IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	) **No. S224599**
	)
Plaintiff and Appellant,	) (Court of Appeal
	) No. B255894;
v.	)
	) LASC No.
STEVEN WADE,	) BA421048)
	)
Defendant and Respondent.	)
	)

Court of Appeal, Second Appellate District, Division Five
Los Angeles County Superior Court
Honorable Clifford L. Klein, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

JACKIE LACEY
District Attorney of
Los Angeles County

PHYLLIS C. ASAYAMA, SBN. 88919
SCOTT D. COLLINS, SBN. 143426
Deputy District Attorneys

Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012
Telephone: (213) 974-5911
Direct Line: (213) 974-3899
Attorneys for Plaintiff and Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

CODES AND STATUTES

California Penal Code

SECONDARY SOURCES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. STEVEN WADE, Defendant and Respondent.	**No. S224599** (Ct. App., Second App. District, Division Five, No. B255894; L.A.S.C. No. BA421048) **APPELLANT'S ANSWER BRIEF ON THE MERITS**

INTRODUCTION

Steven Wade (hereafter Defendant) was charged in the Los Angeles Superior Court, with the crime of carrying a loaded, unregistered firearm, pursuant to Penal Code[1] section 25850, subdivision (a). Wade carried the loaded, unregistered handgun in a backpack that he was wearing on his back. Wade moved to dismiss the charge, pursuant to section 995. Citing the case of *People v. Pellecer* (2013) 215 Cal.App.4th 508 (*Pellecer*), the trial court granted the motion. The People (hereafter Appellant) appealed, and the Court of Appeal, Second Appellate District, Division Five, reversed.

The Court of Appeal held that "[a] defendant wearing a backpack containing a firearm carries the firearm on his or her person." (Slip. Op. p. 2.) The Court of Appeal disagreed with the reasoning in *Pellecer*, and further found that *Pellecer* is distinguishable on two separate grounds. (Slip Op. pp. 6-9.) The Court of Appeal properly noted that the defendant in *Pellecer* was not wearing the backpack containing throwing

1. All further statutory references are to the Penal Code.

knives; here the defendant wore the backpack containing the loaded, unregistered firearm. Moreover, the Court of Appeal properly noted that our Legislature has traditionally exerted greater restrictions over firearms than knives, and because the decision in *Pellecer* relied upon a legislative history that is inapplicable to firearms, *Pellecer* was distinguishable from the facts in the case *sub judice*. (*Ibid.*)

For the reasons set forth below, the ruling by the Court of Appeal, reversing the trial court's ruling and reinstating the charge, should be affirmed, and the case should be remanded to the Los Angeles Superior Court with instructions to reinstate the charge.

STATEMENT OF THE CASE

The defendant was arraigned on an Information in Department 126 of the Los Angeles Superior Court, before the Honorable Clifford L. Klein, Judge Presiding (hereafter the trial court), on March 4, 2014, after being held to answer at a preliminary hearing conducted on February 18, 2014. (Clerk's Transcript (hereafter CT), pp. 20-25.) The defendant was charged in count one of the Information with the crime of possession of a loaded, unregistered firearm, in violation of section 25850, subdivision (a). (*Ibid.*)

On March 7, 2014, the defendant's motion to dismiss pursuant to section 995 was granted as to count one. (CT pp. 42-43; Reporter's Transcript (hereafter RT), pp. B1-9.) Appellant (hereafter the People), filed a timely Notice of Appeal on April 23, 2014. (CT pp. 86-88.) On February 10, 2015, the Court of Appeal, Second Appellate District, Division Five, reversed, in its Opinion issued in case B255894. (Slip Op.)

STATEMENT OF FACTS

A

The Preliminary Hearing

The facts established in the trial court are not in dispute. During a preliminary hearing held on February 18, 2014, in Department 33 of the Los Angeles Superior Court, Officer Brent Sforzini testified that he is a police officer for the City of Los Angeles, assigned to the 77th Division, Gang Enforcement Detail. (CT p. 3.) On February 2, 2014, at approximately 2:45 p.m., Officer Sforzini was in the vicinity of 55th Street and Normandy, in the City and County of Los Angeles, in uniform and driving a marked black and white patrol car. (*Id.* at pp. 3-4.) As Officer Sforzini turned westbound from Normandy onto 55th Street, he saw the defendant exiting a liquor store with a little girl. (*Id.* at p. 4.) Officer Sforzini recognized the defendant from a prior arrest a few weeks earlier, and decided to stop and talk to the defendant. (*Id.* at pp. 3-4.)

Officer Sforzini stopped the patrol car and opened his door, and the defendant pushed the little girl and took off running southbound down an alley. (CT p. 4.) Officer Sforzini ran after the defendant and ordered him to stop, but the defendant ignored him and kept running. (*Id.* at pp. 4-5.) The defendant was wearing a blue and gray backpack on his back. (*Ibid.*) As he ran from the officer, the defendant took the backpack off, ran through a rear courtyard of a duplex, and threw the backpack over a fence. (*Id.* at p. 5.) Officer Sforzini recovered the backpack and found a loaded Smith and Wesson .38 Special revolver in the backpack. (*Id.* at pp. 6-7.)

Officer Sforzini subsequently ran the serial number on the handgun and discovered that it was unregistered. (*Id.* at pp. 7-8.) A

Certified Law Enforcement Telecommunications System (CLETS) document was introduced by reference and demonstrated that the gun was unregistered. (*Id.* at pp. 16-17.) No affirmative defense was offered at the preliminary hearing and the defendant was held to answer on the charge of possession of a loaded, unregistered handgun, in violation of section 25850, subdivision (a). (*Id.* at p. 17.)

B

The Section 995 Motion to Dismiss

The trial court heard argument on the section 995 Motion to Dismiss on March 7, 2014. (RT pp. B1-9.) The defendant argued that the gun was not carried upon the defendant's person, and cited *Pellecer*, *supra*, 215 Cal.App.4th 508, 516, as the authority for his motion. (*Id.* at pp. B1-2.) The trial court noted that knives and guns pose different risks, but ruled that it was bound by *Pellecer* and granted the motion to dismiss count one. (*Id.* at pp. B3-4.) The People filed a timely Notice of Appeal on April 23, 2014. (CT pp. 86-88.) The Court of Appeal reversed. (Slip Op. B255894.)

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ARGUMENT

I

STANDARD OF REVIEW

A

Questions of Statutory Construction are Reviewed De Novo by this Court

The People agree with Respondent's assertion that this Court independently reviews questions of statutory construction. (*Imperial Merchant Services v. Hunt* (2009) 47 Cal.4th 381, 387.) This Court's taşk is to "ascertain the Legislature's intent in order to effectuate the law's purpose." (*Ibid.*) In examining a statute, "[t]he statute's plain meaning controls the court's interpretation unless its words are ambiguous." (*Id.* at pp. 387-388.) "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Ibid.*) As Respondent properly notes, the Court may "look to a variety of extrinsic aids, including 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.)

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B

The Rule of Lenity is Inapplicable Because Any Ambiguity is Readily Resolved in Light of the Clear Legislative Intent to Regulate the Carrying of Firearms in Public

Respondent argues that under the "rule of lenity," any statutory ambiguity should be resolved in his favor. (Respondent's Opening Brief On the Merits (OBM), pp. 12-13.) However, Respondent fails to fully examine the steps that this Court must take *before* resulting to the "tie breaker" provided by the rule of lenity, and his suggested conclusion is not supported by a careful application of that rule. In *People v. Arias* (2008) 45 Cal.4th 169, 177 (*Arias*), this Court succinctly summarized the steps to be taken in analyzing a statute to determine legislative intent:

> "Under settled canons of statutory construction, in construing a statute we ascertain the Legislature's intent in order to effectuate the law's purpose. [Citation.] We must look to the statute's words and give them their usual and ordinary meaning. [Citation.] The statute's plain meaning controls the court's interpretation unless its words are ambiguous." [Citations.] 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. [Citations.] "'Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute ... ; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed [citation].' [Citations.]" If the statute is ambiguous, we may consider a variety of extrinsic aids, including legislative history, the statute's purpose, and public policy. [Citation.]

(*Arias*, *supra*, 45 Cal.4th at p. 177.) *Arias* then noted that, "If a statute defining a crime or punishment is susceptible of two reasonable interpretations, we ordinarily adopt the interpretation that is more favorable to the defendant. (*People v. Avery* (2002) 27 Cal.4th 49, 57 (*Avery*)." (*Ibid.*)

Beginning with the first portion of the analysis set forth in *Arias*, the People submit that the plain words of the statute at issue are reasonably and logically interpreted to prohibit carrying a loaded unregistered firearm in a backpack worn upon the person, for the reasons set forth in significant detail below. (See *People v. Dunn* (1976) 61 Cal.App.3d Supp. 12, 13-14 [A handgun carried in a locked suitcase at Los Angeles International Airport was carried "upon the person" within the meaning of former section 12025.].) However, if an ambiguity is perceived, then the legislative intent of the statute should prevail over narrow, literal construction, in order to effectuate that statute's purpose. (*Arias*, *supra*, 45 Cal.4th at p. 177; § 4 ["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."].) In construing a statute a reviewing court must "begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " (*California Teachers Assn.* v. *San Diego Community College Dist.* (1981) 28 Cal.3d 692, 698.) As explored at length below, the clear legislative intent of both section 25850, subdivision (a), and the Deadly Weapons Control Act in general, is to prohibit the carrying of firearms in public in order to enhance public safety.

The interpretation urged by the People is consistent with the clearly established legislative intent of both the charged section and the act

as a whole; whereas the conclusion urged by Respondent runs contrary to the clearly stated legislative intent of both the statute at issue and the Deadly Weapons Control Act as a whole. The interpretation of the statute that prohibits carrying a loaded unregistered firearm in a backpack worn on the person is reasonable in light of the clear legislative intent to regulate the carrying of deadly weapons in order to protect the public. In comparison, the interpretation urged by Respondent is not reasonable, given the clear intent of the Legislature, as interpreted by California's appellate courts for almost a century. The People submit that since one interpretation of the statute is reasonable and the other is not, this Court is not faced with a 'tie' in which the rule of lenity gives the 'benefit of the doubt' to the defendant.

This Court has concluded that the rule of lenity only applies to "an egregious ambiguity and uncertainty," and it is not a 'get-out-of-jail-free card[2]' to be freely played whenever some disagreement occurs regarding statutory interpretation. (*Avery*, *supra*, 27 Cal.4th at p. 58.) In *Avery*, this Court held that:

> As Witkin explains, "The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule." (1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53.) In *People v. Jones* (1988) 46 Cal.3d 585, 599, we described the rule of lenity in a way fully consistent with section 4: "The rule of statutory interpretation that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." [¶] Thus, although true ambiguities are resolved in a defendant's favor, an appellate court should not

2. "Monopoly," Parker Brothers, 1935.

> strain to interpret a penal statute in defendant's favor if it can fairly discern a contrary legislative intent.

(*Avery*, *supra*, 27 Cal.4th at p. 58.)

Here, this Court need not "guess" at the Legislature's intent; the clear intent of both the statute and the statutory scheme as a whole is to prohibit the carrying of firearms in the interest of public safety is readily apparent, as set forth below. Since there are not "two reasonable interpretations" of the statute which "stand in relative equipoise," the rule of lenity is inapplicable here. (*Avery*, *supra*, 27 Cal.4th at p. 58.) Because the legislative intent of the statute is readily discernable, this Court "should not strain to interpret a penal statute in [Respondent's] favor …." (*Ibid.*)

II

THE INTENT OF SECTION 25850 IS TO OUTLAW THE CARRYING OF DANGEROUS WEAPONS

Section 25850, subdivision (a), provides in relevant part that "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 …." (§ 25850, subd. (a).) Section 25850, subdivision (c)(6), specifies the punishment when the person is not the registered owner of the firearm. Section 25850 took effect on January 1, 2011, as part of the Deadly Weapons Recodification Act of 2010 (Act). (2010, SB 1080, § 16000 et seq.) Section 25850 is a continuation of former section 12031, without substantive change. (SB 1080; §§ 16005, 16010, 16580, subd. (a)(43).) The Act specifies that "A judicial decision interpreting a previously existing provision is relevant in interpreting any provision of …

the Deadly Weapons Recodification Act of 2010, which restates and continues that previously existing provision." (§ 16020, subd. (a).)

Former section 12031 provided that it was unlawful for a person to "carr[y] a loaded firearm on his or her person or in a vehicle in any public place or on any public street ...." (Former § 12031, subd. (a)(1).) Former section 12025 similarly made it unlawful to carry a concealed firearm in a vehicle or "upon his or her person ....." (Former § 12025, subd. (a); recodified as § 25400, subd. (b).)

The purpose of the former Deadly Weapons Act was "to outlaw instruments which are ordinarily used 'for criminal and improper purposes.' " (*People v. Mulherin* (1934) 140 Cal.App. 212, 215 (*Mulherin*).) In upholding the conviction in that case, the court in *Mulherin* concluded that "the language of the section should be given a liberal construction, so long as no injustice results." (*Id.* at p. 216.) Section 12020, a part of the former Dangerous Weapons Control Law, and the subject of the analysis found in *Pellecer*, *supra*, 215 Cal.App.4th 508, was also discussed in *People v. Grubb* (1965) 63 Cal.2d 614, 620, and the purpose of the law was described as follows:

> The Legislature obviously sought to condemn weapons common to the criminal's arsenal; it meant as well "to outlaw instruments which are ordinarily used for criminal and unlawful purposes." (*People* v. *Canales* (1936) 12 Cal.App.2d 215, 217; to the same effect, *Mulherin, supra*, 140 Cal.App. at p. 215.) The Legislature's understandable concern with the promiscuous possession of objects dangerous to the lives of members of the public finds manifestation in section 12020. Easy access to instruments of violence may very well increase the risk of violence. Hence we must, if possible, sustain the constitutionality of a statute designed for the salutary purpose of checking the possession of objects subject to dangerous use.

(*People v. Grubb*, *supra*, 63 Cal.2d at p. 620.)

In *People v. Gonzalez* (1995) 32 Cal.App.4th 229, 235, the Fifth Appellate District of the Court of Appeal reached the same conclusion about the intent of the Deadly Weapons Control Law, holding:

> Our position finds additional support from the following language taken from *People* v. *Satchell* (1971) 6 Cal.3d 28: "This court has stated that the purpose of the Legislature in enacting section 12020 was to outlaw the possession of 'weapons common to the criminal's arsenal....' [Citation.] This purpose proceeds from the recognition that persons who possess the specialized instruments of violence listed in the section are ordinarily persons who intend to use them in violent and dangerous enterprises. Thus, rather than simply proscribing the *use* of such instruments, the Legislature has sought to prevent such use by proscribing their mere *possession*. In order to insure the intended prophylactic effect, the intent or propensity for violence of the possessor has been rendered irrelevant." (*People v. Satchell*, *supra*, 6 Cal.3d at pp. 41-42.) Thus, it is not the *use* of the weapon being proscribed by statute, but its *possession*.

(*People v. Gonzalez*, *supra*, 32 Cal.App.4th at p. 235.)

In a more recent analysis of section 12020, in the context of reviewing an order dismissing such charge pursuant to section 995, the Fifth Appellate District approached its task by stating the following:

> To determine whether the magistrate erred in this case, we must interpret these statutes. In interpreting a statute, our objective is "to ascertain and effectuate legislative intent." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) To the extent the language in the statute may be unclear, we look to legislative history and the statutory scheme of which the statute is a part. (*People v. Bartlett* (1990) 226 Cal.App.3d 244, 250.) We look to the entire statutory scheme in interpreting particular provisions "so that the whole may be harmonized and retain effectiveness." (*Clean Air Constituency v. California State Air Resources Bd.* (1974) 11

> Cal.3d 801, 814.) In the end, we ' "must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]' " (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003.)

(*People v. Plumlee* (2008) 166 Cal.App.4th 935, 940.)

Thus, in construing a statute a reviewing court must "begin with the fundamental rule that a court 'should ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " (*California Teachers Assn.* v. *San Diego Community College Dist.*, *supra*, 28 Cal.3d at p. 698.) The general purpose of The Dangerous Weapons Control Law 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. Flores* (2008) 169 Cal.App.4th 568, 576-577; *People v. Melton* (1988) 206 Cal.App.3d 580, 589; *People v. Foley* (1983) 149 Cal.App.3d Supp. 33, 39; see also: *People v. Satchell*, *supra*, 6 Cal.3d at pp. 41-42; *People v. Gonzalez*, *supra*, 32 Cal.App.4th at p. 235; § 16020, subd. (a).) "Carrying a concealed firearm presents a recognized 'threat to public order,' and is ' "prohibited as a means of preventing physical harm to persons other than the offender." [Citation.]' " (*People v. Yarborough* (2008) 169 Cal.App.4th 303, 314, citing *People v. Hale* (1974) 43 Cal.App.3d 353, 356; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1348; accord *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [A person who carries a concealed firearm on his person or in a vehicle, "which permits him immediate access to the firearm ... poses an 'imminent threat to public safety ....' [Citation.] "].)

"The obvious intent of the Legislature in each instance" of the former Dangerous Weapons Control Law, and in reference to former

section 12031 specifically, "is to proscribe aspects of firearm possession to protect society." (*People v. Taylor* (1984) 151 Cal.App.3d 432, 437.) In its concluding remarks in *People v. Marroquin* (1989) 210 Cal.App.3d 77, 82, (*Marroquin*) the Court of Appeal noted that the Legislature "continues to focus the scope of the statutory scheme aiming its sights in targeting the unlawful activities of an ever violent society." Bearing that in mind, the Court stated:

> [W]e conclude that a firearm, the generic term used to describe an object which may silence, maim, strike or destroy that which moves, breathes or exists, need not be operable to convict under [former] section 12025, subdivision (b). To engraft such a requirement would be inconsistent with the societal effort to curtail criminal conduct.

(*Ibid.*)

While operability of the firearm is not at issue here, the sentiment expressed by the Court of Appeal in *Marroquin* properly summarizes the history of the state Legislature's attempts to regulate and control the carrying and possession of deadly weapons such as firearms that exact a continuing and bloody toll upon our society.

Other statutes contained within the same Act further illustrate the legislature's intent to stringently regulate the carrying of firearms. For instance, section 25505 requires that the lawful transportation of a firearm requires that "the firearm shall be unloaded and kept in a locked container, and the course of travel shall include only those deviations between authorized locations as are reasonably necessary under the circumstances." (§ 25505 [former § 12026.2, subd. (b)].) Similarly, section 25610, subdivision (a), provides in relevant part that lawful transportation of a firearm occurs when: "(1) The firearm is within a motor vehicle and it is locked in the vehicle's trunk or in a locked container in the vehicle. (2) The

firearm is carried by the person directly to or from any motor vehicle for any lawful purpose and, while carrying the firearm, the firearm is contained within a locked container." (§ 25610, subd. (a).) Both statutes are clearly enacted with the intent to carefully regulate the carrying and possession of firearms, and conform to the overall stated intent of the Act as a whole, to protect the public.

As set forth above, the analysis of the legislative intent of the former Dangerous Weapons Control Law, set forth in prior judicial decisions, and illustrated by relevant companion statutes, is directly applicable to this Court's analysis of the current version of the statute, contained in the Deadly Weapons Recodification Act of 2010. (§ 16020, subd. (a).) With these prior cases - and the legislative intent of the statute - in mind, the proper interpretation of the statute at issue here is self-evident if the legislative purpose of the protection of the public is considered. The Court of Appeal's determination that the possession of a gun in a backpack worn on the body of the defendant violated the statute was correct in light of the clear legislative intent to protect the public.

III

A LOADED FIREARM LOCATED IN A BACKPACK WORN ON THE PERSON IS CARRIED ON THE PERSON WITHIN THE MEANING OF SECTION 25850(a)

A

The Term "Carry" Is Broadly Construed to Effectuate the Purpose of the Statute

The evidence presented at the preliminary hearing established that the defendant was wearing the blue and gray backpack, that he discarded that backpack as he fled from the police, and the backpack

contained a loaded, unregistered Smith and Wesson .38 Special revolver. (CT pp. 4-8.) The People submit that because the backpack was worn on the body of the defendant, the firearm contained therein was carried on his person within the meaning of section 25850, subdivision (a).

Webster's New Collegiate Dictionary (First Printing, 1973, p. 170) defines the word "carry" as "to move while supporting (as a package): transport;" "to get possession or control of;" "to transfer from one place to another;" "to contain and direct the course of;" "to wear or have on one's person;" or "to act as a bearer." Synonyms of the word "carry," listed by Webster's, include "bear, convey, [and] transport." (*Ibid.*) Webster's further defines the word "on" as "in or into a position of contact with an upper surface;" or "in or into a position of being *attached to* or covering a surface." (*Id.* at p. 801, emphasis added.) Webster's further states that the word "on" is "used as a function word to indicate a position over and in contact with ... *or juxtaposition with* ...." (*Ibid.*, italics added.)

In *People v. Overturf* (1976) 64 Cal.App.3d Supp. 1 (*Overturf*), the Appellate Division of the Los Angeles Superior Court examined what is meant by the word "carry" within the meaning of former section 12031, the direct predecessor to section 25850. The Appellate Division found that the word " 'carrying' refers to the 'act or instance of carrying' and the verb 'carry' in relevant definition connotes 'to convey, or transport ...;' and 'to transfer from one place ... to another.' (Webster's New International Dictionary, Second Edition, p. 412.)" (*Overturf, supra*, 64 Cal.App.3d Supp. at p. 6.)

In *Overturf*, the court further found that, "Speaking generally 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. (*In re Bergen* (1923) 61 Cal.App. 226, 228 (*Bergen*); *People v. Smith* (1946) 72

Cal.App.2d Supp. 875, 878." (*Overturf, supra*, 64 Cal.App.3d Supp. at p. 6, fn. omitted.) In *Bergen*, the Court of Appeal held, "At common law the offense of carrying concealed weapons involved riding or going about and not merely holding or possessing a weapon. [Citation.] The use of the word 'carry' in an indictment conveys to a defendant the thought of going about armed ...." (*In re Bergen, supra*, 61 Cal.App. at p. 228.) Similarly, in *People v. Smith, supra*, 72 Cal.App.2d Supp. at p. 878, the Appellate Division of the Los Angeles Superior Court noted that:

> Webster's New International Dictionary, second edition, defines the word "carry," in one sense, to mean: "To have upon or about one's person; hold. To hold or bear; to bear. To act as a bearer." Used in the active transitive sense, the word "carry" has been said to connote transportation (13 C.J.S. 1763), but when used in the general sense of carrying arms or carrying weapons the word means "going armed, wearing weapons." (13 C.J.S. 1765; 10 C.J. 1243.)

(*People v. Smith, supra*, 72 Cal.App.2d Supp. at p. 878.) The court further found that:

> The word "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.

(*Ibid.*)

In *Muscarello v. United States* (1998) 524 U.S. 125, 130 [118 S.Ct. 1911, 141 L.Ed.2d 111] (*Muscarello*), superseded by statute, the United States Supreme Court examined the term "carry" in conjunction with the federal prohibition against carrying a firearm during and in relation to a

drug trafficking offense, within the meaning of 18 U.S.C. section 924, subdivision (c)(1), and stated the following:

> The Oxford English Dictionary's *twenty-sixth* definition of "carry" is "bear, wear, hold up, or sustain, as one moves about; habitually to bear about with one." (2 Oxford English Dictionary (2d ed. 1989), p. 921. Webster's defines "carry" as "to move while supporting," not just in a vehicle, but also "in one's hands or arms." Webster's Third New International Dictionary (1986), p. 343. And Black's Law Dictionary defines the entire phrase "carry arms or weapons" as [¶] "To wear, bear or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person." Black's Law Dictionary 214 (6th ed. 1990). [¶] These special definitions, however, do not purport to *limit* the "carrying of arms" to the circumstances they describe. 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.

(*Muscarello*, *supra*, 524 U.S. at p. 130.)

In her dissent in *Muscarello*, Justice Ginsburg stated that, "It is uncontested that [18 U.S.C.] § 924(c)(1) applies when the defendant bears a firearm, *i.e.*, carries the weapon on or about his person 'for the purpose of being armed and ready for offensive or defensive action in case of a conflict.' Black's Law Dictionary 214 (6th ed. 1990) (defining the phrase "carry arms or weapons")." (*Id.* at pp. 139-140; accord, *District of Columbia v. Heller* (2008) 554 U.S. 570, 584 [128 S.Ct. 2783, 171 L.Ed.2d 637] (citing Justice Ginsburg's definition of "carry" in *Muscarello* with approval).) Accordingly, the Court in *Muscarello* concluded that the term " '[c]arry' implies personal agency and some degree of possession ...." (*Muscarello*, *supra*, 524 U.S. at p. 134.)

In applying a broad interpretation to the statute, the United States Supreme Court looked to the legislative intent of the federal statute before it, and noted that the statute was intended to "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." (*Muscarello*, *supra*, 524 U.S. at p. 132.) With this in mind, the Supreme Court concluded that "we cannot also construe 'carry' narrowly without undercutting the statute's basic objective." (*Id.* at p. 136.) Here, this Court should also look at the phrase "carries a loaded firearm on the person," as contained in section 25850, subdivision (a)(1), in its totality and in light of the intent of the statute. When the term "on the person" is considered in light of the statutory intent, the phrase cannot be viewed so narrowly as to preclude criminal liability for the possession of a loaded firearm in a backpack carried on the body of an individual. This view makes sense when the facts here illustrate that the handgun was affixed to the defendant in such a manner that "the locomotion of the body [carried] with it the weapon ...." (*People v. Smith*, *supra*, 72 Cal.App.2d Supp. at p. 878.) A common sense reading of section 25850, subdivision (a), supports the conclusion that the defendant's actions here violated the law.

B

A Firearm In a Backpack, Which is Carried on the Body, is Carried "On the Person"

Officer Sforzini testified that the defendant was wearing the blue and gray backpack "on his back." (CT pp. 4-5.) This backpack was subsequently found to contain the loaded, unregistered Smith and Wesson .38 Special revolver. (*Id.* at pp. 6-8.) The People submit that the revolver was carried upon the person within the meaning of the statute.

As set forth above, the word "on" is defined as meaning "in or into a position of being attached to ..." or "in contact with ... *or juxtaposition with* ...." (Webster's New Collegiate Dictionary, *supra*, at p. 801, italics added.) When the phrase "on the person" is taken in context with the word "carries" and is also considered in the context of the intent of the statute, it is clear that the Court of Appeal correctly concluded that a gun contained in a backpack carried on the body of the defendant was prohibited by the statute. Respondent argues that the term "on the person" requires the gun to either be "in contact with" the person or "carried in his clothing." (OBM, p. 14.) While Appellant agrees that a gun carried in an individual's clothing is violative of the statute, there is little practical distinction between a pocket in a jacket, and a backpack worn on the body. Both a pocket and a backpack are manufactured items, worn externally and affixed to the body, whose purpose is to carry items upon the person.

In *People v. Dunn*, *supra*, 61 Cal.App.3d Supp. 12, the defendant was arrested when a handgun was found in the locked suitcase that he carried into Los Angeles International Airport. The defendant did not dispute the fact that the weapon was both carried and concealed, but rather appealed his conviction on the basis that the handgun was not "upon his person" within the meaning of former section 12025. (*Id.* at p. 13.) He argued that a gun contained within a man's attire or clothing or a woman's purse or handbag would constitute a violation, but argued that a gun contained in an attaché case or suitcase was not "upon the person" within the meaning of former section 12025. (*Id.* at pp. 13-14.) The Appellate Division of the Los Angeles Superior Court rejected his contention, stating:

> 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.

(*Id.* at p. 14; see also *People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1377, fn. 5.)

Dunn cited *People v. Pugach* (1964) 15 N.Y.2d 65 [204 N.E.2d 176], cert. den. 380 U.S. 936 (1965) (*Pugach*), in support of its conclusion. In *Pugach*, officers found a loaded revolver in the defendant's briefcase. (*Id.* at p. 68.) The court held that "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.' " (*Id.* at p. 69.) Accordingly, the defendant's conviction for carrying a concealed firearm "upon his person" was affirmed. (*Ibid.*)

Dunn has been cited with approval in other jurisdictions. For instance, the Court of Appeals in Alaska cited *Dunn* and held that "We conclude ... that the phrase 'on the person' is broad enough, without the additional word 'about,' to encompass weapons concealed either in clothing or in purses, briefcases, or other hand-carried containers." (*De Nardo v. State* (1991) 819 P.2d 903, 906.)

In *State v. Anfield* (1992) 313 Ore. 554, 556-557 [836 P.2d 1337] (*Anfield*), the arresting officer observed the defendant standing on the sidewalk, holding a black bag in one hand. Upon observing the officer, the defendant dropped the bag to the pavement. The officer recovered the bag, opened it, discovered two loaded pistols and arrested the defendant for unlawful possession of a firearm. (*Ibid.*) On appeal, the defendant argued that the guns were not concealed "upon his person," within the definition of

the former Oregon statute.[3] (*Id.* at p. 558.) The Oregon Supreme Court disagreed and, citing *Dunn*, held that the guns in the bag were "upon the person" of the defendant:

> [T]he language, 'upon the person,' includes purses, handbags, bags, and their contents, when they are carried in the manner that defendant was carrying this bag. See *People v. Pugach*, *supra*, 15 N.Y.2d 65 (holding that 'upon the person' included a loaded firearm concealed in a briefcase carried by the defendant); *Dunn*, *supra*, 61 Cal.App.3d Supp. 12 (holding that 'upon the person' included a handgun concealed in a suitcase carried by the defendant). The pertinent consideration is whether defendant carried the bag, not the fact that it was a bag or how long defendant carried it. [The officer] saw defendant carrying a bag. While defendant held the bag, it and, necessarily, its contents were 'upon the person' of defendant."

(*Anfield*, *supra*, 313 Ore. at p. 559.)

In *State v. Finlay* (2002) 179 Ore.App. 599, 601-602 [942 P.2d 326] (*Finlay*), the defendant had a gun in her suitcase at the Portland International Airport. She argued that the gun was not "upon her person," within the meaning of the Oregon Statute, ORS section 166.250, subdivision (1)(a). That statute makes possession of a firearm unlawful if the person knowingly "[c]arries any firearm concealed upon the person ...." (ORS section 166.250, subdivision (1)(a); *Finlay*, *supra*, 179 Ore.App. at p. 601.) The Oregon Court of Appeal noted that "*Anfield* and the authorities on which it relied[4] all involved a defendant carrying a firearm inside of a

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3. The defendant was charged with violating former Oregon Revised Statute (ORS) section 166.250, subdivision (1)(b) which made it unlawful for a person to knowingly "carr[y] any firearm concealed upon the person ...." (*Id.* at p. 558.) That statute was subsequently renumbered as ORS section 166.250, subdivision (1)(a). (*Id.* at p. 558, fn. 2.)

bag, briefcase or suitcase. Each of those courts held that the contents of those bags were 'upon the person.'" (*Finlay*, *supra*, 179 Ore.App. at p. 604.) Accordingly, the Court of Appeal rejected the defendant's claim and upheld her conviction for possession of a firearm concealed "upon her person." (*Id.* at pp. 604-605.)

Similarly worded California state penal statutes also illuminate the issue. For instance, section 487, subdivision (c), defines Grand Theft as being committed "when the property is taken from the person of another." In *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656 (*Huggins*), the victim was seated in a salon, with her purse on the floor next to her, with "her foot against the purse to make sure she knew where it was. The purse was in contact with her foot the entire time." The Defendant ran into the salon, grabbed the purse, and ran out the door. (*Ibid.*) In upholding the conviction for Grand Theft Person, the Court of Appeal found that, "these facts are sufficient to show that the purse was taken "from the person" of the victim. (*Id.* at p. 1657.) The Court found that, "the victim at all times maintained contact with her purse for the purpose of maintaining dominion and control over it. Here, therefore, the purse was actually attached to her person within the meaning of the rule in *McElroy*." (*Id.* at p. 1658.)

The Court in *Huggins* distinguished its facts from those found in *People v. McElroy* (1897) 116 Cal. 583 (*McElroy*). In *McElroy*, money was taken from the pants-pocket of a sleeping victim, who had removed his pants and placed then under his head as a pillow. (*Id.* at p. 584.) The conviction for Grand Theft Person was overturned upon the conclusion that

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4. As set forth above, *Dunn* was cited with approval within *Anfield*. (See *Anfield*, *supra*, 313 Ore. at p. 559.)

the victim was not wearing the pants containing the money, but rather the pants had been "laid away from his person and out of his hands." (*Id.* at pp. 586-587.) In overturning the conviction, the Supreme Court stated:

> In view of these authorities and the origin of the statute, we think its obvious purpose was to protect persons and property against the approach of the pick-pocket, the purse-snatcher, the jewel abstracter, and other thieves of like character who obtain property by similar means of stealth or fraud, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession -such as clothing, apparel, or ornaments, or things contained therein, or attached thereto, or property held or carried in the hands, or by other means, upon the person; that it was not intended to include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control or possession of the owner while so laid away from his person and out of his hands.

(*Id.* at p. 586.)

Respondent's citation to *State of Oklahoma v. Humphrey* (1980) 620 P.2d 408 (*Humphrey*) (OBM, pp. 17-18), commands no different result. In *Humphrey*, a deputy sheriff went to the defendant's home and knocked on the screen door. (*Id.* at p. 409.) Through the screen, the deputy saw the defendant seated on a couch, and then saw the defendant get up to answer the door. The defendant invited the deputy inside and returned to the couch to put on his shoes. As the defendant approached the couch and began to sit down, the deputy saw a .45 caliber pistol sitting on the couch in the area where the defendant was about to sit. The Oklahoma Court of Criminal Appeals noted that "the defendant was never seen carrying the pistol on his person." (*Ibid.*) Like section 25850, subdivision (a), Oklahoma statute 21 O.S. 1971, § 1283 provided (in relevant part) that "it shall be unlawful for any person ... to carry on his person ... any pistol."

(*Ibid.*) On appeal, the Oklahoma appellate court found that the defendant had not violated the statute because he did not have the pistol on his person. The facts of *Humphrey* are distinguishable from the facts in the instant case and *Humphrey* accordingly does not command a different result from that reached by our Court of Appeal based upon on the facts in our case.

In the instant case, the defendant was wearing the backpack containing the gun; he was not merely laying or resting upon it, or sitting near it. "Wearing a backpack" connotes the backpack being attached to - and carried by - the body, usually by the use of shoulder straps to secure both the bag and its contents to the wearer. One normally wears a backpack to carry and transport items with the wearer, just as an individual carries personal items about in one's pocket or purse. There is no question that the defendant was exercising full dominion and control over the backpack as he wore it on his back, nor is there any question that a backpack worn on the body is attached to the wearer; indeed that is the whole purpose of the design of a backpack. Surely if items carried in a pocket, a purse, an attaché case, or a suitcase are considered to be carried "on the person" then items carried in a backpack, worn by the individual, are carried "on the person" as well. Respondent concedes that a gun carried within an article of clothing – for instance in a pocket – is carried upon the person. (OBM, p. 14.) As established above, there is no practical difference between carrying an item in one's pocket, and carrying the same items in a backpack, fanny-pack, or purse worn or carried on the body of the individual. The *method of attachment* to the person is immaterial; what matters is that the gun here was carried upon the defendant's person, within the meaning of the statute.

C

Pellecer Should be Limited on its Facts

The relevant facts in *Pellecer* were recited in the opinion rendered by that court as follows:

> At 2:30 a.m. on September 5, 2011, Los Angeles Police Department Officers Reynaldo Masangkay and Carlos Landivar responded to a call about a burglary suspect at Barnsdall Art Park in Los Angeles. They found defendant crouching in a corner of an enclosed patio in the park. Defendant was leaning on a closed backpack. In response to the officers' orders, defendant approached them. *The record does not indicate whether defendant took the backpack with him while complying with the officers' orders.* Masangkay unzipped the backpack and found inside it a nylon pouch that contained three identical knives. Masangkay testified that he had previously studied martial arts and recognized the knives as shuriken throwing knives, which could be used offensively or defensively for throwing or stabbing.

(*Pellecer*, *supra*, 215 Cal.App.4th at p. 511 (emphasis added).)

Upon review, the Court of Appeal concluded that carrying "a dirk or dagger inside an *adjacent* container, such as the backpack *upon which the defendant was leaning*"[5] did not constitute a violation of former section 12020. (*Pellecer*, *supra*, 215 Cal.App.4th at p. 513, italics added.) *Pellecer* is readily distinguishable on its facts from the instant case, and its ruling should be limited to its facts. In *Pellecer*, the defendant was *adjacent to* a backpack containing *knives*. (*Id.* at p. 511.) Here, in comparison, the defendant was wearing the backpack, containing a loaded firearm, and the

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5. The Court's additional phrase "or even inside a carried container" is dicta and is not controlling here since the Court's own recitation of the facts makes no reference to the container being *carried* by the defendant. (See *id.* at p. 511.)

backpack was affixed to his body. (CT pp. 4-5.) *Pellecer* is accordingly distinguishable on its facts and is not controlling in the case sub judice. The facts in *Pellecer* are similar to those in *McElroy*, *supra*, 116 Cal. at p. 584, where the defendant was sleeping on (or adjacent to) the pair of pants containing the money. The Supreme Court in *McElroy* stated that if the stolen property had been "actually upon or attached to the person, or carried or held in actual physical possession ... or attached thereto, or property held or carried in the hands, or by other means, upon the person," then the charged crime would have been committed. (*Id.* at p. 586.) Certainly a backpack worn on the body fits the above description set forth by the Supreme Court in *McElroy*. (*Ibid.*) Here, the backpack containing the gun was worn by the defendant; it was not merely adjacent to the defendant as in *McElroy* and *Pellecer*.

In addition, the facts in *Pellecer* do not indicate that the defendant ever did anything other than *lean* on the backpack containing the knives. "The record does not indicate whether defendant took the backpack with him while complying with the officers' orders." (*Pellecer*, *supra*, 215 Cal.App.4th at p. 511.) According to the Court of Appeals recitation of the facts in *Pellecer*, there is no evidence that the defendant in *Pellecer* ever "carried" the knife. Here, to the contrary, the undisputed evidence is that the defendant was wearing the backpack containing the gun while fleeing the police. (CT pp. 4-5.) Thus, the instant facts are clearly distinguishable from *Pellecer* as to the element of "carrying" as well. This distinction was cited by the Court of Appeal in its Opinion. (Slip. Op. p. 8.) Respondent's claim that "the factual distinction [between *Pellecer* and this case] is meaningless" (OBM p. 35) misses the point, and fails to either recognize or acknowledge the significance of the word "carry" in the statute.

In addition, in reaching its conclusion, the Court in *Pellecer* examined a proposed legislative amendment that would have exempted *knives* carried in a "backpack, tool belt, tackle box, briefcase, purse, or similar container that is used to carry or transport possessions" from the section. (*Pellecer*, *supra*, 215 Cal.App.4th at pp. 513-515.) The legislative history referred to by the Court specifically mentioned knives but not guns. (*Ibid.*) Thus, the rationale relied upon - in significant part - by the Court in *Pellecer* simply does not apply to the facts or the charge here, which involves a gun and not a knife. The Court of Appeal also cited this fact in declining to follow *Pellecer* in the instant case. (Slip. Op. pp. 2, 8.)

The Court in *Pellecer* noted that, "the Legislature did not outlaw carrying a dirk or dagger in a backpack is understandable, given the utility of a knife in such lawful pursuits as fishing, hunting, camping, picnicking and the like." (*Pellecer*, *supra*, 215 Cal.App.4th at p. 517.) There are a myriad of lawful reasons why one might possess or carry a knife. In *People v. Mitchell*, the Court listed examples such as "a shopper who purchases a knife and carries it in a shopping bag, or a mother who packs a knife in a picnic basket to cut an apple at a picnic ... a tailor who places a pair of scissors in his jacket, a shopper who walks out of a store with a recently purchased steak knife in his pocket, or a parent who wraps a sharp knife in a paper towel and places it in his coat to take to a PTA potluck dinner." (*People v. Mitchell*, *supra*, 209 Cal.App.4th 1364, 1377.) In cases such as these, "the California Supreme Court has recognized that in cases involving *an instrument that may have innocent uses*, the defendant may defend against the charges based on circumstances showing innocuous possession. (*People v. Grubb, supra*, 63 Cal.2d at p. 621, fn. 9.)." (*Id.* at p. 1377, emphasis added.) Such "innocuous possession" does not apply to a

loaded, unregistered firearm; certainly one does not bring a .38 Special to cut an apple at a picnic or to use as a serving piece at a PTA potluck.

Accordingly, both the facts and the rationale behind the holding in *Pellecer* are distinguishable from the instant case, and the Court of Appeal properly concluded that the trial court erred in relying upon *Pellecer*. (RT pp. B3-4.) The People respectfully suggest that the proper analysis is that set forth in the Opinion of the Court of Appeal (Slip Op.), as well as in *Dunn*, *supra*, 61 Cal.App.3d Supp. 12, and the cases cited above. Taking into account both the legislative intent of the Deadly Weapons Recodification Act of 2010 and its predecessor, to control the possession of firearms in the interest of public safety, and logical definitions of "carrying" an item "on" one's person, as explored in detail above, this Court should affirm the decision of the Court of Appeal. The gun concealed in the backpack worn by the defendant was carried upon the defendant's person within the meaning of section 25850, subdivision (a), and the trial court erred in dismissing the charge.

One final, but important, distinction may be drawn between our case and *Pellecer*. *Pellecer* applied to former section 12020, subdivision (a)(4), which states, in its entirety, that it is unlawful for any person to "carr[y] concealed upon his or her person any dirk or dagger." (*Pellecer*, *supra*, 215 Cal.App.4th at p. 510.) Section 25850, subdivision (a), regulates the carrying of a loaded firearm, and is more broadly drawn:

> 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 in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory.

(§ 25850, subd. (a).)

The addition of the prohibition against carrying a loaded firearm in a vehicle clearly illustrates a legislative intent to more broadly regulate the carrying of a loaded firearm. Where the Court in *Pellecer* found a legislative intent to limit the scope of the prohibition against carrying knives in former section 12020, subdivision (a)(4) (*Pellecer*, *supra*, 215 Cal.App.4th at pp. 513-515), the Legislature clearly intended a broader statutory scope of the prohibition against carrying loaded firearms, as set forth in section 25850, subdivision (a), for the public policy reasons set forth at great length above, namely the protection of the public. The two sections are neither drafted identically, nor do they address identical safety concerns. The trial court correctly noted that knives and guns pose different risks. (RT pp. B3-4.) The Legislature has accordingly chosen to regulate them in a different fashion. The prohibition against the carrying of knives is narrowly proscribed, but the prohibition against carrying guns is much broader, given the difference in the use and the accompanying difference in the danger presented to the public.

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CONCLUSION

The Court of Appeal correctly concluded that the trial court erred as a matter of law in granting the motion to dismiss. The undisputed facts demonstrated that the defendant carried the gun on his person by possessing it in a backpack worn upon his person. The purpose of a backpack is to carry and affix items to one's person. The intent of the statute is to protect the public from individuals who carry loaded firearms on their person, and by carrying the gun in a backpack worn on his back, the defendant violated both the letter and the intent of the law.

The decision of the Court of Appeal should be affirmed.

Respectfully submitted,

JACKIE LACEY
District Attorney of Los Angeles County

By Phyllis C. Asayama

PHYLLIS C. ASAYAMA
Deputy District Attorney

SCOTT D. COLLINS
Deputy District Attorney

Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that, pursuant to Rule 8.520(c)(1) of the California Rules of Court, the enclosed Appellant's Answer Brief is produced using 13-point Times New Roman type and contains approximately 8,660 words, including footnotes and excluding the Table of Contents and Table of Authorities, which is less than the 14,000 words permitted by the Rule. Counsel relies on the word count of the computer program used to prepare this brief. The brief is printed on 20-pound weight recycled paper.

DATED: September 23, 2015

SCOTT D. COLLINS
Deputy District Attorney

NOTICE OF RULE 8.25(b)(3)(A)
FILING BY MAIL

Pursuant to Rule 8.25, subdivision (b)(3)(A), of the California Rules of Court, undersigned appellate counsel hereby provides notice that the People request that this Court deem this brief timely filed. The ANSWER BRIEF ON THE MERITS was delivered to this Court by U.S. Postal Service overnight or express mail on September 23, 2015, as demonstrated by the postmark or postal receipt enclosed herein.

SCOTT D. COLLINS
Deputy District Attorney

DECLARATION OF SERVICE BY MAIL

People v. Steven Wade; Case No. S224599
(Ct. App. Case No. B255894; LASC Case No. BA421048)

The undersigned declares under the penalty of perjury that the following is true and correct:

I am over eighteen years of age, not a party to the within cause, and employed in the Office of the District Attorney of Los Angeles County with offices at 320 West Temple Street, Suite 540, Los Angeles, California 90012. On the date of execution hereof I served the attached document entitled APPELLANT'S ANSWER BRIEF by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail in the City and County of Los Angeles, California, addressed as follows:

HON. CLIFFORD L. KLEIN
Los Angeles County Superior Court
Department 126
210 West Temple Street
Los Angeles, CA 90012

HON. PAUL TURNER,
California Court of Appeal
Second App. Dist., Div. Five
300 South Spring Street
Los Angeles, CA 90013

DAVID L. POLSKY, ESQ.
P.O. Box 118
Ashford, CT 06278

*Attorney on Appeal for defendant Steven Wade

Executed on September 23, 2015, at Los Angeles, California.

PATRICIA MYERS