IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Appellant,	S224599
v.	
STEVEN WADE,	
Defendant and Respondent.	

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

DAVID L. POLSKY
Attorney at Law
CA Bar No. 183235

P.O. Box 118
Ashford, CT 06278
Telephone: (860) 429-5556
Email: polskylaw@gmail.com

Attorney for Defendant/Respondent
STEVEN WADE by appointment of the
California Supreme Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

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

RESPONDENT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Mr. Wade submits this reply brief in response to appellant's answer brief on the merits. Mr. Wade's failure to address any specific point made by appellant is not intended as a concession that appellant is correct but rather reflects Mr. Wade's belief that his existing briefing adequately refutes appellant's point and thus no further elaboration is required.

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

In its brief, appellant contends there is only one reasonable interpretation of section 25850—it proscribes the carrying of a firearm in a backpack. Appellant concludes that both the plain meaning and legislative purpose of the statute support that interpretation and no others. Respectfully, appellant is mistaken as its analysis suffers from the same flaws as those contained in the Court of Appeal's opinion and ignores much of the analysis in respondent's opening brief.

A. Rule of Lenity

Appellant begins its analysis by claiming that the rule of lenity, which requires statutory ambiguities to be resolved in the defendant's favor, does not apply here because there is no ambiguity. (AABM,[1] at pp. 6-9.) Appellant's claim is premised on its belief that only its interpretation of the statute is reasonable. (AABM, at pp. 8-9.) That is not so, as was demonstrated in the opening brief and will be further demonstrated below.

[1] AABM refers to Appellant's Answer Brief on the Merits.

Of course, in so arguing, appellant implicitly acknowledges that, as long as Mr. Wade's interpretation of the statute is also reasonable, this court must side with Mr. Wade. On that point, Mr. Wade agrees.[2]

B. Legislative Intent

Appellant next contends that the purpose of the statute requires a finding that section 25850 proscribes carrying a firearm in a backpack. Appellant's argument in that regard, however, is flawed. In making its point, appellant relies on the purpose of irrelevant statutory provisions and the overly general, and thus uninformative, purpose of a tangentially related legislative scheme while ignoring the statute's legislative history.

Appellant begins its analysis by relying on what it claims was the purpose of the statutory scheme governing Penal Code[3] section 12031 (which was recodified as section 25850). It first cites the purpose of the Deadly Weapon Act of 1923 (Stats. 1923, c. 696, § 1), noting it has been held that the act should be given a liberal construction. (AABM, at p. 10,

---

[2] Mr. Wade in fact maintains the opposite of appellant's position—that Wade's interpretation of the statute is the only reasonable one in light of both the plain meaning of the words used and the Legislature's clear intent when enacting it. However, even if that is not the case, Mr. Wade disagrees that his interpretation is wholly unreasonable, and his analysis shows that it is at least as reasonable as appellant's interpretation.

[3] Hereafter, all statutory references are to the Penal Code unless otherwise indicated.

quoting *People v. Mulherin* (1934) 140 Cal.App. 212, 215.) However, that act is inapplicable to this case as section 12031 was enacted 44 years later and was not part of that statutory scheme.

Appellant likewise misplaces reliance on the purpose underlying a specific part of former section 12020, namely that portion that proscribed all manner of possessing a certain type of weapon, such as a "blackjack, slung shot, billy, sandclub, sandbag [and] metal knuckles." (Stats.1953, c. 36, § 1; see AABM, at pp. 10-11, citing *People v. Grubb* (1965) 63 Cal.2d 614, *People v. Gonzalez* (1995) 32 Cal.App.4th 229.) Section 12020 was first enacted in 1953 as part of the Dangerous Weapons' Control Law (DWCL) and contained that provision from its inception. (*People v. King* (2006) 38 Cal.4th 617, 623; Stats.1953, c. 36, § 1.) As discussed in the opening brief (ROBM,[4] at p. 30), section 12031 was not part of that 1953 enactment. It was enacted in 1967. Thus, the purpose of that legislative scheme has little bearing on the purpose of section 12031.

Even if the purpose of the DWCL is relevant to the issue herein presented, the purpose of that portion of section 12020 is unhelpful as it was expressly aimed at a broader scope of conduct than that regulated by section 25850/12031 (or even other parts of the original section 12020, such as that which punishes carrying "concealed upon his person any dirk

[4] ROBM refers to Respondent's Opening Brief on the Merits.

or dagger"). The provision on which appellant relies proscribes the mere possession of the weapon. Regarding the statutory purpose, this court wrote, "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.'" (*Grubb, supra,* 63 Cal.2d at p. 620; see also *Gonzalez, supra,* 32 Cal.App.4th at p. 235 [purpose of section 12020 was to proscribe "'mere possession'" of weapons "'common to the criminal's arsenal'"]; AABM, at pp. 10-11.) At issue here is not a complete proscription on the possession of a particular type of weapon but rather a ban on possessing it in a specified location, the precise scope of which is in dispute. There is nothing about the purpose underlying section 12020's complete ban that speaks to the issue before this court now.

Regarding the DWCL's purpose, it is also unhelpful because it is simply too general. In *People v. Taylor* (1984) 151 Cal.App.3d 432, 437, cited by appellant (AABM, at p. 13), the Court of Appeal briefly reviewed various statutory components of the act and concluded, "The obvious intent of the Legislature in each instance is to proscribe aspects of firearm possession *to protect society.*" (Emphasis added.) The obvious conclusion that the firearm laws encompassed by the act are aimed at protecting society leads to no conclusions about the "on the person" language at issue here, and appellant has not explained how the interpretation of that

language advanced by Mr. Wade fails to satisfy that purpose. That is because it clearly does.

As discussed at length in the opening brief, the Legislature intended section 12031 (and by extension section 25850) to protect society from a threat that had materialized as a result of racial tension in the 1960s—the open carrying of loaded firearms in public. (ROBM, at pp. 21-27.) Proponents of the legislation expressed concern that such behavior had the potential to erupt into a shootout, causing harm to members of the public. (ROBM, at pp. 24.) At the same time, the Legislature was cognizant of the difficulty it faced in enacting new firearm control legislation in light of anticipated opposition from gun rights advocacy groups and, to garner their support, intended the legislation to be construed narrowly. (ROBM, at pp. 28-29.) Mr. Wade's interpretation of the statute is consistent with this legislative intent, as it is narrowly tailored to avoid prohibiting conduct the statute was never designed to target. Appellant's interpretation is not compatible with the Legislature's intent, as it expands the scope of section 25850/12031 to include the carrying of a concealed firearm in a container, conduct that the Legislature never contemplated as a target of this legislation when it enacted it.

Next, appellant mistakenly relies on the purpose underlying section 12025 (recodified as section 25400), which proscribed the carrying of *concealed firearms*. (AABM, at p. 12, citing *People v. Yarborough* (2008)

169 Cal.App.4th 303, 314 [interpreting § 12025], *People v. Hale* (1974) 43 Cal.App.3d 353, 356 [same], *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1348 [same], and *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [same].) The Court of Appeal in this case made the same mistake in its opinion, as discussed in the opening brief. (ROBM, at p. 30.) Admittedly the threat to society by concealed firearms is and has been real and obvious, but there is nothing in section 25850/12031 that remotely suggests it was ever intended to address that threat. It does not use the word concealed or reference firearms that are concealable, as section 12025 did (and section 25400 does now). In fact, the legislative history of section 12031 shows the Legislature's purpose in enacting it was to bar not the carrying of concealed firearms but rather the open carrying in public of loaded firearms, including shotguns and rifles which are not concealable. (ROBM, at pp. 21-27.)

Moreover, the existence of section 25400/12025 (the original enactment of which predates section 12031's enactment by 14 years) undermines appellant's position. It has always made it a crime for one to carry a concealed firearm "upon his person" (§ 12025) or "upon the person" (§ 25400, subd. (a)(2)), a nearly identical phrase to the one at issue in this case. If a backpack or other container in the defendant's possession is necessarily, in every context, "on the person" then section 25850/12031 is redundant of section 25400/12025. It would also be more limited in some

respects. The latter would punish the possession of all firearms found within a worn backpack while the former would punish only carrying loaded firearms in one. Courts "must avoid interpretations that would render related provisions unnecessary or redundant." (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 345.) That is particularly so where, as here, the legislative history of section 12031 makes clear that the Legislature meant for it to fill a statutory gap left in the gun control laws of the state and not to duplicate any of those laws. (ROBM, at p. 22-27.)

Notably, in addressing the purpose of the legislation at issue in this case, appellant ignores the lengthy recitation in the opening brief of section 12031's legislative history, likely because it undermines appellant's position. However, as appellant even contends (AABM, at p. 12), this court's goal in construing section 25850/12031 must be to give effect to that legislative intent. Thus, the history cited by Mr. Wade must not be ignored.

C. Plain Meaning of Statute

After arguing what it believes is the legislation's purpose, appellant contends that the plain meaning of the statutory language, which should control the outcome of this case, inexorably leads to the conclusion that a gun concealed in a backpack is carried on the person within the meaning of section 25850/12031. (AABM, at pp. 14-24.) However, it begins its

analysis with the same rhetorical flaw that plagued the Court of Appeal's opinion.

1. Meaning of "To Carry"

Appellant, like the Court of Appeal, misplaces reliance on the meaning of the verb "to carry" used in the statute. (ROBM, at pp. 33-35; AABM, at pp. 14-18.) They argue, because the defendant is "carrying" a firearm if it is in a backpack he is wearing, that conduct must necessarily fall within the scope of the statute. It is obvious that one "carries" a firearm in such a circumstance. However, the meaning of that verb is not at issue. As explained in the opening brief, what is at issue is the meaning of "on the person," which defines the place that the firearm must be carried to be criminal and thus limits the scope of the verb. (ROBM, at p. 34.) The definition of the verb is meaningless without considering the words that modify it.

2. Meaning of "On the Person"

To its credit, unlike the Court of Appeal in this case, appellant also presents an argument as to the plain meaning of the "on the person" language. (AABM, at pp. 18-24.) In particular, appellant relies on the definition of the word "on" and, more specifically, one definition—"in . . . *juxtaposition with*" another object. (AABM, at p. 19, emphasis in original.) Appellant's argument lacks merit.

There are so many meanings to the word "on" that attempting to ascertain the intended meaning of "on the person" from the word's ordinary dictionary definition is challenging. For instance, "on" is "a function word to indicate position in contact with and supported by the top surface of" an object (e.g., "the book is lying [on] the table"). (Webster's 9th New Collegiate Dict. (1991) at p. 823.) Of course it would be absurd to conclude the Legislature intended section 25850/12031 to proscribe only the carrying of firearms on top of a person (i.e., on the person's head), but that is one—albeit a narrow—meaning of "on."

More broadly, "on" is "a function word to indicate position in close proximity with" an object (e.g., "a village [on] the sea"). (Webster's 9th New Collegiate Dict. (1991) at p. 823.) It is unlikely the Legislature intended such a broad meaning to apply to the statute. Close proximity does not require actual contact with one's person or even clothes or containers he or she is carrying; it need only be nearby. The only way one could carry a firearm that is near his or her person would be in a vehicle. The statute expressly proscribes carrying a firearm in a vehicle as an alternative means of violating it, a prohibition that would be unnecessary if this broader meaning of "on" was intended.

The definition on which appellant relies is similar to this one as two items are "juxtaposed" if they are "placed side by side," a synonym of which is "adjacent." (Webster's 9th New Collegiate Dict. (1991) at p. 656.)

An object can be juxtaposed with a person without being in contact with anything he is wearing or holding. Thus, as with the definition of "on" in the preceding paragraph, absent such contact, the object would have to be contained in a vehicle occupied by the person for the person to "carry" or move it, making the reference to a vehicle in the statute unnecessary.

Additionally, "on" is "a function word to indicate means of conveyance" of an object (e.g., "[on] the bus" or other vehicle). (Webster's 9th New Collegiate Dict. (1991) at p. 656.) Mr. Wade does not believe that definition was intended, but if it was, it does not aid appellant. A backpack is to a person as a trailer is to a vehicle. One would not logically characterize an object contained in a trailer as "on the" vehicle towing it.

"On" also indicates "presence within the confines or in possession of" an object (e.g., "had a knife [on] him"). (Webster's 9th New Collegiate Dict. (1991) at p. 656.) Of all the definitions provided so far, this one seems to most closely parallel the manner in which the Legislature used the word in the statute. On the other hand, that definition is vague and potentially problematic as it suggests the possibility that it might be enough to establish mere constructive possession, which does not require any actual contact with or particular distance from the object but merely the exercise of control over it (see, e.g., *People v. Jenkins* (1979) 91 Cal.App.3d 579, 584 [one can infer defendant has "dominion and control" over anything in

"his residence" or "his automobile"]). Even appellant does not contend that constructive possession is sufficient to constitute "on the person."

The word is also "a function word to indicate position in or in contact with an outer surface" of an object (e.g., "I have a cut [on] my finger" or there is "paint [on] the wall"). (Webster's 9th New Collegiate Dict. (1991) at p. 823.) This definition most closely matches the statute's legislative history, which shows the Legislature passed the law to combat the open carrying of firearms in public.

As shown, reliance on the meaning of the word "on" is of little assistance in ascertaining the legislative intent. Besides, "the meaning of a statute may not be determined from a single word." (*Bode v. Los Angeles Metropolitan Medical Center* (2009) 174 Cal.App.4th 1224, 1237.) Instead, the Legislature's intent must be derived from the meaning of the entire phrase "on the person" in context and in conjunction with the legislative history. Taking all that into consideration, as respondent did in his opening brief, it is plain that the Legislature did not intend for section 25850/12031 to proscribe carrying firearms in backpacks.

In arguing it did, appellant claims there is no difference between carrying an item in clothing, such as in the pocket of a jacket, and carrying it in a backpack: "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." (AABM, at p. 19.) In fact, there is a difference—

accessibility. A pocket within a jacket is "quite obviously an 'easily accessible location.'" (*U.S. v. Mangum* (8th Cir. 2010) 625 F.3d 466, 468; see also *U.S. v. Mack* (8th Cir. 2003) 343 F.3d 929, 936 [shoulder holster holding a firearm is "an easily accessible location"].) The inside of a backpack, particularly one worn on the possessor's back, is considerably less so. (See *State v. Neff* (2008) 163 Wash.2d 453, 474, fn. 2 [181 P.3d 819, 830] ["a gun contained in a backpack behind the driver's seat is not readily accessible"].)

Mr. Wade is not suggesting that the contents of a backpack are inaccessible to the wearer. It is, though, a matter of degree. Pockets are designed and placed for easy access by one's hands; a backpack is not. "[I]n law as in life, differences are generally differences of degree, and lines must be drawn somewhere." (*Zahorian v. Russell Fitt Real Estate Agency* (1973) 62 N.J. 399, 413, fn. * [301 A.2d 754].) "The law is thoroughly accustomed" to drawing such lines. (*Ibid.*) Given the statute's legislative history and, as analyzed in the opening brief, the plain meaning of the words used and not used (e.g., "about the person") (ROBM, at pp. 13-16), the line should be drawn between clothing and containers, such as backpacks.

3. Dunn, Pugach, and Other Jurisdictions

To support its position, appellant, like the Court of Appeal, relies upon *People v. Dunn* (1976) 61 Cal.App.3d Supp. 12 and *People v. Pugach*

(1964) 15 N.Y.2d 65 [204 N.E.2d 176], both of which held that one carries a firearm on his person if it is in a container he or she is holding. (AABM, at pp. 19-20.) Appellant also cites cases in other jurisdictions that have held the same thing. (AABM, at pp. 20-22, citing *State v. Anfield* (1992) 313 Ore. 554 [836 P.2d 1337], *State v. Finley* (2002) 179 Ore.App. 599 [942 P.2d 326].) Understandably, appellant likes those cases because the ultimate holding is consistent with its position, but none of those cases present any analysis that explains why that holding is correct. As discussed in the opening brief, neither *Dunn* nor *Pugach* analyzed the statutory language used in, or the legislative history underlying, the laws at issue. (ROBM, at pp. 31-33.) Additionally, *Anfield* blindly followed *Dunn* and *Pugach* without any analysis, and *Finley* blindly followed *Anfield.* Thus, these cases fail to provide any guidance on how to interpret the language in section 25850/12031.

Their lack of guidance in interpreting section 25850/12031 is particularly obvious given that all of them but *Pugach* were decided after the 1967 enactment of the statute at issue here and thus could not have influenced the Legislature's use of language. Moreover, *Pugach* likely did not influence the Legislature in this state. It was a New York case, it was not cited in a case outside that state for the same proposition until six years after section 12031 was enacted (see *Williams v. State* (Md. Ct. Spec. App.

1973) 19 Md.App. 204, 214 [310 A.2d 593]), and there was no reference to it in section 12031's legislative history.

4. De Nardo

Only one case that appellant cites provided any statutory analysis, and that case is both logically flawed and legally distinguishable. (AABM, at p. 20, citing *De Nardo v. State* (Alaska Ct. App. 1991) 819 P.2d 903.) In *De Nardo*, the defendant was in a courthouse when law enforcement personnel discovered a long-bladed knife in "a briefcase he was carrying." (*Id.* at p. 904.) He was convicted of possessing "'a deadly weapon . . . that is concealed on the person.'" (*Id.* at p. 905.) The appellate court rejected the defendant's claim that a weapon in a briefcase is not "on the person" and upheld that conviction.

What the *De Nardo* court found most important was the fact that California in *Dunn* and New York in *Pugach* had ruled the same way. (*De Nardo, supra,* 819 P.2d at p. 906.) However, as discussed above, *Dunn* and *Pugach* are poor sources of support for that position as neither of them followed settled principles of statutory construction, or provided any analysis, in reaching it.

a. "On the Person" v. "About the Person"

Unlike *Dunn* and *Pugach*, the *De Nardo* court also relied upon the plain meaning of the language used in the statute. It recounted the definition of "on the person" found in Black's Law Dictionary, which

"encompasses items 'in contact with [the defendant's] person or . . . carried in his clothing.'" (*De Nardo, supra,* 819 P.2d at p. 905.) The court believed that language was broad enough to include carrying a weapon not only in clothing but also "in purses, briefcases, or other hand-carried containers." (*Id.* at p. 906.) Mr. Wade disagrees.

As noted in the opening brief, "'person' means 'the body of a human being.'" (ROBM, at p. 14.) Basically, *De Nardo* held something is "on the person" if it is in contact with anything in contact with a person's body. Followed to its extreme, that logic would produce absurd results. For instance, a weapon in a car within which a defendant is sitting would be on his person because the car is in contact with both the weapon and the defendant. If that were intended in section 25850/12031, there would have been no need to include the prohibition on carrying a firearm "in a vehicle" in addition to "on the person." (§ 12031, subd. (a); ROBM, at p. 69 [App. I].) However, the Legislature did so. *De Nardo*'s logic would also mean that a weapon is on the defendant's person if it is on a sofa on which he is sitting, on a floor on which he is standing, or on a table on which any part of his body is resting. Clearly the Legislature did not intend that when it enacted section 25850/12031, and it is doubtful the Alaska legislators intended it either. A knife in a briefcase, like a gun in a backpack, is in contact with the container and not the body of the person holding the

container. It is at least one physical entity removed from the person's body and thus not on his or her "person."

The *De Nardo* court found insignificant the statutory use of the phrase "about the person" in conjunction with or in lieu of "on the person" in other jurisdictions that have upheld convictions under similar facts. (*De Nardo, supra,* 819 P.2d at p. 906.) The use of "about," however, is significant. "About" in addition to or rather than "on" expands the prohibited location of carried items to include those areas that are in close proximity to or within reach of the defendant's person, such as containers one is holding. (ROBM, at pp. 15-16.) Notably, the *De Nardo* court claimed it was adopting the "majority view" while also conceding that "most concealed weapons statutes from other states" use that broader language. (*Id.* at p. 906.) Accordingly, its position was not, in fact, in line with the majority of jurisdictions, as most lacked identically worded statutes.

b. Larceny "From the Person"

Next, *De Nardo* found support for its position in the definition of larceny "from the person." (*De Nardo, supra,* 819 P.2d at p. 906.) The court wrote, "Such larceny includes thefts of a purse or suitcase which has been set down beside or in the immediate presence of its owner." (*Ibid.*) California also has a statute proscribing "theft . . . from the person of another" (§ 487, subd. (a)), and appellant relies on it to make an argument

similar to the one made by the *De Nardo* court (AABM, at p. 22, citing *People v. Huggins* (1997) 51 Cal.App.4th 1654). While *De Nardo* may have accurately interpreted the scope of its theft statute, California's interpretation is narrower, and appellant's reliance on the *De Nardo* argument is thus misplaced.

In California, theft *from the person* does not include the taking of property that is merely beside or within the immediate presence of its owner. In *People v. McElroy* (1897) 116 Cal. 582, the defendant took $17 from a wallet in the pocket of the victim's trousers while the victim was asleep and using the trousers as a pillow. This court reversed the defendant's conviction for grand theft from the person, concluding he had not taken the money from the person of the victim. (*Id.* at pp. 586-587.) The court held that the statute required the stolen property to be "in some way actually upon or attached to the person, or carried or held in actual physical possession" and did not include property "removed from the person and laid aside, however immediately it may be retained in the presence of constructive control or possession of the owner while so laid away from his person and out of his hands." (*Id.* at p. 586.)

Huggins is distinguishable. In that case, the victim was sitting on a chair with her purse on the floor against her foot when the defendant snatched the purse. The Court of Appeal found the purse had been taken from the person of the victim based on "the crucial fact that the purse was

at all times in contact with the victim's foot." (*Huggins, supra,* 51 Cal.App.4th at p. 1657.)

The obvious distinction between *McElroy* and *Huggins* is the stolen property's physical contact with the victim's body. In *McElroy*, the defendant was not charged with stealing the victim's pants, on which his head was lying, but the contents of the wallet contained in those pants. Those contents were not in contact with the victim's body and not deemed on his person. In *Huggins*, the defendant was convicted of stealing not the contents of the purse but rather the purse itself, which was in contact with the victim's foot and thus on her person.

Another factual scenario is instructive. In *In re George B.* (1991) 228 Cal.App.3d 1088, the Court of Appeal upheld the juvenile court finding that the minor committed theft from the person where he "stole a bag of groceries from a shopping cart as the victim was pushing the cart in the parking lot of a market." (*Id.* at p. 1090.) Noting that the victim was not holding the stolen bag, the Court of Appeal distinguished its case from *McElroy*, observing that in that case the victim was not holding the pants from which his money was taken while in the case before it the victim was physically grasping the cart from which the groceries were taken. (*Id.* at p. 1092, citing *Mack v. State* (Tex.Cr.App. 1971) 465 S.W.2d 941 [holding likewise where "victim's hand was on the [shopping] cart" from which defendant took her purse].) Thus, the cart and its contents were not "out of

[the victim's] hands" like the property stolen in *McElroy*. (See *McElroy, supra,* 116 Cal. at p. 586.)

As these authorities show, to the extent an interpretation of the theft statute has any bearing on this case, it does not aid appellant. Mr. Wade was not charged with the unlawful carrying of a backpack, which was in contact with his person (like the purse in *Huggins*), but rather with unlawfully carrying a weapon inside the backpack, which was not (like the stolen money in *McElroy*). Also, the backpack (unlike the shopping cart in *George B.*) was not in his hands. As a result, the gun was not on him within the meaning of the theft statute.

c. Battery of the Person

In addition to relying on the scope of Alaska's theft from person statute, *De Nardo* relied upon the tort of battery, which it believed showed that the word "person" has an expansive meaning. It noted that battery is defined as a "'harmful or offensive contact with another person,'" including "'any part of the body or . . . anything which is attached to it and practically identified with it," such as anything in "contact with the plaintiff's clothing, or . . . any other object held in the plaintiff's hand.'" (*De Nardo, supra,* 819 P.2d at p. 906, quoting Prosser and Keeton, *The Law of Torts* (5th ed. 1984) § 9, p. 39.) In fact, the law of battery, whether related to the tort or the crime, does not support *De Nardo* and appellant's position.

De Nardo failed to analyze why contact with the plaintiff's clothing or other object in his hand can constitute a battery. It is not because those objects are deemed part of the victim's person. It is rather because, when touched, those objects then touch the victim's person (or body). (See *Mount Vernon Fire Insurance Corporation v. Oxnard Hospitality Enterprise, Inc.* (2013) 219 Cal.App.4th 876, 884 [battery results from either "'body-to-body' contact [or] . . . from an object set in motion by the defendant's action"]; *McCracken v. Sloan* (N.C. Ct. App. 1979) 40 N.C.App. 214, 216 [252 S.E.2d 250, 252] [battery requires "intentional and unpermitted contacts with the plaintiff's person" whether "brought about by a direct application of force" or where "the defendant set a force in motion which ultimately produces the result"]; see also § 243.4, subd. (f) [the act of touching "an intimate part of another person" for purposes of sexual battery "means physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense"].) For instance, a defendant commits a battery by throwing an object at the victim that hits him or her. (See, e.g., *People v. Pinholster* (1992) 1 Cal.4th 865, 961 [defendant threw cup of urine in a person's face]; *People v. Duchon* (1958) 165 Cal.App.2d 690, 693 [defendant threw electric hedge-trimming clippers at his next door neighbor, striking him with them].) Such an act is a battery not because the object thrown, which is the only item the defendant touched, is deemed part of the victim's body

but because that object contacted the victim's body as a result of force the defendant applied to it.

Thus, contrary to the *De Nardo* court's belief, the definition of "person" in the context of a battery is not so expansive as to include anything that is in contact with the body or with clothing covering the body, such as a backpack. Significantly, *De Nardo* omitted a key passage from Prosser and Keeton's text that makes plain the inapplicability of battery law to the issue that was before *De Nardo* and that is before this court. The text provides not only that a battery may result from a non-consensual touching of the plaintiff's clothing or an object in his hand but also "of the chair in which the plaintiff sits, the horse or the car the plaintiff rides or occupies, or the person against whom the plaintiff is leaning." (Prosser and Keeton, *The Law of Torts* (5th ed., 1984) § 9, pp. 39-40; accord, *Kelly v. County of Monmouth* (N.J. Super. Ct. App. Div. 2005) 380 N.J.Super. 552, 559 [883 A.2d 411].) It would be absurd to conclude that the chair, horse, car and other person are part of the plaintiff's body. Instead, a battery occurs because those objects touch the plaintiff's body as a result of the force applied to them by the defendant.

d. Alaska Legislative History

In addition to its flawed analysis, *De Nardo* does not aid appellant because it is distinguishable. In *De Nardo*, the court concluded that the legislative history of the statute in question indicated the Alaska legislature

intended "on the person" to include containers carried by the defendant. (*De Nardo, supra,* 819 P.2d at pp. 906-907.) It noted that the legislature rejected adding the phrase "about the person" without comment, despite explaining why other rejected language did not constitute "concealed on a person." (*Ibid.*) To the court, that meant the legislature believed the "on the person" to be expansive enough to include that which was "about the person" as well. (*Ibid.*)

Additionally, the *De Nardo* court found the Alaska legislature included such a broad definition of "concealed" that it must include items secreted in not only clothing but containers as well. The court wrote,

> [A] weapon is "concealed" if it is: [¶] covered or enclosed in any manner so that an observer cannot determine that it is a weapon without removing it from that which covers or encloses it or without opening, lifting, or removing that which covers or encloses it. [¶] These extremely general references—"covered or enclosed in any manner", removal of the weapon "from that which covers or encloses it", and "opening, lifting or removing that which covers or encloses" the weapon—would seem unneeded and unnecessarily oblique if the legislature were simply referring to weapons concealed in the pockets or folds of a person's clothes.

(*De Nardo, supra,* 819 P.2d at p. 907.)

By contrast, there is nothing in the legislative history of section 25850/12031 to suggest our Legislature intended the "on the person" language to include that which is "about" the defendant and to include that which is within "covered" containers. In fact, as noted repeatedly, the legislative history shows section 25850/12031 was intended to proscribe

polar opposite conduct—not the possession of weapons concealed or enclosed and about the defendant's person but rather weapons that he or she is openly carrying or wearing.

D. Pellecer

Finally, appellant (like the Court of Appeal) claims the decision in *People v. Pellecer* (2013) 215 Cal.App.4th 508 should be limited to its facts—the possession of a knife in a backpack adjacent to and not worn by the defendant. (AABM, at pp. 25-29.) For the same reasons the Court of Appeal's argument in that regard lacks merit, appellant's does as well. (See ROBM, at pp. 35-37.) For clarities sake, Mr. Wade addresses a few points made by appellant.

Appellant argues that *Pellecer* is factually distinguishable because the defendant was not wearing the backpack in that case. (AABM, at pp. 25-26.) However, *Pellecer*'s analysis was not so limited. Former section 12020(a)(4), which is what the defendant was convicted of violating in that case, punished one who "[*c*]*arries* concealed *upon his or her person* any dirk or dagger." (*Pellecer, supra,* 215 Cal.App.4th at p. 513, emphasis in original.) *Pellecer* did not reverse the conviction because the defendant was not carrying the backpack. It reversed the conviction because a knife in a backpack, whether beside a person or worn, is not "upon his or her person." Notably, in stating its holding, the court expressly referenced the

act of carrying: "[T]he phrase 'upon his or her person' does not include a *carried* or adjacent container, such as the backpack upon which defendant was leaning." (*Id.* at pp. 515-516, emphasis added.)

Another ground which appellant advances to support limiting *Pellecer* actually undermines its position and bolsters Mr. Wade's position with respect to section 25850/12031. When interpreting the meaning of "concealed upon his or her person," the *Pellecer* court relied in part upon a 1997 proposed amendment to the law that would have expressly provided that "'a dirk or dagger is not concealed upon the person where the dirk or dagger . . . is carried in a backpack . . . or similar container that is used to carry or transport possessions.'" (*Pellecer, supra,* 215 Cal.App.4th at p. 514.) The legislative history shows the Legislature understood that one carries a weapon "concealed upon the person" only if it "is under the person's clothes." (*Id.* at p. 514.) According to that history, the Legislature rejected the amendment because it was "'duplicative'" and might create "'confusion.'" (*Id.* at p. 515.) As the Court of Appeal explained,

> [T]he Legislature considered that proposed exemption to reflect what it believed was established law, that is, a dirk or dagger carried in a backpack . . . or similar container that is used to carry or transport possessions is not concealed "upon his or her person," and thus does not violate former section 12020, subdivision (a)(4).

(*Ibid.*) The *Pellecer* court found that history supported its holding. (*Id.* at pp. 515-516.)

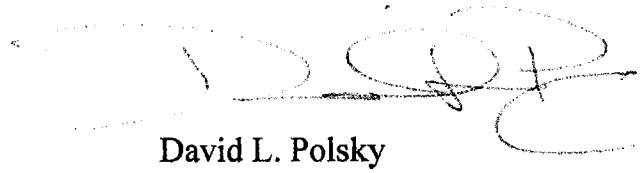
Appellant argues that, because the proposed amendment was limited to forms of knives and did not mention guns, the history is of no value here. (AAMB, at p. 27.) Actually, it is quite valuable. It shows that the Legislature does not view the phrase "upon his or her person" or "on the person" to include backpacks and other carried containers. That guns were not part of the amendment is what is meaningless because the statute concerned knives and not guns. That the statute did not concern firearms does not mean that the Legislature would ascribe a wholly different definition to "on the person" in a statute that does.

CONCLUSION

For the reasons stated above and in the opening brief, this court should hold that the phrase "carries a loaded firearm *on the person*" in section 25850(a) does not include one carried in a backpack. To hold otherwise would require ignoring the statute's legislative history, the plain meaning of the statutory language, the failure by the Legislature to include broader language (i.e., "about the person"), the resulting overlap with section 25400/12025, and the legislative history cited in *Pellecer* indicating that the Legislature does not view "on the person" to include items in backpacks. 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: October 5, 2015.

Respectfully submitted,



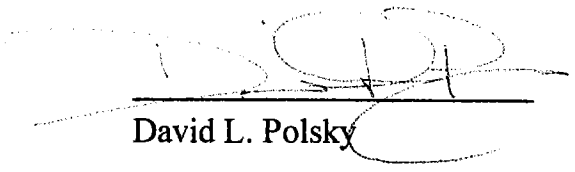
David L. Polsky
Attorney for Mr. Wade

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 6,301 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 October 5, 2015, at Ashford, Connecticut.



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 October 5, 2015, I served a copy of the attached **RESPONDENT'S REPLY 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

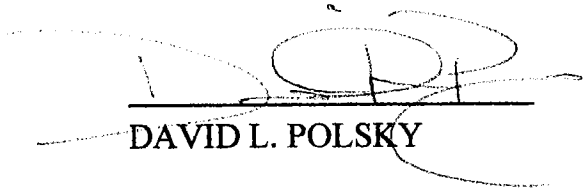
Clerk, Los Angeles Superior Court
Attn: Hon. Clifford Klein, Judge
210 West Temple Street
Los Angeles, CA 90012

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 October 5, 2015, at Ashford, Connecticut.



DAVID L. POLSKY