothing—or to be construed more broadly—to include a firearm within a container carried by the person, such as a backpack.

The trial court in this case dismissed the charge based on *People v. Pellecer* (2013) 215 Cal.App.4th 508, in which the Court of Appeal held that "on the person" in a related statute—section 12020, subdivision (a)(4), criminalizing carrying a dirk or dagger concealed upon the person—does not include within a carried or adjacent container. *Pellecer* disapproved an earlier decision of the Appellate Department of the Los Angeles County Superior Court, *People v. Dunn* (1976) 61 Cal.App.3d Supp. 12, which construed carrying a firearm "on the person" to include a firearm within luggage carried by the defendant.

The People appealed the trial court's ruling. On appeal, Division Five of the Second Appellate District reversed the trial court's dismissal, finding the analysis in *Dunn* to be more consistent with the purpose of the statute and both disagreeing with the analysis in *Pellecer* and finding it factually distinguishable and legally inapposite.

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

This court granted Mr. Wade's petition for review to decide the meaning of the phrase "on the person" in section 25850(a). Mr. Wade submits the trial court's order was correct. Under established principles of statutory construction, a weapon carried in a backpack or similar container is not "on the person," and the Court of Appeal's holding should be reversed.

STATEMENT OF THE CASE

As relevant for purposes of appeal, Mr. Wade was charged by information with carrying in public a loaded, unregistered handgun "on the person" in violation of section 25850(a). (1CT 20.) Subsequently, the trial court granted Mr. Wade's motion to dismiss that charge pursuant to section 995 on the ground that a firearm in a backpack is not "on the person." (1RT B3-B4.) The prosecution filed a timely notice of appeal. (1CT 86-87.)

On appeal, the Court of Appeal reversed the trial court's order dismissing the charge (App. A [Opn., at p. 2][2]), and this court thereafter granted Mr. Wade's petition for review of that decision.

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[2] The opinion was previously published as *People v. Wade* (2015) 234 Cal.App.4th 265, review granted Feb. 10, 2015, S224599. Mr. Wade cites to the Court of Appeal's slip opinion throughout, which is attached hereto as Appendix A.

STATEMENT OF FACTS[3]

At 2:45 p.m. on February 2, 2014, Los Angeles Police Department officers observed Mr. Wade exiting a liquor store at 55th Street and Normandie Avenue in Los Angeles. (1CT 3-4.) He was wearing a backpack. (1CT 5.) One of the officers had had a prior contact with Mr. Wade, prompting them to attempt to stop him and talk to him on this occasion. (1CT 4.) As they exited their patrol car, Mr. Wade spotted them and fled. The officers pursued him. (1CT 4.) During his flight, Mr. Wade removed the backpack, threw it over a fence, and continued running. (1CT 5.) One of the officers recovered the backpack. It contained a loaded, unregistered revolver. (1CT 6-7.) About an hour later, Mr. Wade was located and taken into custody. (1CT 5-6.)

[3] The factual summary is based on the evidence adduced at the preliminary hearing.

ARGUMENT

I.

A DEFENDANT IS NOT CARRYING A FIREARM "ON THE PERSON" WITHIN THE MEANING OF PENAL CODE SECTION 25850, SUBDIVISION (A), IF THE WEAPON IS CONTAINED WITHIN A BACKPACK HE IS WEARING

Section 25850(a) provides, in relevant part, "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 . . .." The question presented herein is whether a person "carries a loaded firearm on the person" if the firearm is contained within a backpack he is wearing. This is an issue of statutory construction. Applying settled principles of statutory construction, the question must be answered in the negative.

A. Standard of Review

This court independently reviews questions of statutory construction. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387.) Its goal in doing so is to "ascertain the Legislature's intent in order to effectuate the law's purpose." (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572.) In divining that intent, the court must first "look to the statute's words." (*Ibid.*) If the plain meaning of the statutory language is unambiguous, that meaning controls, and the court should delve no deeper

into the legislator's thought processes. (*Ibid.*) The court must "presume that the Legislature meant what it said." (*People v. Gray* (2014) 58 Cal.4th 901, 906.)

Only if the statutory language is ambiguous—only if it is "reasonably subject to multiple interpretations"—should the reviewing court consider "extrinsic aids" to ascertain the legislative intent. (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 52.) Among the extrinsic aids the court may consider are "the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Scott* (2014) 58 Cal.4th 1415, 1421, internal quotation marks and citations omitted.)

Because the statute in question is a penal one, the court must approach this interpretation with the following settled principle in mind:

> It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; just as in the case of a question of fact, the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute.

(*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631; see also *People v. Robles* (2000) 23 Cal.4th 1106, 1115 ["When, as here, the language of a penal law is reasonably susceptible of two interpretations, we construe the law 'as favorably to criminal defendants as reasonably permitted by the

statutory language and circumstances of the application of the particular law at issue'"].) This principle serves an important function. As this court has said, it

> protects the individual against arbitrary discretion by officials and judges and guards against judicial usurpation of the legislative function which would result from enforcement of penalties when the legislative branch did not clearly prescribe them.

(*People v. Overstreet* (1986) 42 Cal.3d 891, 896; accord, *Robles*, at p. 1115.)

B. Plain Meaning of Statutory Language

Mr. Wade submits that an examination of the statutory language supports his position that the Legislature did not intend for section 25850(a) to proscribe carrying a loaded firearm within a backpack. When examining the statutory language, the reviewing court must give the words used "their usual and ordinary meaning [citation], while construing them in light of the statute as a whole and the statute's purpose [citation]." (*Pineda v. Williams–Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 529-530.) "When attempting to ascertain the ordinary, usual meaning of a word, courts appropriately refer to the dictionary definition of that word." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121-1122.) A common source for the plain meaning of statutory language is, *inter alia*,

Black's Law Dictionary. (See, e.g., *Independent Energy Producers Ass'n v. McPherson* (2006) 38 Cal.4th 1020, 1035.)

Black's Law Dictionary defines "on the person," the identical phrase used in the statute and at issue on appeal, as follows: "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. (6th ed. 1990) p. 1089, col. 2.) As used in that definition, "person" means "the body of a human being," in the sense of an "unlawful search of the" person—i.e, his body. (Webster's 9th New Collegiate Dict. (1991) p. 877.) "Clothing" means "the things that people wear to cover their bodies." (Merriam-Webster (2015) at <http://www.merriam-webster.com/dictionary/clothing> [as of Aug. 19, 2015].) Thus, to be "on the person," the item must be in contact with his or her body or within the garments used to cover his or her body. The contents of a backpack are not in contact with the wearer's body, and the backpack is not something one wears to cover his body but rather "a bag for carrying things that has two shoulder straps and is carried on the back." (Merriam-Webster (2015) at <http://www.merriam-webster.com/dictionary/backpack> [as of Aug. 19, 2015].)

Notably, a slight modification to the phrase "on the person" can give it a much broader meaning. The definition of "on the person" in Black's Law Dictionary directs the reader to the related phrase "[o]n or about."

(Black's Law Dict. (6th ed. 1990) p. 1089, col. 2.) It defines "[o]n or about" to mean a "phrase used in reciting . . . the location of [something] to escape the necessity of being bound by the statement of an exact . . . place." (*Id.* at p. 1089, col. 1.) It next defines the phrase "[o]n or about the person" within the context of carrying a weapon as follows:

> As used in statutes making it an offense to carry a weapon 'on or about' the person, it is generally held that the word 'on' means connected with or attached to, and that 'about' is a comprehensive term having a broader meaning than 'on,' and conveying the idea of being nearby, in close proximity, within immediate reach, or conveniently accessible.

(*Ibid.*) In other words, the use of "on or about" denotes a less precise location than merely the use of the word "on," and within the context of carrying an object, the use of "about" expands the location to include areas close or accessible to the person in question. Without question, a worn backpack (or other container held by a person) would fall within the scope of this language.

It is significant that the Legislature opted not to include the "or about" language in section 25850(a), especially given that an examination of the Penal Code reveals its use elsewhere. For instance, Penal Code section 374.4 defines "litter" as "discarding . . . small quantities of waste matter ordinarily *carried on or about the person* . . . and including waste matter that escapes or is allowed to escape from a container, receptacle, or package." (Emphasis added.) In that statute, the Legislature made clear

that it was including within the definition of litter not only that which is carried "on . . . the person" but also "about the person," including items carried within containers in the person's possession. A backpack would obviously fall within the scope of the "about the person" language. The inclusion of the "or about" language in section 374.4 shows the Legislature knows how to expand the scope of a statute dealing with possession to include items in containers physically connected with the person. The failure to do likewise in section 25850(a) leads to the compelling inference that the Legislature did not intend for it to have a similarly broad scope. (See *Bruns v. E-Commerce Exchange, Inc.* (2011) 51 Cal.4th 717, 727 [failure to include a requirement in one statute is significant when the Legislature has included that requirement in another]; *Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1295-1296 [same].)

Mr. Wade acknowledges that Penal Code section 374.4 was originally enacted in 1980, 13 years after section 25850(a)'s nearly identical predecessor, former section 12031 (hereafter, "section 12031"). However, the Legislature repeatedly revisited the firearm provision after 1980. Its predecessor was amended 21 times. (Stats.1981, c. 1065, § 1; Stats.1982, c. 136, § 9; Stats.1982, c. 1262, p. 4651, § 23; Stats.1983, c. 1196, § 3; Stats.1984, c. 351, § 2; Stats.1986, c. 937, § 3; Stats.1987, c. 115, § 2; Stats.1988, c. 998, § 2; Stats.1988, c. 1212, § 3.5; Stats.1990, c. 1249 (S.B.2065), § 2; Stats.1991, c. 952 (A.B. 1904), § 3; Stats.1991, c.

1022 (A.B.637), § 1.1; Stats.1992, c. 163(A.B.2641), § 117; Stats.1993, c. 219 (A.B.1500), § 221.7; Stats.1993, c. 224 (A.B.578), § 2; Stats.1993, c. 428 (A.B.141), § 5; Stats.1996, c. 787 (A.B.632), § 3; Stats.1997, c. 598 (S.B.633), § 15; Stats.1998, c. 760 (S.B.1690), § 8; Stats.1999, c. 571 (A.B.491), § 3; Stats.2009, c. 288 (A.B.1363), § 1.) Then, in 2010, the Legislature recodified section 12031 as section 25850 (Stats.2010, c. 711 (S.B.1080), § 6) and then amended section 25850 in 2011 (Stats.2011, c. 15 (A.B.109), § 544). Despite those acts, the Legislature never saw fit to expand the "on the person" language. This is further evidence that it was the Legislature's intent to keep the reach of the statute narrow and to exclude from its reach firearms within a container carried by a person.

This analysis and the conclusion reached from it are not unique. The Court of Appeal in *Pellecer, supra,* 215 Cal.App.4th at p. 513, applied nearly identical logic in concluding that the crime of carrying a knife "concealed upon his or her person" as proscribed by section 12020 does not include a knife within a backpack.

The Court of Criminal Appeals of Oklahoma ruled the same way with respect to a related law from its state. (*State v. Humphrey* (Okla. Crim.App. 1980) 620 P.2d 408.) In *Humphrey*, a deputy sheriff made contact with the defendant, a convicted felon, at his home on an unrelated matter. (*Id.* at p. 409.) As the defendant was about to sit on a sofa, the deputy noticed a handgun on that same location. (*Ibid.*) The defendant was

charged with violating a law that made it "unlawful for any person having previously been convicted of any felony . . . to carry *on his person*, or in any vehicle which he is operating, or in which he is riding as a passenger, any pistol." (*Humphrey, supra,* 620 P.2d at p. 409, fn. 2.)

The appellate court held that the statute did not encompass such possession. It rejected the State's reliance on the definition of "carry," which the State argued "usually means to bear or to have *on or about* the person." (*Id.* at p. 410, emphasis added.) The court noted that the statute "qualifies and limits the scope of the term 'carry' with the phrases 'on his person' and 'in any vehicle.'" (*Ibid.*) It distinguished similar statutes that "employ the phrases 'about the person' or 'on or about the person,'" observing, "The word 'about' has a broader meaning than the word 'on.'" (*Ibid.*) The court explained,

> The word 'on' signifies closer contact. In common parlance, when someone has an article 'on' his person, it means that it is carried in his clothing. Had the intent of the Legislature been to prohibit convicted felons from having the designated weapons in close proximity to their persons they could have employed the term 'about' or 'on or about' instead of 'on.' They also could have used terms such as 'have,' 'possess,' or 'own' instead of 'carry' to better express their intent.

(*Ibid.*) The same logic applies here.

Florida uses the broader language and, not surprisingly, ascribes to it a broader scope. In Florida, it is a felony for anyone to carry "a concealed firearm *on or about* his or her person." (*State v. Smith* (Fla. Dist. Ct. App.

2011) 67 So.3d 409, 411, emphasis added.) According to the Florida courts, "The term 'on or about the person' means physically on the person or readily accessible to him." (*Ensor v. State* (Fla. 1981) 403 So.2d 349, 354, overruled on other grounds by *Dorelus v. State* (Fla. 1999) 747 So.2d 368; accord, *Smith*, at p. 411.) In other words, the use of the "or about" language expands the reach from beyond the physical body of the person to any area "readily accessible" to him, which would clearly encompass a container in his possession.

Application of another principle of statutory construction supports Mr. Wade's interpretation of the Legislature's intent. "Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) To interpret the statute to encompass containers within a person's possession would render the "on the person" language meaningless. The *Pellecer* court argued as much with respect to section 12020:

> If the Legislature intended to include within the statute's scope the act of carrying a dirk or dagger in a backpack or other container, the phrase 'upon his or her person' is meaningless surplusage. If that were the Legislature's intent, it could have fully expressed it by phrasing former subdivision (a)(4) as 'carries any concealed dirk or dagger.' Conversely, if the Legislature intended for the phrase 'upon his or her person' to include containers that are carried, then 'carries' is meaningless surplusage. But the Legislature defined the crime using separate language for the elements of carrying and the place of carrying, that is, upon the person. In

> order to give effect to both the carrying and 'upon his or her person' elements of the statute, as we must presume the Legislature intended, the phrase 'upon his or her person' cannot be construed to include a container that is carried.

(*Pellecer, supra,* 215 Cal.App.4th at p. 513.) This was essentially the conclusion reached by the Oklahoma court. As the *Humphrey* court noted, that phrase "on the person" qualifies and limits the scope of the word "carry."

The same limitation applies to section 25850(a). If the Legislature intended it to encompass firearms within containers, such as backpacks, the "on the person" language is rendered meaningless. The Legislature could have achieved that goal simply by making one guilty who "carries a loaded firearm . . . while in any public place." However it chose instead to use language to qualify and limit the scope of the word "carry." That language must be given meaning, and such meaning excludes from the scope of the statute the content of containers carried by a person.

C. Statute's Purpose

The conclusion advanced above regarding the intent of the Legislature is reinforced by an examination of the legislative history and the purpose of the legislation. Section 25850 was added to the Penal Code in 2010 as part of a reorganization of the provisions relating to deadly weapons. (Stats.2010, c. 711 (S.B.1080), § 6.) Section 25850 was simply a

recodification of section 12031 without substantive change. (§ 25850, Law Revision Commission Comments.) Thus, the history of this provision begins with the enactment of section 12031.

"Section 12031 of the Penal Code was enacted in 1967 as one section of a statute declared by the Legislature to be emergency legislation arising from a growing concern over an increase in the carrying of loaded firearms." (*People v. Zonver* (1982) 132 Cal.App.3d Supp. 1, 5.) The legislative enactment itself describes the emergency in relatively vague terms as follows:

> The State of California has witnessed, in recent years, the increasing incidence of organized groups and individuals publicly arming themselves for purposes inimical to the peace and safety of the people of California. [¶] Existing laws are not adequate to protect the people of this state from either the use of such weapons or from violent incidents arising from the mere presence of such armed individuals in public places. Therefore, in order to prevent the potentially tragic consequences of such activities, it is imperative that this statute take effect immediately.

(Stats.1967, ch. 960, § 6.[4]) A review of the history of the times, including the legislative history, provides more insight into the threat the statute was aimed at curbing.

The 1960s were a time of great racial turmoil in the United States, including California. In 1966, the Black Panther Party for Self-Defense

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[4] The full text of section 12031 as originally enacted in 1967 (Stats.1967, ch. 960, § 1) is attached hereto as Appendix I.

was formed in the Oakland area of California. (Leonardatos, *California's Attempts to Disarm the Black Panthers* (1999) 36 San Diego L.Rev. 947, 968.) "[T]he Black Panthers appealed to the needs of the lower classes and their lack of power. The Panthers encouraged ideas of revolution, cultural autonomy, and economic advancements." (*Id.* at p. 958, footnotes omitted.) Its leaders also advocated "arming blacks for self-protection" and carrying firearms in public. (*Id.* at pp. 959, 961-962.)

> [T]he Black Panthers were not content with simply arming themselves in case police officers or an unruly white mob should attack them. They sought situations in which they could *brandish their guns* if necessary.

(*Id.* at pp. 961-962, emphasis added.) In doing so, they were careful not to run afoul of the state's gun control laws.

In 1953, a series of laws (referred to in the aggregate as the Dangerous Weapons' Control Law) were enacted to regulate a myriad of weapons and weapon-related activities, including the carrying and possession of *concealed* weapons. (Stats.1953, c. 36, § 1.) Among them was former section 12025 (hereafter, "section 12025"), which made it a crime to carry "concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver, or other firearm capable of being concealed upon the person without having a license to carry such firearm." (Stats.1953, c. 36, § 1.) This provision was in effect in nearly identical form in 1967. (Stats.1955, c. 1520, p. 2799, § 1.) However, in

1967, there were no laws proscribing openly carrying loaded firearms in public. In fact, section 12025 expressly excluded from the definition of concealed weapons "[f]irearms carried openly in belt holsters." (Stat.1955, c. 1520, p. 2799, § 1.)

"[T]he Panthers religiously adhered to the tenets of the California Penal Code regarding weapons possession." (Leonardatos, *supra*, 36 San Diego L.Rev. at p. 969.) "They carried their loaded weapons in an unconcealed manner on their person, which was legal." (*Ibid.*)

> Arming themselves with law books and *unconcealed firearms*, the Panthers would actively monitor the activities of the police (especially in Oakland, California) and police interaction with black communities.

(*Id.* at p. 962, emphasis added.)

Such incidents spread beyond Oakland. For instance, in April of 1967, about 12 "armed Panthers traveled to Martinez, California to protest" the killing of a 22-year-old Black burglary suspect by a Contra Costa County Sheriff's deputy. (Leonardatos, *supra*, 36 San Diego L.Rev. at p. 968.)

> The protesting Panthers in Contra Costa County stood atop cars and spoke to about 150 blacks who had gathered to listen, instructing the crowd on how to respond to police brutality. The Contra Costa sheriff's deputies later stated that they could take no action against the speakers because they did not violate the laws and *they openly displayed their weapons*.

(*Id.* at pp. 968-969, footnotes omitted, emphasis added.)

Such behavior understandably alarmed law enforcement. On March 16, 1967, concerns about it by Captain John Arca of the Oakland Police Department were relayed to Donald Mulford, a member of the California State Assembly from that city. (App. B [Memo from Marvin Buchanan to Don Mulford, Mar. 16, 1967].[5]) Captain Arca described the Panthers as "violently anti-white" and noted they "carried loaded shotguns around with them and had 45 automatics strapped on their hips." (App. B.) The officer expressed concern that such continued behavior would result in a "'shoot-out'" in which "innocent bystanders might also be injured" and requested "corrective legislation." (App. B.)

At the request of the Oakland Police Department, Assemblyman Mulford proposed Assembly Bill No. 1591 (which included within it what would become section 12031) to combat this behavior. (App. C [Letter by Don Mulford to Gov. Reagan, Apr. 21, 1967].) Mr. Mulford wrote to then Governor Ronald Reagan to describe the problem and request his assistance in the bill's passage. (App. C.) Mr. Mulford wrote,

> The Black Panther movement is creating a serious problem. . . . [¶] . . . I cannot help feeling that the people of this State are concerned about individuals armed with loaded weapons walking the streets of our communities in numbers.

[5] Appendices B to H, which are cited throughout, originated from the California State Archives in response to a request for all legislative history material on Assembly Bill No. 1591, via which section 12031 was enacted. (App. J [Declaration of David L. Polsky, Aug. 21, 2015].)

(App. C.)

Meanwhile, on April 20, 1967, John Nejedly, the Contra Costa County District Attorney, also wrote the governor about this issue and requested "more effective controls in the area of possession of firearms." (App. D [Letter by John Nejedly to Gov. Reagan, Apr. 20, 1967].) Mr. Nejedly described a number of incidents in his letter, including the Black Panthers's protest regarding the killing of the burglary suspect, during which Mr. Nejedly, as he described it, was confronted by a group "armed with pistols and shotguns" that "threatened to obtain 'justice' if their demands were not met." (App. D.) Mr. Nejedly observed, "[T]he acts of carrying a firearm of these types are not per se a violation of the law." (App. D.)

On May 3, 1967, the Governor's Office responded to Mr. Nejedly's letter. (App. E [Letter from Edwin Meese to John Nejedly, May 3, 1967].) In that response, the Governor's Office said it was "very cognizant of the severe recent incidents throughout California, in which armed groups have openly displayed their weapons, thus constituting an imminent threat to the peace and safety of many citizens." (App. E.) The letter indicated the office was "working with legislators and law enforcement organizations to develop some new proposals." (App. E.) On May 19, 1967, the Governor's Office wrote to Assemblyman Mulford pledging its support for

Assembly Bill 1591 and promising to sign it. (App. F [Letter from Jack Lindsey to Don Mulford, May 19, 1967].)

As presented to the Legislature, the goal of the bill was to stamp out the open display of firearms. State Senator Donald Grunsky introduced the bill in the Senate. (App. G [Introduction for AB 1591 by Senator Grunsky].) He noted that the legislation was aimed at providing law enforcement "a tool to deal with some persons who arm themselves with the sole purpose of intimidating society." (App. G.) In urging passage, he described "[a]rmed bands, carrying loaded shotguns, automatic and semi-automatic rifles and pistols" in government buildings as well as parading "up and down our city streets brandishing their loaded weapons." (App. G.)

Additional evidence of the bill's purpose can be found in letters written by Mr. Mulford to constituents. For instance, on April 27, 1967, after the bill's passage, he responded to a constituent who, in a letter, expressed concern about the potential impact of the bill on a citizen's ability to carry "a loaded pistol." (App. H [Letters exchanged between Mr. Mulford and Robert Lamborn, Apr. 1967].) Mr. Mulford replied,

> The Oakland Police Department asked me to introduce this bill to do something about the armed bands of citizens who are increasing their activities in our community. Are you aware the police can do nothing about these guerrilla bands intimidating citizens in our community with *loaded rifles and shotguns*? This is a serious problem. [¶] . . . I do not believe

> you can justify carrying a *loaded rifle or shotgun* on the streets of our cities.

(App. H, emphasis added.)

As this history reveals, the legislation that ultimately became section 12031 was aimed at proscribing a specific type of weapon use that was not previously banned—the open display of loaded firearms, particularly shotguns and rifles, in public. In other words, the Legislature intended the statutory language "carries a loaded firearm *on the person*" to refer to the type of firearm carrying that the Black Panthers had been doing at the time, which was primarily the carrying of shotguns and rifles in their hands (as well as pistols in their hands and in holsters visible to the public). It was never intended to target the type of behavior at issue in this case—the carrying of a concealed firearm secreted within a container, such as a backpack.

A particular provision of the statute supports this interpretation as well. As enacted, and as its modern counterpart still provides today in almost identical language, section 12031 provided,

> In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his person . . . while in any public place or on any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to the provisions of this section constitutes probable cause for arrest for violation of this section.

(Stats.1967, ch. 960, § 1; § 12031, subd. (c); see § 25850, subd. (b).) This provision further demonstrates the Legislature intended the statute to target the carrying of firearms in the open, visible to the public. Recall, section 12025, which proscribed the carrying of concealed firearms at the time, did not require those firearms to be loaded. Thus, in 1967, there was no need to determine whether a concealed firearm was loaded. Moreover, if the newly-enacted section 12031 had been intended to encompass the carrying of firearms within containers, its examination provision would have been of little value because, by virtue of the firearms' hidden nature, law enforcement would not observe them and thus would not have cause to examine them to determine if they are loaded.

The legislative history of section 12031 also indicates the Legislature intended the statute to be construed narrowly. When Captain Arca of the Oakland Police Department first sought this "corrective legislation," he expressed concern that it "would be fought by the National Rifle Association." (App. B.) The Governor's Office expressed a similar concern, noting, "Effective legislation in this area is difficult to achieve, due both to drafting problems and to a great deal of resistance from certain special interest groups." (App. E.) Notably, the final draft of section 12031 that passed the Legislature used 56 words to describe the conduct proscribed and the penalty imposed (§ 12031, subd. (a)) and 648 words detailing exceptions to that proscription (§ 12031, subds. (b), (f), (g), (h),

(i), (j)). (App. I [text of former § 12031].) In arguing for its passage during the bill's introduction to the Senate, Senator Grunsky stated,

> One thing [the bill] doesn't do, and perhaps the most important, it does not discriminate against the honest citizen. And in this same vein, it does not work a hardship on the legitimate hunter. In fact, this bill has the active support of the National Rifle Association.

(App. G.) Thus, it is clear the Legislature at the time was concerned about drafting a bill that would be read and applied broadly for fear of special interest group opposition that would ultimately defeat the legislation.

In sum, the legislative history reveals that the Legislature's intent in passing section 12031 was to thwart the public display of loaded firearms used to intimidate citizens and the police and that posed a threat of a shootout in public. There is nothing in the legislative history, or in the plain language of the statute itself, to indicate it was ever intended to proscribe the carrying of a firearm in a backpack or other such container. To the extent there can be any doubt about that, which Mr. Wade contends there cannot be, that doubt must be resolved in his favor under settled principles of statutory construction. (See *Robles, supra,* 23 Cal.4th at p. 1115; *Keeler, supra,* 2 Cal.3d at p. 631.)

D. Court of Appeal's Opinion

The Court of Appeal in this case disagreed, concluding that a "defendant wearing a backpack containing a firearm carries the firearm on

his or her person" within the meaning of section 25850(a). (App. A [Opn., at p. 2].) Mr. Wade submits the Court of Appeal's analysis is fundamentally flawed and its conclusion should be rejected.

The court began it analysis by conflating the crime of carrying a concealed firearm and the crime proscribed by section 25850(a) (and section 12031). It cited to the "general purpose" of the Dangerous Weapons' Control Law, noting that the carrying of "'a concealed firearm'" poses a threat to the public "because immediate access to the firearm impedes others from detecting its presence." (App. A [Opn., at pp. 3-4].) It concluded the purpose was "broad" and asserted it had a duty to interpret "statutes regulating the possession of firearms" in light of that "broad legislative purpose." (App. A [Opn., at p. 4].)

The Court of Appeal thus began its analysis from a flawed premise—that the purpose underlying the enactment of legislation designed to curb the carrying of concealed firearms applied to section 12031. Section 12031 was not part of the original Dangerous Weapons' Control Law, which was enacted in 1953. (See *People v. King* (2006) 38 Cal.4th 617, 623; Stats.1953, c. 36, § 1.) However, section 12025 was, and as discussed above, it addressed the very issue of concern to the Court of Appeal in this case—the carrying of a concealed firearm. The legislative history of section 12031 reveals the Legislature was not concerned with the carrying of concealed firearms when it enacted the law but rather, as noted

above, was concerned with the practice of openly carrying loaded firearms in public. That history also reveals the Legislature intended section 12031 to be interpreted narrowly so as to gain the support of special interest groups opposed to gun control legislation. The Court of Appeal in this case never considered the legislative history of section 12031.

The Court of Appeal also never considered the plain meaning of the statutory language at issue, and neither did the case on which it rested its conclusion, *Dunn, supra,* 61 Cal.App.3d Supp. 12. In *Dunn*, the defendant was convicted of carrying a concealed firearm "upon his person" in violation of section 12025 based on his carrying it in a suitcase at the airport. (*Id.* at p. 13.) The *Dunn* court rejected the defendant's argument that "the phrase 'upon his person'" meant "a man's attire or clothing exclusive of handbags, attache cases, suitcases, and the like." (*Ibid.*) The Court of Appeal in this case observed that the issue in *Dunn* "is indistinguishable from that presented in this case." (App. A [Opn., at p. 4].) That is not so.

First, section 12025, as noted above, is not section 12031 (or section 25850) and was not intended to target the same conduct. Mr. Wade acknowledges that they both used similar language—"upon the person" (§ 12025) versus "on his person" (§ 12031). If an interpretation of section 12025 was before this court, Mr. Wade would argue it likewise does not include within its scope the carrying of a firearm in a container for all the

reasons discussed in section B., *ante*. Regardless, the purpose of the two statutes was clearly different, and thus an interpretation of section 12025 does not enlighten the issue presented herein.

Second, *Dunn* did not analyze section 12025 before reaching its conclusion. *Dunn* (like the Court of Appeal in this case) reached its conclusion without following the settled principles of statutory construction. Neither court examined the plain meaning of the statutory language at issue or the purpose underlying the legislation in question. *Dunn* simply relied upon the holding of a New York case interpreting the same language. (*Dunn, supra,* 61 Cal.App.3d Supp. at p. 14.) Its entire legal analysis consisted of the following paragraph:

> While our research reveals no California case directly on point, we find a New York Court of Appeals case, *People v. Pugach* (1964) 15 N.Y.2d 65, 255 N.Y.S.2d 833, 204 N.E.2d 176 to be persuasive. *Pugach* is legally on all fours with the instant case. In *Pugach* a loaded gun was found inside a brief case carried by defendant. The New York court saw no significance in '(t)he fact that the loaded gun was found concealed in the brief case, rather than in a pocket of defendant's clothing, . . .' The court declared that a '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, s 1897).' (255 N.Y.S.2d at p. 836, 204 N.E.2d p. 178.)

(*Ibid.*) *Dunn* failed to discuss why or how a New York court's interpretation of language included in a New York statute by the New York Legislature is relevant to the interpretation of language used in section 12025. Notably, the court in *Pugach* also did not analyze either the

statutory language or the legislative history of the New York statute, instead merely asserting, without any supporting authority, "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, s 1897)." (*People v. Pugach* (1964) 15 N.Y.2d 65, 69 [204 N.E.2d 176, 178].) Given the absence of any legislative analysis in *Dunn* or the New York case, the Court of Appeal's reliance on *Dunn* was misplaced.

The Court of Appeal also attempted to rely upon the definition of "carry" to support its position, citing, for instance, *People v. Smith* (1946) 72 Cal.App.2d Supp. 875, 878, for the proposition that

> 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.

(Internal quotation marks omitted.) The Court of Appeal's reliance on the definition of "carry" in *Smith* is likewise flawed. The proposition in *Smith* was quoted from a 1913 Alabama case, *Thomas v. State* (Ala. Ct. App. 1913) 9 Ala.App. 67, 69-70 [64 So. 192, 193]. (*Smith*, at p. 878.) In citing *Thomas*, the *Smith* court made clear it was examining "[s]everal cases from other states" that had "construed the word 'carry' in connection with statutes making it a crime to carry concealed weapons *on or about* the person." (*Id.* at p. 878, emphasis added.) Thus the statute at issue in

Thomas used the broader "about" language not incorporated into section 12025 or 12031. Additionally, the conduct at issue in *Thomas* was the carrying of a "pistol" in the defendant's "hip pocket." (*Thomas*, at p. 69.) Thus, that case is factually distinguishable from the case herein presented.

Besides, as discussed above, while the word "carry" necessarily has a broad meaning, that meaning is not at issue. It is the inclusion of language defining the place of carry—i.e., "on the person"—that limits its scope. Thus, the definition of "carry" is meaningless without considering any words that modify it.

This fact points to another flaw in the Court of Appeal's analysis. It relied upon *Muscarello v. United Sates* (1998) 524 U.S. 125, 130 [118 S.Ct. 1911, 141 L.Ed.2d 111], which observed, "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." (See App. A [Opn., at p. 6].) However, the Court of Appeal ignored the statutory language at issue in that case. As the *Muscarello* court described the issue,

> A provision in the firearms chapter of the federal criminal code imposes a 5–year mandatory prison term upon a person who "*uses or carries a firearm*" "during and in relation to" a "drug trafficking crime." 18 U.S.C. § 924(c)(1). The question before us is whether the phrase "*carries a firearm*" is limited to the carrying of firearms on the person. We hold that it is not so limited.

(*Id.* at p. 126, emphasis added.) The case does not support the Court of Appeal's holding. Of course the phrase "carries a firearm" is not limited to "carrying of firearms on the person" in the absence of language so limiting it. Here there is such limiting language, but the Court of Appeal still insists the word "carry" should have the same broad interpretation as in *Muscarello* to include weapons tied to the saddle of a horse or placed in a bag. To so interpret section 25850 would render "on the person" meaningless, a result the reviewing court must avoid.

Next, in its opinion, the Court of Appeal also distinguished *Pellecer* "on two bases." (App. A [Opn., at pp. 8-9].) First, it noted the case was factually distinguishable because the defendant in that case was not wearing his backpack but rather merely leaning on it, meaning the interpretation in that case cannot speak to the *carrying* requirement of section 25850(a). (App. A [Opn., at p. 8].) The factual distinction is meaningless. In rejecting *Pellecer* on this ground, the Court of Appeal disregarded the fact that the phrase the *Pellecer* court was interpreting was "upon his or her person." (*Pellecer, supra,* 215 Cal.App.4th at p. 512.) Once again, the Court of Appeal misplaced reliance on the word *carries* or *carry*.

Second, the Court of Appeal rejected *Pellecer* because at issue there was the carrying of a knife and not a firearm. (App. A [Opn., at pp. 8-9].) The Court of Appeal stated the Legislature "treats the public possession of

firearms and knives differently," noting one can openly wear a knife in a sheath but not a firearm in a holster. (App. A [Opn., at pp. 8-9].)

While that might be so now, that was not so when section 12031 was enacted. At the time, section 12025 provided, "Firearms carried openly in belt holsters are not concealed within the meaning of this section, nor are knives which are carried openly in sheaths suspended from the waist of the wearer." (Stat.1955, c. 1520, p. 2799, § 1.) In fact, the distinction on which the Court of Appeal relies is a recent one. Even today, section 25400 (which replaced section 12025) provides, "A firearm carried openly in a belt holster is not concealed within the meaning of this section." (Subd. (b).) It was not until 2011 that the Legislature made it unlawful to openly carry a handgun in a holster by defining such unconcealed carry as "carried openly or exposed" (§ 16950) and making it a crime to carry an "exposed" unloaded handgun "upon his or her person" (§ 26350). Importantly, there is nothing in this recent legislation that suggests the Legislature meant to alter the meaning of "on the person" in section 25850 (or in any other firearm statute using similar language).

Oddly, the Court of Appeal had no issue with relying on the interpretation of statutes pertaining to knife possession when it believed such authority supported its position. It cited *De Nardo v. State* (Alaska Ct.App. 1991) 819 P.2d 903, 908, which involved the "carrying of a long-bladed knife in a briefcase." (App. A [Opn., at p. 5].)

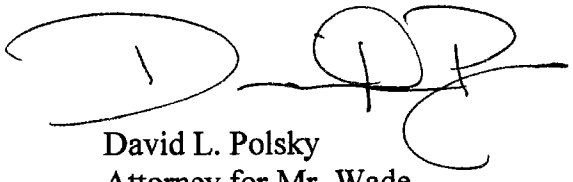
The Court of Appeal's decision in this case failed to undermine the cogent analysis contained in *Pellecer*. It ignored settled principles of statutory construction and misplaced reliance on cases interpreting immaterial language. This court should hold that "on the person" within the meaning of section 25850(a) does not include within a backpack, reverse the Court of Appeal's opinion, and reinstate the trial court's order dismissing the section 25850(a) charge.

CONCLUSION

For the reasons stated above, Mr. Wade asks this court to reverse the decision of the Court of Appeal and reinstate the trial court's order dismissing the section 25850(a) charge.

Dated: August 21, 2015.

Respectfully submitted,



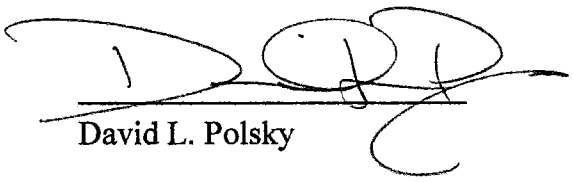
David L. Polsky
Attorney for Mr. Wade

CERTIFICATE OF WORD COUNT

I, David L. Polsky, counsel for appellant, hereby certify pursuant to rule 8.520, subdivision (c), of the California Rules of Court that respondent's opening brief on the merits in the above-referenced case consists of 7,389 words as indicated by the software program used to prepare the document.

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

Executed on August 21, 2015, at Ashford, Connecticut.



David L. Polsky

APPENDIX A:

Copy of Court of Appeal's Opinion

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.

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

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[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.)

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[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

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[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

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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.*

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

APPENDIX B:

Memo from Marvin Buchanan to Don Mulford, Mar. 16, 1967

#14707

MAR 17 1967

MEMO TO: ASSEMBLYMAN DON MULFORD March 16, 1967

FROM: MARVIN C. BUCHANAN

RE: BLACK PANTHERS
PROPOSED LEGISLATION

On March 16, 1967, Captain John Arca, Oakland Police Department, telephonically contacted the writer at the Legislative office and advised that there was a group of "Black Panthers" now located in Oakland. He stated that these negroes were violently anti-white and carried loaded shotguns around with them and had 45 automatics strapped on their hips.

He stated that he was very apprehensive concerning this developing situation and was fearful that there would be a "shoot-out" in the not too distant future. He was fearful that innocent bystanders might also be injured.

He was hopeful that some kind of corrective legislation might be initiated but was well aware that this would be fought by the National Rifle Association. He stated that he would prepare some information on the subject and contact the writer or Assemblyman Mulford.

He requested that the writer contact him at the station in order that he might take the writer on a tour to exhibit precisely what is developing.

cc - 1 - Buchanan

hmh

APPENDIX C:

Letter by Don Mulford to Gov. Reagan, Apr. 21, 1967

April 21, 1967

The Honorable Ronald Reagan
Governor of California
State Capitol

My dear Governor:

Regarding the copy of letter from John A. Nejedly, District Attorney, Contra Costa County, I have introduced AB 1591, which will be polished with the addition of amendments, The Black Panther movement is creating a serious problem. The bill was introduced at the request of the Oakland Police Department.

At the proper time, I shall discuss it with you because we may need your personal help. I cannot help feeling that the people of this State are concerned about individuals armed with loaded weapons walking the streets of our communities in numbers.

Regarding the letter from Hardin Jones, I have requested that we all meet on next Thursday and bring Jones to Sacramento. His letter underwrites the reason for this meeting.

Sincerely,

DON MULFORD

Enclosures
cc Mr. Philip M. Battaglia
Mr. Lyn Nofziger

APPENDIX D:

Letter by John Nejedly to Gov. Reagan, Apr. 20, 1967

JOHN A. NEJEDLY
DISTRICT ATTORNEY
JOHN B. CLAUSEN
ASSISTANT DISTRICT ATTORNEY
GEORGE W. McCLURE
CHIEF CIVIL DEPUTY
DONALD R. WALKER
CHIEF CRIMINAL DEPUTY

INVESTIGATORS
DAVID COOK JR., CHIEF
JACK W. FRANCIS
JOSEPH J. HALASZ
CHARLES A. MYHRE
WILLIAM R. PRICE

OFFICE OF DISTRICT ATTORNEY

CONTRA COSTA COUNTY

COURT HOUSE, 4TH FLOOR
P. O. BOX 670
MARTINEZ, CALIFORNIA, 94553
PHONE: 415/228-3000

DEPUTIES

CIVIL DIVISION
J. H. DISNEY
K. D. EWART
S. FISHMAN
W. W. McCOMBS
J. M. McSHARRY
V. H. PYNN
G. F. SWIFT
P. C. RANK
A. W. WALENTA, JR.
V. J. WESTMAN

CRIMINAL DIVISION
W. H. BARTLETT
D. L. BOAZ

K. J. BRANCH
H. C. FRYER
G. L. GINDER
H. T. GONSALVES
B. D. GLENN
W. R. HARTMAN
J. D. HATZENBUHLER
L. F. HOLDRICH
S. H. MESNICK
J. S. ODA
D. M. QUINLAN
T. C. SMITH
L. L. SNYDER
E. M. SWANN

April 20, 1967

APR 21 1967

Honorable Ronald Reagan
State Capitol
Sacramento, California

Dear Sir:

May I respectfully call to your attention recent incidents in this area that may suggest consideration of legislation to provide more effective controls in the area of possession of firearms.

Incident to the peace demonstrations at Port Chicago, certain residents of Clyde, an unincorporated community near the Naval Ammunitions Base, armed themselves with rifles and patrolled the streets, particularly at night. I was concerned with the obvious possibilities, met with these people and an agreement to terminate the carrying of arms was reached.

In December, groups in Orinda, concerned about incidents involving women and delays in securing Sheriff response, similarly armed themselves and instituted a patrol service. Again in meeting with these people we were able to secure the termination of this practice.

Last Friday, a request was made to me, through the Council of Community Services in Richmond, to meet with the family of a young man killed by a deputy sheriff in the course of a burglary. I met with the family in good faith only to be confronted with an armed group, the Black Panthers. This group was armed with pistols and shotguns and threatened to obtain "justice" if their demands were not met.

Today, this same group is appearing before the County Administration Building similarly armed, apparently as an incident to a meeting arranged with Sheriff Young on the same matter.

COPY

As the acts of carrying a firearm of these types are not per se a violation of the law, I respectfully bring these conditions to your attention. I am concerned as to the possibilities, particularly when one realizes that in the last instances, we are dealing with a group not sensitive to reasonable decisions.

Very truly yours,

John A. Nejedly
District Attorney

JAN:ems

cc: Assemblyman Don Mulford

APPENDIX E:

Letter from Edwin Meese to John Nejedly, May 3, 1967

AB 1591

State of California

GOVERNOR'S OFFICE
SACRAMENTO 95814

RONALD REAGAN
GOVERNOR

MAY 8 1967

May 3, 1967

Mr. John A. Nejedly, District Attorney
Contra Costa County Courthouse
Martinez, California

COPY

Dear John:

Governor Reagan has asked me to answer your letter of April 20, 1967, concerning the need for legislation to provide for additional controls on the use of firearms.

We are very cognizant of the severe recent incidents throughout California, in which armed groups have openly displayed their weapons, thus constituting an imminent threat to the peace and safety of many citizens.

Effective legislation in this area is difficult to achieve, due both to drafting problems and to a great deal of resistance from certain special interest groups. We are presently working with legislators and law enforcement organizations to develop some new proposals. In this endeavor, we appreciate the information in your case, which is an excellent example in support of such legislation.

If there are any further incidents of this kind in your county, I would appreciate your advising me so that we can add them to the evidence in support of additional firearms controls.

Best personal wishes.

Sincerely,

Edwin Meese III
Extradition and
Clemency Secretary

cc: Assemblyman Don Mulford

APPENDIX F:

Letter from Jack Lindsey to Don Mulford, May 19, 1967

RONALD REAGAN
GOVERNOR

State of California
GOVERNOR'S OFFICE
SACRAMENTO 95814

MAY 24 1967

May 19, 1967

The Honorable Don Mulford
Room 3143, State Capitol
Sacramento, California

Dear Don:

The Governor has asked me to reply to your letter concerning AB 1591. The attached letter from John Nejedly emphasizes the danger of the carrying of firearms by groups such as the Black Panthers and the need for control in this area.

The Governor is keenly concerned with the legislation you have introduced, he is following the progress of this bill with interest and will sign it when it reaches his desk.

Sincerely,

Jack Lindsey
Legislative Secretary

APPENDIX G:

Introduction for AB 1591 by Senator Grunsky

INTRODUCTION FOR AB 1591
By Senator GRUNSKY

Gentlemen, I arise for the purpose of introducing what I believe to be one of the most important bills of this session. The measure before you is AB 1591, authored by Assemblyman Don Mulford.

Briefly, this bill prohibits unauthorized persons from carrying a loaded firearm in a public place, on a public street, or in an unincorporated territory where it is already illegal to discharge a firearm. Provisions of the bill extend to our schools, the Capitol, the homes and offices of the State's Constitutional officers, and to the homes and offices of members of the Senate and the Assembly.

This bill, gentlemen, is an excellent, well-thought-out piece of legislation. Much work on both sides of the Legislature has gone into it. As you will notice, the bill has been amended six times. Each amendment has been meticulously considered by both the Criminal Procedure Committee in the Assembly and the Senate Judiciary Committee.

I have told you, without going into minute detail, what the bill does. Now, just for a moment, allow me to tell you what this measure does not do. One thing it doesn't do, and perhaps the most important, it does not discriminate against the honest citizen. And in this same vein, it does not work a hardship on the legitimate hunter. In fact, this bill has the active support of the National Rifle Association.

Assemblyman Mulford submitted this legislation at the urgent request of law enforcement officials in the Bay Area and Southern California because they need a tool to deal with some persons who arm themselves with the sole purpose of intimidating society.

Armed bands, carrying loaded shotguns, automatic and semi-automatic rifles and pistols, have invaded our courts, the offices of municipal government, and, indeed, they have even violated the Chambers of the Assembly here in the State Capitol. They have carried their loaded weapons into schoolhouses while children were attending school. They have formed vigilante gangs with the purpose of taking the law into their own hands. And they have paraded up and down our city streets brandishing their loaded weapons.

An Oakland police officer told Assmblyman Mulford, and I quote: "I hope you have good luck with your bill. As policemen out on our beats, we can cope with almost any weapon except a gun. When someone has a loaded gun -- he is as well armed as the police who have the responsibility of maintaining law and order."

The thrust of this bill, gentlemen, is to prohibit unauthorized persons from carrying a loaded weapon where they have no business being armed. The bill is constitutional according to the Legislative Counsel's office, and it fills a vital need of today's society. Therefore, I ask that you approve AB 1591 today.

APPENDIX H:

Letters exchanged between Mr. Mulford and Robert Lamborn,

Apr. 1967

April 27, 1967

Mr. Robert C. Lamborn
Attorney at Law
270 Grand Avenue at Lenox
Oakland, California 94610

Dear Bob:

Thank you for writing to me concerning Assembly Bill 1591 which I introduced on April 5.

The Oakland Police Department asked me to introduce this bill to do something about the armed bands of citizens who are increasing their activities in our community. Are you aware the police can do nothing about these guerrilla bands intimidating citizens in our community with loaded rifles and shotguns? This is a serious problem.

No one is going to pass legislation which would prevent a person from having a weapon in his home, but I do not believe you can justify carrying a loaded rifle or shotgun on the streets of our cities.

I am enclosing a copy of AB 1591 and would appreciate your thoughts about this legislation after you have had a chance to analyze it.

It was good to hear from you.

Cordially,

DON MULFORD

em

Enclosure

ROBERT C. LAMBORN
ATTORNEY AT LAW
270 GRAND AVENUE AT LENOX
OAKLAND, CALIFORNIA 94610

4-19-67

Dear Dan —

I want to express my opposition to what I understand is your proposed bill regarding carrying a loaded pistol.

You cannot legislate people from killing one another + the kind we are all worried about aren't going to be much concerned about gun laws. Otherwise - keep up the good work —

[signature]

APPENDIX I:

Text of former § 12031

(a) Except as provided in subdivision (b), every person who carries a loaded firearm on his person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory is guilty of a misdemeanor.

(b) Subdivision (a) shall not apply to any of the following:

(1) Sheriffs, constables, marshals, policemen, members of the California Highway Patrol, members of the California State Police, and employees of the State Department of Justice listed in Section 817 who are designated as peace officers, whether active or honorably retired, other duly appointed peace officers as defined in Section 817, full-time paid peace officers of other states and the federal government who are carrying out official duties while in California, or any person summoned by any such officers to assist in making arrests or preserving the peace while he is actually engaged in assisting such officer.

(2) Guards or messengers of common carriers, banks, and other financial institutions while actually employed in and about the shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within this state.

(3) Members of the military forces of this state or of the United States engaged in the performance of their duties.

(4) Persons who are using target ranges for the purpose of practice shooting with a firearm, or who are members of shooting clubs while hunting on the premises of such clubs.

(5) Patrol special police officers appointed by the police commission of any city, county, or city and county under the express terms of its charter who also under the express terms of the charter (i) are subject to suspension or dismissal after a hearing on charges duly filed with the commission after a fair and impartial trial, (ii) must be not less than 21 years of age nor more than 40 years of age, (iii) must possess physical qualifications prescribed by the commission, and (iv) are designated by the police commission as the owners of a certain beat or territory as may be fixed from time to time by the police commission.

(6) The carrying of concealable weapons by persons who are authorized to carry such weapons pursuant to Article 3 (commencing with Section 12050) of Chapter 1 of Title 2 of Part 4 of the Penal Code.

(7) Private investigators, private patrol operators, and operators of a private patrol service who are licensed pursuant to Chapter 11 (commencing with Section 7500) of Division 3 of the Business and Professions Code, while acting within the course and scope of their employment.

(8) The carrying of weapons by persons who are authorized to carry such weapons pursuant to Section 607f of the Civil Code, while actually engaged in the performance of their duties pursuant to such section.

(c) In order to determine whether or not a firearm is loaded for the purpose of enforcing this section, peace officers are authorized to examine any firearm carried by anyone on his person or in any vehicle while in any public place or on

any public street in an incorporated city or prohibited area of an unincorporated territory. Refusal to allow a peace officer to inspect a firearm pursuant to the provisions of this section constitutes probable cause for arrest for violation of this section.

(d) As used in this section "prohibited area" means any place where it is unlawful to discharge a weapon.

(e) A firearm shall be deemed to be loaded for the purposes of this section when there is an unexpended cartridge or shell, consisting of a case which holds a charge of powder and a bullet or shot, in, or attached in any manner to, the firearm, including, but not limited to, in the firing chamber, magazine or clip thereof attached to the firearm; except that a muzzle-loader firearm shall be deemed to be loaded when it is capped or primed and has a powder charge and ball or shot in the barrel or cylinder.

(f) Nothing in this section shall prevent any person engaged in any lawful business, including a nonprofit organization, or any officer, employee, or agent authorized by such person for lawful purposes connected with such business, from having a loaded firearm within such person's place of business, or any person in lawful possession of private property from having a loaded firearm on such property.

(g) Nothing in this section shall prevent any person from carrying a loaded firearm in an area within an incorporated city while engaged in hunting, during such time and in such area as the hunting is not prohibited by the city council.

(h) Nothing in this section is intended to preclude the carrying of any loaded firearm, under circumstances where it would otherwise be lawful, by a person who reasonably believes that the person or property of himself or another is in immediate danger and that the carrying of such weapon is necessary for the preservation of such person or property.

(i) Nothing in this section is intended to preclude the carrying of a loaded firearm by any person while engaged in the act of making or attempting to make a lawful arrest.

(j) Nothing in this section shall prevent any person from having a loaded weapon, if it is otherwise lawful, at his place of residence, including any temporary residence or campsite.

(Stats.1967, ch. 960, § 1 [former § 12031].)

APPENDIX J:

Declaration of David L. Polsky, Aug. 21, 2015

DECLARATION OF DAVID POLSKY

I, David L. Polsky, the undersigned, declare as follows:

1. In am an attorney licensed in the State of California (State Bar no. 183235). I was appointed by the California Supreme Court to represent Steven Wade in case number S224599 after the court granted his petition for review of the decision of Division Five of the Second Appellate District in case number B255894.

2. On appeal in case number B255894, Mr. Wade was represented by Jean Bellantine (State Bar no. 93675).

3. Upon my appointment in the currently pending matter, Ms. Bellantine forwarded me her legal research. The entirety of what she provided me in that regard was a stack of documents totaling approximately 750 pages. Ms. Bellantine informed me that all of those documents were provided to her by the California State Archives in response to her request for all legislative history on the statute under which Penal Code section 12031 was enacted into law in 1967.

4. Appendices B to H attached to this brief were included among the legislative history material Ms. Bellantine forwarded me.

I declare under penalty of perjury under the laws of the State of California that the facts set forth in this declaration are true and correct to the best of my knowledge.

Dated: August 21, 2015.

Respectfully submitted,

David L. Polsky

PROOF OF SERVICE

I declare that:

I am employed in Windham County, Connecticut; I am over the age of 18 years and not a party to the within entitled cause; my business address is P.O. Box 118, Ashford, CT 06278. On August 21, 2015, I served a copy of the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** in said cause on all parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Ashford, Connecticut, addressed as follows:

Scott Douglas Collins, DDA
Office of the District Attorney
320 West Temple St., Suite 540
Los Angeles, CA 90012

California Court of Appeal
Second District, Division Five
300 South Spring Street
Los Angeles, CA 90013

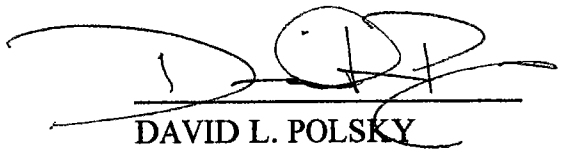
Clerk, Los Angeles Superior Court
Attn: Hon. Clifford Klein, Judge
210 West Temple Street
Los Angeles, CA 90012

Steven Wade
36979 Desert Willow Drive
Palmdale, CA 93550

In addition, I electronically served the attached brief to the following parties via electronic email:

California Appellate Project,
capdocs@lacap.com

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on August 21, 2015, at Ashford, Connecticut.



DAVID L. POLSKY