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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JARVONNE FEREDELL JONES, Defendant and Appellant.	)	S179552

Third Appellate District, No. C060376
Sacramento County Superior Court No. 08F04254
Honorable Jaime R. Roman, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

SUPREME COURT
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SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	S179552
Plaintiff and Respondent,	)	
v.	)	
JARVONNE FEREDELL JONES,	)	
Defendant and Appellant.	)	

ISSUE PRESENTED

The Court has granted review of the following question: Did the trial court properly impose concurrent sentences for being an ex-felon in possession of a firearm (Pen. Code, § 12021, subd. (a)(1)) and carrying a loaded, concealed firearm (Pen. Code, § 12025, subd. (b)(6)) under the present circumstances? (See Pen. Code, § 654; *People v. Harrison* (1969) 1 Cal.App.3d 115, 121-122.)

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Underlying Facts.

On May 26, 2008, Sacramento Police Officer Weinrich stopped a car which lacked a license plate. (RT 21.) Appellant, Jarvonne Feredell Jones, was driving the car, and his girlfriend was the sole passenger. (RT 22, 70.) The girlfriend informed the officer that the car belonged to her mother. (RT 87.)

Officer Weinrich decided to search the car for contraband. (RT 24.) Officer Buno and an officer-in-training responded to Wienrich's call for assistance. (RT 25, 65.)

Weinrich searched the car twice, but found nothing. (RT 25, 49.) Then Officer Buno searched it and found a loaded .38 Smith and Wesson antique revolver. (RT 25-26, 44.) The revolver was hidden behind a quarter panel in the driver's side door. (RT 76.) The panel had to be pried open for the gun to be removed. (RT 73.)

It took some effort to remove the bullets from the chamber and render the gun safe. (RT 29-30, 34.) The officers were unfamiliar with that particular weapon because it dated back to 1898. (RT 34, 44.)

After the gun was discovered, Officer Weinrich questioned appellant. (RT 26-27.) Appellant stated that he purchased the gun three

days earlier from a stranger who approached him asking whether he knew of anyone interested in buying a gun. (RT 28.) Appellant said that there were three bullets in the gun when he bought it. (RT 29.) Appellant explained that he bought the gun for protection and had kept it at his grandmother's house. It was in the car because he just picked it up from there. (RT 28, 61.)

B. Procedural Facts.

A jury convicted appellant of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1), count one), carrying a readily accessible concealed and unregistered firearm (Pen. Code, § 12025, subd. (b)(6), count two), and carrying an unregistered loaded firearm in public (Pen. Code, § 12031, subd. (a)(2)(F), count three). (CT 59-61.)

The probation report recommended counts two and three be stayed pursuant to section 654. (CT 105; see also Opinion, p. 3.) At sentencing, neither party expressed disagreement with that recommendation. (Opinion, p. 4.) The only thing contested was whether the upper term should be imposed. However, the trial court ultimately imposed concurrent sentences on both counts.[1] The four-year prison sentence imposed by the court

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[1] The Court of Appeal observed that it was possible that the trial court agreed with the recommendation of the probation report, but misapplied the statute. (Opinion, p. 4.)

consisted of the upper term of three years on count 1, concurrent three-year terms on counts 2 and 3, and one year for the prison prior. (CT 5; RT 171.)

Appellant timely appealed. (CT 136-137.) On appeal, appellant argued that the sentences on counts two and three should be modified on the ground that they violated the multiple-punishment bar of section 654.

C. The Opinion of the Court of Appeal.

On December 10, 2009, the Court of Appeal agreed in part and modified the Sacramento County judgment. It stayed the sentence on count three, accepting respondent's concession that, as between it and count two, appellant committed a single act when he possessed a loaded firearm in public and possessed a concealed weapon. (Opinion, p. 4.)

However, the Court of Appeal held that appellant could be separately punished for counts one and two "because of the purpose of the ban on felons possessing firearms." (Opinion, p. 6.) The court reasoned appellant possessed the firearm in an unlawful way separate and above the unlawfulness inherent in a felon's possession of a firearm, namely by concealing the loaded firearm in a vehicle that he then drove on a public street. (Opinion, p. 7.) The court found that appellant's status as a convicted felon merited additional punishment. (Opinion, p. 10.)

The court cited *People v. Harrison* (1969) 1 Cal.App.3d 115, which upheld multiple sentences for possession of a gun by an ex-felon (Pen. Code, §12021) and possession of a loaded firearm in public (Pen. Code, § 12031) because loading the weapon involves a separate activity. (Opinion, p. 7-9; *People v. Harrison*, *supra*, 1 Cal.App.3d at p. 22.) Under the reasoning in *Harrison*, the Court of Appeal concluded that appellant's act of concealing the weapon, or allowing someone to conceal it for him, merited additional punishment from the act of mere possession because that was a separate act. (Opinion, p. 9.)

Appellant filed a petition for review on January 19, 2010, which this court granted on March 25, 2010.

ARGUMENT

APPELLANT'S SENTENCE FOR POSSESSING A CONCEALED WEAPON SHOULD HAVE BEEN STAYED PURSUANT TO PENAL CODE SECTION 654.

A. Summary Of Argument

This case concerns the multiple-punishment bar of section 654 – specifically, whether despite that bar a defendant can be doubly punished for possessing a concealed weapon because of his status as a convicted felon. Under the facts of this case, the correct answer to the above question is "no." The Court of Appeal erred in reaching the contrary conclusion. The Court of Appeal opinion conflates the criminal objectives of the defendant, which is the focus of the section 654 analysis in *Neal v. State of California* (1960) 55 Cal.2d 11, with the legislative objectives of the statutes in a way that renders *Neal* meaningless. And while there are other tests that can be used to determine whether section 654 should apply, because the record in this case contains evidence regarding appellant's intent, the *Neal* test is the controlling test. But even if the Court finds that *Neal* should not be applied to crimes of a continuing nature, such as possession offenses, multiple punishment was nevertheless prohibited under the test set forth by this Court in *People v. Bradford* (1976) 17 Cal.3d

8, which considered section 654 in the context of Penal Code section 12021.

B. The Multiple Punishment Bar Of Section 654.

Section 654 provides, in pertinent part:

> An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. (§ 654, subd. (a).)

This part of the statute ensures that a defendant's punishment is commensurate with his culpability and that he is not punished more than once for what is essentially one criminal act. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211; *People v. Perez* (1979) 23 Cal.3d 545, 552.)

C. The Standard Of Review.

Whether section 654 applies is a determination made from all the circumstances of the case and is primarily a question of fact for the trial court. The question on appeal becomes whether there is substantial evidence supporting the court's finding. If so, the finding will be upheld on appeal. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Coleman* (1989) 48 Cal.3d 112, 162.) Substantial evidence is defined as evidence which is reasonable, credible, and of solid value. (*People* v. *Johnson* (1980) 26 Cal.3d 557, 578.)

D. The Section 654 Tests.

“Because of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance." (*People v. Beamon* (1973) 8 Cal.3d 625, 636; see also *In re Adams* (1975) 14 Cal.3d 629, 633.) This Court has adopted several tests which can be used to determine whether section 654 applies to a given case. They are not mutually exclusive. If section 654 is deemed to apply under any one of the tests, a contrary result under another test is irrelevant and multiple punishment is barred. (*In re Hayes* (1969) 70 Cal.2d 604, 606, fn.1.)

In *In re Chapman* (1954) 43 Cal.2d 385, this Court enunciated a test to apply where there is a single act which overlaps essential elements of multiple crimes. According to *Chapman*, "when two offenses are committed by the same act or when that act is essential to both [] they may not both be punished." (*Id.* at p. 390.) The *Chapman* “overlapping elements” test has never been expressly disapproved. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1209.)

The most widely used test in applying section 654 is the “intent and objective” test stated in *Neal v. State of California, supra,* 55 Cal.2d 11. It

applies where there is a continuing course of criminal conduct that violates more than one statute. The *Neal* test focuses on the intent and objective of the defendant. (*Id.* at p. 19.) "If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid.*)[2] Since *Neal*, the Court has advised against both parsing the intent and objective of the defendant too finely (*People v. Britt* (2004) 32 Cal.4th 944, 953-954 [failure to register in new jurisdiction and to notify former jurisdiction of move had single objective of preventing any law enforcement agency from learning of current residence]), as well as construing it too broadly (*People v. Perez* (1979) 23 Cal.3d 545, 552 [rejecting argument that multiple punishment for discrete sex offenses was impermissible based on the single objective of sexual gratification]).

There have been refinements of the *Neal* "intent and objective test" for dealing with certain contexts. (*People v. Beamon*, *supra*, 8 Cal.3d 625, 638, fn. 10.) For example, in *In re Adams*, *supra*, 14 Cal.3d 629, the Court applied *Neal* to narcotic offenses. Recognizing one may possess or transport drugs for a variety of reasons, the Court held the application of

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[2] *Neal* recognizes an exception for crimes of violence committed against multiple victims. (*Neal*, *supra*, 55 Cal.2d 11, 20–21; see also *People v. Miller* (1977) 18 Cal.3d 873, 885; *People v. King* (1993) 5 Cal.4th 59, 78.)

section 654 is not necessarily based on the number or types of drugs, but rather on the motivation of the defendant. (*Id.* at pp. 635-636.) In the context of two Vehicle Code violations, *In re Hayes* (1969) 70 Cal.2d 604, added a requirement that the overlapping elements of two offenses committed at the same time share the same criminal purpose in order to satisfy the *Neal* test. (*Hayes*, *supra*, 70 Cal.2d at pp. 607-611.) And in *People v. Perez*, *supra*, 23 Cal.3d 545, the Court applied *Neal* to cases dealing with multiple sex offenses against a single victim. For section 654 to apply to one of several self-contained sex offenses, it must be committed as a means of committing another, facilitate commission of another, or be incidental to the commission of any other. (*Id.* at pp. 553-554.) What all of these cases have in common is the use of the intent and objective test initially set forth in *Neal*. Despite the refinements, cases subsequent to *Neal* continue to utilize this common test to determine the application of section 654.

As to Penal Code section 12021 convictions in particular, one of the crimes at issue here, in *People v. Bradford* (1976) 17 Cal.3d 8, this Court cited with approval the test applied in *People v. Venegas* (1970) 10 Cal.App.3d 814, and held that whether the possession constitutes a divisible transaction from the offense in which the felon employs the weapon

depends on the facts and evidence of each individual case. Where the evidence shows a possession *distinctly antecedent and separate from* the primary offense, multiple punishment is permitted. But where the evidence shows possession only in conjunction with the primary offense, then separate punishment for section 12021 is not allowed. (*People v. Bradford, supra*, 17 Cal.3d at pp. 22-23, emphasis added.)

Some Courts of Appeal have devised a test focusing on the legislative intent of the underlying offenses; a "statutory purpose" type of evaluation. (See e.g., *People v. Vang* (2010) 184 Cal.App.4th 912, 917 ["the crimes of felon in possession of a firearm and possession of methamphetamine while armed address distinct dangers"].) The thinking is that if statutes have different public purposes directed at "distinct evils," then a defendant who violates both statutes simultaneously should be doubly punished because he is infringing upon two societal interests. In such a test, the defendant is supposedly not being doubly punished because the remedial target of each statute being violated differs, no matter what the intent and objective of the defendant. This approach can be traced to *People v. Harrison* (1969) 1 Cal.App.3d 115. And that was the rationale of the court in this case. But this "statutory purpose" approach has never been

approved by this Court and, as will be explained below, it is at odds with the *Neal* "intent and objective" test.

E. The Court Of Appeal's Reliance On *People v. Harrison* (1969) 1 Cal.App.3d 115 Was Misplaced And *Harrison* Should Be Disapproved.

The Court of Appeal in this case concluded that convicted felons who simultaneously violate both sections 12021 and 12025 or 12031 necessarily possess two separate intents and objectives for purposes of section 654 because those laws target different statutory purposes. It relied on *People v. Harrison, supra*, 1 Cal.App.3d 115, to reach this conclusion. But the *Harrison* approach is flawed and should be disapproved.

In *Harrison*, the defendant was convicted of one count of being a felon in possession of a firearm and one count of carrying a loaded firearm in a vehicle on a public street, based on one discrete event - a single traffic stop in which a loaded gun was found in the defendant's car. (*People v. Harrison, supra,* 1 Cal.App.3d at p. 118.) The Court of Appeal rejected the defendant's contention that separate punishment for each conviction violated the prohibition of section 654. In upholding multiple punishments, the court gave three reasons for its conclusion. First the court observed that one offense was not a lesser included offense of the other. (*Id.* at p. 122.) Second, the court noted that the two statutes addressed two different

concerns: that of felons possessing concealed weapons, loaded or not, and that of anyone carrying a loaded gun in a public place. (*Ibid.*) Third, the court determined "the 'intent and objective' underlying the criminal conduct was not single, but several" because the gun was loaded. (*Ibid.*) "For an ex-convict to a carry a concealable firearm is one act. But loading involves separate activity." (*Ibid.*)

In concluding that section 654 does not apply when one offense is not a lesser included offense of the other, *Harrison*, appears to have confused merger with the application of section 654. This Court has clearly stated that the proscription against multiple punishment of a single act is not limited to necessarily included offenses. (See *Neal*, *supra*, 55 Cal.2d at p. 18.) In fact, were one offense a lesser included of the other, the remedy would be to strike the lesser included offense, not simply stay punishment. (*People v. Bauer, supra,* 1 Cal.3d at p. 375.)

Harrison predates this Court's decision in *Bradford* which, as noted above, held that for a conviction of section 12021 to merit additional punishment, there must be possession *distinctly antecedent and separate from* the primary offense. (*People v. Bradford*, *supra*, 17 Cal.3d at pp. 22-23.) *Harrison* cannot be reconciled with the rule this Court adopted in *Bradford.*

The *Harrison* court found it important that the statutes at issue addressed two different societal evils. (*People v. Harrison*, *supra*, 1 Cal.App.3d at p. 122.) But, as this Court recently made clear, section 654 and the "divisible course of conduct" rule presuppose that the defendant has violated two statutes. It should make no difference, for purposes of applying section 654, that each of these offenses is supported by a different and distinct public policy. Section 654 is concerned with the defendant's intent, not the Legislature's purpose in enacting the offenses in question. (*People v. Britt*, *supra*, 32 Cal.4th at p. 952.) In fact, the effect of section 654 is to limit or prohibit multiple punishment for behavior that may violate different laws.

Turning to the present case, the appellate court found it significant that, after appellant purchased the gun, he concealed it in the car, or had someone hide it for him. (Opinion, p. 9.) The court then held that per *Harrison*, *supra*, 1 Cal.App.3d 122, that act merits separate punishment from mere possession. (*Ibid.*)

The Court of Appeal noted, "The purpose of section 12021 is to protect the public welfare by precluding the possession of guns by those who are more likely to use them for improper purposes– felons [Citations], and to provide a greater punishment to an armed felon than to an unarmed

felon. [Citation.]." (Opinion, p. 6, citations omitted.) Thus, the Court of Appeal in this case suggests that multiple punishment is required, as a matter of law, for the single act of a felon possessing a firearm and carrying a loaded firearm or concealing it. The decision of the Court of Appeal improperly divests the trial court of its discretion to determine, based on the facts of the case, the intent and objective of the defendant.[3]

And that rationale ignores that the Legislature has already lowered the threshold for behavior by felons. *Any* possession of a firearm *anywhere* is prohibited. It is a fair assumption that felons' guns would be loaded and concealed. (The original version of section 12021 even applied only to concealable firearms.) (See *People v. Mills* (1992) 6 Cal.App.4th 1278, 1282.

Appellant acknowledges "The law presumes the danger is greater when the person possessing the concealable firearm has previously been convicted of felony, and the presumption is not impermissible." (*People v.*

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[3] It should be noted that it is not only felons who would be automatically subjected to multiple punishment under the reasoning of *Harrison, supra,* 1 Cal.App.3d 122, and of the Court of Appeal in this case. If this logic is to be applied, then any minor who unlawfully possesses a weapon in violation Penal Code section 12101, subdivision (a) and committed another offense involving possession of a weapon, such as a violation of section 12031 or 12025, would also be subjected to multiple punishment simply because of his or her age. And yet, most minors do not present a clear and present danger to society.

Bell (1989) 49 Cal.3d 502, 544.) And the Legislature may provide for increased punishment for an offense that has more serious consequences by, for instance, raising the statutory prison terms, adding enhancements, or upgrading the offense from a misdemeanor to a felony. (*Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 352.)

The Legislature could have very easily limited the applicability of section 654 to section 12021, as it has done in other contexts. (*People v. Norrell* (1996) 13 Cal.4th 1, 5-6.) For example, Penal Code section 667.6, subdivision (c) provides an exception to allow imposition of multiple punishment for multiple acts of certain sex offenses that were committed during a single transaction. (See *People v. Hicks* (1993) 6 Cal.4th 784, 792 [the enactment of Penal Code section 667.6, subdivision (c), created an exception to Penal Code section 654].) The Legislature could have provided a similar exception within section 12021 itself. Alternatively, had it wanted to, the Legislature could have converted section 12021 to a status enhancement which would not be subject to the section 654 prohibition. Since 1995, when this Court decided *People v. Coronado* (1995) 12 Cal.4th 145, it has been settled that Penal Code section 654 does not apply to status-type enhancements. (See also *People v. Reeves* (2001) 91 Cal.App.4th 14,

55-56.) The Legislature is presumed to know the existing case law. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1090-91.)

However, the Legislature has not chosen to limit the application of section 654 in this context. Instead, what the Legislature has chosen to do is to upgrade the penalty for other weapon possession offenses in the Dangerous Weapons Control Act when the defendant is convicted under those sections and is also an ex-felon who is prohibited from possessing a weapon by virtue of that status. Two examples are the very statutes at issue in this case, section 12025 and 12031. Penal Code section 12025, subdivision (b)(4) increases the punishment for carrying a concealed weapon in a car from a wobbler to a felony based on the defendant's status as a felon. It provides: "Where the person is not in lawful possession of the firearm, as defined in this section, or the person is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code or Section 8100 or 8103 of the Welfare and Institutions Code, as a felony."

Similarly, Penal Code section 12031, subdivision (a)(2)(D) increases the punishment for carrying a loaded firearm in a public place from either a misdemeanor or a wobbler to a felony based on the defendant's status as a felon. It provides: "Where the person is not in lawful possession of the

firearm, as defined in this section, or is within a class of persons prohibited from possessing or acquiring a firearm pursuant to Section 12021 or 12021.1 of this code ..., as a felony."

Thus, although the Legislature has been aware of the *Neal* "intent and objective" test for some time, it has chosen not to limit the application of section 654 when the offender has a prior felony conviction. So, the conclusions of both the Court of Appeal and the *Harrison* court that Penal Code section 654 should not apply merely because of the defendant's status as an ex-felon is not sound. The Legislature has already taken that into consideration.

At least one court has questioned whether the reasoning in *Harrison* is still persuasive. In *People v. Manila* (2006)139 Cal.App.4th 589, the court rejected an argument that the defendant, a convicted felon, could be charged with both a firearm-possession enhancement and with the violation of section 12021 for his possession of a firearm. Defendant in that case was primarily charged with narcotics possession. Respondent argued that section 654 did not proscribe the charging of both the weapon enhancement and the violation of section 12021 because the gun possession involved the multiple objectives of protection of the narcotics as well as protection of the defendant. However, the court rejected the argument, finding that such

reasoning "parsed the objectives too finely." In so holding, the *Manila* court "declined to comment on the persuasiveness of th[e] reasoning," given by the court in *People v. Harrison, supra*, 1 Cal.App.3d at page 122, to support its finding of multiple objectives for violations of sections 12021 and 12031. (*Id.* at p. 600.)

In appellant's case there is no evidence of multiple objectives. To find otherwise would similarly "parse the [appellant's] objectives too finely."

Whether or not *Harrison* was wrongly decided, the sentence for violating section 12025 should nevertheless have been stayed in this case. The *Harrison* court concluded: "For an ex-convict to carry a concealable firearm is one act. But loading involves separate activity." (*People v. Harrison, supra*, 1 Cal.App.3d at p. 122.) Here, appellant is being doubly punished for his status as an ex-felon and for the separate act of *concealment*, not loading. When *Harrison* was decided, concealment was an element of section 12021. (*Id.* at p. 118.)[4] Thus, the act of concealment

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[4] The statute disallowed any person, previously convicted of a felony, to own, possess, or have "under his custody or control any ... revolver ... capable of being concealed upon the person." (*Ibid.*) Section 12021 was amended in 1989, effective January 1, 1990, to prohibit possession of any firearm. (*People v. Mills*, *supra*, 6 Cal.App.4th at p. 1282.)

was considered part and parcel of the prohibited possession by the felon. Instead, the *Harrison* court focused on the defendant's separate act of loading. But, in this case, appellant did not load the weapon. There is undisputed evidence before the court that the weapon was already loaded when appellant took possession of it. (RT 29.) Even under the expansive (and incorrect) reasoning of *Harrison*, punishment for the conduct of possessing and concealing the gun are precluded in appellant's case. And even the *Harrison* court assumed that a defendant who was a felon cannot be punished for both possessing and concealing a firearm, as concealment was part of the offense. Cases may not be considered authority for propositions not considered therein. (*People v. Norrell*, *supra*, 13 Cal.4th at p. 18.)

The prosecutor himself recognized there was but a single act in this case. In closing argument the prosecutor told to the jury that the case involved "three different counts for the *same exact conduct*." (RT 119, emphasis added.) The prosecutor explained:

> *It's not a situation where we're trying to pile on and add extra punishment* – there we go with that word again, something we're not to consider – to Mr. Jones. What we want the jury to do is look at the facts, determine what the facts are, look at the law – and here we've got three specific laws that we're talking about – and answer the question did a violation of the law occur or not. Okay?

And then, if we find somebody guilty, we turn it over to the judge who ultimately would have a chance to render a judgment or sentence. Okay? And it's at that time that all of the information would be before the judge as far as things that are helpful or not helpful in making the decision on the issue of punishment. *So no one's trying to stick it to Mr. Jones by putting three different counts together for the same incident. That's just not what's going on here.*" (*Ibid*, emphasis added.)

The prosecutor's argument makes sense because in reality, many if not most convicted felons who violate section 12021 will also violate another section in the Dangerous Weapons Control Act (Pen. Code, § 12020 et seq.). Most ex-felons who intend to violate section 12021 would presumably violate section 12025 at some point during their possession of the weapon. Since the ex-felon knows he or she is prohibited from possessing the weapon, concealment of the weapon would be the means to successfully possess it.[5]

"[F]ew if any crimes, . . ., are the result of a single physical act." (*Neal*, *supra*, 55 Cal.2d at p. 19.) In resolving section 654 issues, appellate courts should not parse the objectives too finely. (*People v. Britt*, *supra*, 32 Cal.4th 944, 953.) That is what the Court of Appeal did here, as did the

[5] Otherwise, if the ex-felon who possesses a firearm in violation of section 12021 did not also violate 12025, then he or she would likely commit the offense of brandishing a firearm (Pen. Code, § 417), and again automatically be subject to multiple punishment under the reasoning of the appellate court.

Harrison court. The reasoning of *Harrison* should be disapproved because it strays from the plain language of section 654, and incorrectly applies the *Neal* "intent and objective" test by parsing the defendant's objectives too finely.

F. *In re Hayes*, *supra*, 70 Cal.2d 604, Also Does Not Mandate Multiple Punishment.

Although not cited by the Court of Appeal, *In re Hayes, supra*, 70 Cal.2d 604, does not compel a different conclusion. As noted above, that case focuses on the criminality of acts, and not their essential elements.

In *Hayes*, the defendant received separate sentences for driving under the influence (Veh. Code, § 23102) and driving while knowingly having a suspended license (Veh. Code, § 14601). The crimes were based on the single act of driving 13 blocks without a valid license and while intoxicated. This court, in a 4-3 opinion, upheld multiple punishments. (*In re Hayes*, *supra*, 70 Cal.2d at p. 605.)

The majority recognized that the single act of driving was common to both crimes. (*In re Hayes*, *supra*, 70 Cal.2d at p. 606.) Nevertheless, relying on cases where the Courts of Appeal had rejected the application of section 654 to the possessing of two different types of drug contraband, the *Hayes* majority found it paramount that section 654 does not refer to any *physical* act or omission, but rather to *criminal* acts or omissions. (*In re*

Hayes, *supra*, 70 Cal.2d at pp. 606-607.) So, the analysis requires isolation of the various criminal acts, and review of those criminal acts for identity. (*Ibid.*) The majority reasoned that while the two crimes involved the same underlying act of driving, the mere act of driving is not made punishable by any statute. (*Id.* at pp. 607, 611.) The two distinct criminal acts were unlicensed driving and drunk driving. (*Id.* at p. 607) One violation was not a "'means' toward the other." (*Id.* at p. 609.)[6] The simultaneity of the offenses was "fortuitous" and did not reduce the defendant's culpability. (*Id.* at pp. 607-608.) It is "the *criminal* 'act or omission' to which section 654 refers." (*Id.* at p. 610, emphasis in original.) Likewise, "it is the *criminal* 'intent and objective' that [the Court] established as the test in *Neal*." (*Ibid.*, emphasis in original.) The *criminality* of the acts and their objectives were separate in *Hayes*. (*Id.* at p. 611.)

Interestingly, the dissenters in *Hayes* would have applied section 654, finding it dispositive that the two offenses shared the same essential element of driving. (*In re Hayes*, *supra*, 70 Cal.2d at pp. 611-617 ["there is no requirement that the act common to both crimes be punishable before

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[6] In *People v. Beamon* (1973) 8 Cal.3d 625, The Court subsequently stresses this part of the *Hayes* holding. "[N]either of the *Hayes* violations, although simultaneously committed, was a means toward the objective of the commission of the other. (*People v. Beamon*, *supra*, 8 Cal.3d at p. 639.)

section 654 comes into play."]; and see *In re Chapman*, *supra*, 43 Cal.2d 385, 389-390 [the multiple-punishment bar of section 654 applies where two offenses share one or more essential elements.].)

Hayes is distinguishable from appellant's case. Unlike in *Hayes*, in this case the concealment violation *was* "a means towards the objective of the commission of the other" offense. (See *People v. Beamon*, *supra*, 8 Cal.3d at p. 639.) Appellant intended to possess a weapon for protection. But, because appellant was an ex-felon who was prohibited from possessing such an item, logically, he needed to conceal it.

On this point, *People v. Britt* (2004) 32 Cal.4th 944, is instructive. Britt moved from one county to another and was convicted of two violations of section 290: failing to register his change of address with the county he left (Pen. Code, § 290, subd. (f)), and failing to register his address with the county into which he moved (Pen. Code, § 290, subd. (a).) (*Id.* at p. 949.) The Court of Appeal had concluded multiple punishment was permissible because Britt had two objectives: "(1) to mislead law enforcement and the residents of one community to believe that the sex offender remains there; and (2) to conceal from law enforcement and the residents of another community the fact that the sex offender is now residing in that community." (*Id.* at p. 953.) This Court reversed and held

that while Britt could be prosecuted for violating both subdivisions of the statute, he could not be punished for both violations. (*Id.* at p. 954.). The Court found Britt engaged in only one course of criminal conduct for purposes of section 654. Both offenses were necessary to achieve his single objective -"to prevent any law enforcement authority from learning of his current residence." (*Id.* at p. 952.) The Court recognized "[t]hese are separate, albeit closely related, requirements." (*Id.* at p. 951.) But "[s]ection 654 turns on the *defendant's* objective in violating both provisions, not the Legislature's purpose in enacting them." (*Id.* at p. 952, [italics in original].)

In *Britt*, this Court rejected the respondent's reliance on *Hayes*, *supra*, 70 Cal.2d 604, because "each failure to report *was* 'a means toward the objective of the other." (*People v. Britt*, *supra*, 32 Cal.4th at p. 953.) The same is true in this case.

Hayes is also distinguishable on a separate ground. In contrast to the Vehicle Code provisions at issue in *Hayes*, as previously noted in the Deadly Weapons Control Act, the Legislature has accounted for the defendant's status as a felon in possession of a weapon in related statutes by increasing punishment for the criminal act of illegal possession based on status. In this case, appellant was charged and convicted under Penal Code

section 12025, subdivision (b)(6), the unregistered-owner wobbler provision, instead of under subdivision (b)(4), the convicted-felon provision. (CT 8, 60.) But he received the same punishment as he would have received had he been charged under subdivision (b)(4). Had he been charged under the equally-applicable, alternate subdivision, it would be clearer that appellant suffers multiple punishment if sentenced under section 12021 and section 12025.

The same is true of the other count of conviction in this case. Appellant was charged and convicted under Penal Code section 12031, subdivision (a)(2)(F) (unregistered owner), instead of under subdivision (a)(2)(D) (ex-felon). (CT 9, 61.) Had he been charged under the alternate subdivision, it would be clear that appellant suffers multiple punishment if sentenced under section 12021, and section 12031.

As noted above, the prosecutor told the jury that it was not seeking to "pile on and add extra punishment" for three counts involving the same exact conduct. (RT 119.) Given this argument, and given the fact that the prosecutor did not express disagreement with the recommendation made in the probation report that section 654 should be applied to two of the three counts of conviction (see Opinion, p. 4), it is quite likely the prosecutor mistakenly charged the wrong subdivision. Otherwise his argument to the

jury would have been misleading. But in any event, unlike the statutes at issue in *Hayes,* the three statutes at issue here already take appellant's status as a felon into consideration.

Finally, it should be noted that *Hayes*, *supra*, 70 Cal.2d 604, provides no support for the Court of Appeal's conflation of criminal intent and legislative purpose in deciding whether to apply section 654. As noted in Chief Justice Traynor's dissent, the respondent made a similar argument in *Hayes*. (*In re Hayes, supra*, 70 Cal.2d at pp. 613-614.) But the *Hayes* majority did not adopt, or even mention, this argument. Nor could it have without disapproving *Neal* itself. A legislative-purpose exception to the *Neal* rule, as used by the Court of Appeal, would effectively swallow it. Again, this point was clearly made recently in *People v. Britt*, *supra*, 32 Cal.4th 944, 952: "Section 654 turns on the *defendant's* objective in violating both provisions, not the Legislature's purpose in enacting them." (Emphasis in original.)

G. Applying either *Neal* or *Bradford* to the Facts of this Case, the Sentence on Count Two Should Have Been Stayed

In this case, the court had before it uncontroverted evidence of appellant's intent and objective. Appellant told police officers that he purchased and carried the gun for protection. (RT 28.) Consistent with that purpose, the weapon was either in a residence or in the car he occupied

during the time he possessed it. And, as the Court of Appeal acknowledged, "Defendant did not use his gun to commit a nonpossessory crime." (Opinion, p. 6.) Because there was evidence of appellant's intent and objective before the court, the *Neal* "intent and objective" test should have been applied. Under *Neal*, the question was whether the appellant had a single intent and objective in committing the charged offenses. The answer to that question is, "yes" - self-protection. Thus, this single objective precludes multiple punishment.

The analysis does not change because possession of a firearm is viewed as a continuing offense. (*People v. Mesa* (2010) __ Cal.App.4th __ [D056280, July 13, 2010] 2010 DJDAR 10911; *People v. Spirlin* (2000) 81 Cal.App.4th 119, 130.) Crimes of a continuing nature, such as possession offenses, may at times present a challenge with respect to the application of section 654 because the defendant's intent and objective may change during the pendency of the crime. But that is not the case here. There was no evidence before the court that appellant's intent in possessing the gun changed during the time he had control over it. The only evidence before the court was that he had the gun in his possession for protection. Because the *Neal* "intent and objective" test was satisfied here, the court should have applied section 654 to stay the sentence on count two.

In addition to satisfying the *Neal* test, this case also meets the *Bradford* test. In *Bradford, supra*, 17 Cal.3d 8, an officer pulled the defendant over for a traffic violation. The defendant got out of his car, approached the officer, wrestled the officer's weapon away from him, and shot him. (*Id.* at p. 13.) After the defendant was convicted of, *inter alia*, assault with a deadly weapon upon a peace officer and possession of a firearm by a felon, the court imposed concurrent sentences for these offenses. (*Id.* at pp. 19, 22.) As noted above, in determining whether to apply section 654 to a section 12021 violation, this Court adopted the test used in *People v. Venegas, supra*, 10 Cal.App.3d 814:

> "'Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.'" (*People v. Bradford, supra*, 17 Cal.3d at p. 22 [citations omitted].)

The Court then concluded appellant's possession of the revolver "was not 'antecedent and separate' from his use of the revolver in assaulting the officer." (*Id.* at p. 22.) Imposition of sentence for the lesser crime --

ex-felon in possession of a gun, was therefore prohibited by section 654. (*Id.* at pp. 22-23.)

In this case, the appellate court rejected a theory of antecedent possession because the prosecutor did not argue appellant's guilt stemmed from possession of the gun three days before his arrest. (Opinion, p. 6.) Nevertheless, appellant anticipates respondent will argue, as was done in the appellate court, that possession in this case was antecedent and separate because appellant said he purchased the gun three days before it was found in the car. This position arguably finds support in a line of cases which hold that "if the evidence demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense, section 654 will bar a separate punishment for the possession of the weapon by an ex-felon." (See *People v. Ratcliffe* (1990) 223 Cal.App.3d 1401, 1412; see also *People v. Jones* (2002) 103 Cal.App.4th 1139, *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1565-1566.)

This line of authority narrowly reads *Bradford* to assert that application of section 654 should be limited to facts like those in *Bradford*, something the Court in *Bradford* never suggested. Had the Court intended application of section 654 only in the unusual circumstance where the ex-

felon fortuitously obtains possession of the weapon at the moment another offense is committed, the Court would have stated the rule differently. It would have been sufficient to say that section 654 barred multiple punishment for a section 12021 offense where the evidence showed antecedent possession alone. The Court need not have mentioned that the possession also had to be *separate from the primary offense*. The use of these words by the Court could not have been accidental, and the choice of phrasing makes sense.

Possession offenses are "instantaneous" crimes, in that they are complete as soon as the offender obtains possession of the controlled item. (See e.g., *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410.) But unlike most other instantaneous crimes, possession offenses are also "continuing" offenses in that each day brings "a renewal of the original crime or the repeated commission of new offenses." (*Wright v. Superior Court* (1997) 15 Cal.4th 521, 525-529, quoting *Toussie v. United States* (1970) 397 U.S. 112, 119 [90 S.Ct. 858].) All of appellant's conduct in these continuous crimes was incident to one basic objective, despite the fact that the jury *could have* convicted him based on acts that spanned three days. "'Neither clocks, calendars nor county boundaries convert one continuing course of conduct into a series of criminal acts.'" (*In re Hayes*,

supra, 70 Cal.2d at p. 609, fn. 8.)

At any rate, the jury could have just as likely convicted appellant based upon conduct occurring in a single day, as appellant told the officer he had just picked up the gun from his grandmother's house and that is why it was in the car. (RT 61.) This is, after all, the argument the prosecutor advanced. (RT 119.) Section 654 thus prohibits separate punishment for each crime.[7]

Appellant is not arguing that whenever an ex-felon violates section 12021 by unlawfully possessing a weapon, he or she gets to commit another crime without the threat of additional punishment. But multiple punishment is prohibited when the other offenses consist of "passive" conduct, such as the commission of other possessory crimes involving the same weapon. On the other hand, if a defendant actively uses the firearm, such as by discharging it, brandishing it, or using it to commit a crime of violence, then that conduct is separate from the act of possession. In such an event multiple punishment for the various offenses may be proper. Applying section 654 in this manner would not render section 12021 a nullity

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[7] And had appellant's car had been stopped by police immediately after he purchased the weapon from the man on the street, applying the rationale of the Court of Appeal, even under those circumstances, appellant would still be subject to multiple punishment because of the fact the gun was concealed.

whenever the ex-felon is convicted of another crime. But it would advance the purpose of section 654: insuring that the defendant's punishment is commensurate with his culpability. (*Neal*, *supra*, 55 Cal.2d at p. 20.)

Here, appellant possessed the gun in violation of several statutes, but did not actually *use* the gun to commit other crimes. Nor was his intent and objective different as between the statutes violated. Because all of his offenses were exclusively possessory, involving the same weapon, he should not suffer multiple punishment. The other two statutes at issue already accounted for appellant's status as a convicted felon by containing an enhanced sentence.

As shown above, section 654 applies under two of the tests delineated by this Court. Both *Neal* and *Bradford* were binding on the appellate court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Under either of those decisions count two should have been stayed.[8]

If the Court were to adopt the Court of Appeal's position, it would have to overrule not only *Neal*, but also *Bradford* and *Britt*. Instead, this

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[8] As long as section 654 applies under any one test, a contrary result under another test is irrelevant, and multiple punishment is barred. (*In re Hayes*, *supra*, 70 Cal.2d at p. 606, fn.1.)

Court should disapprove *Harrison*, *supra*, 1 Cal.App.3d 115, which ignores the plain meaning of section 654 and fails to follow the intent and objective tests set forth in *Neal*.

Seventeen years ago in *People v. Latimer*, *supra*, 5 Cal.4th 1203, the Court considered the on-going validity of *Neal*, which was at that time 30-year-old precedent, and decided to uphold it. This Court has recognized that it should not lightly set aside its own well-established precedent. (*Sierra Club v. San Joaquin Local Agency Formation Com*. (1999) 21 Cal.4th 489, 503.) Now *Neal* has been precedent for nearly 50 years, and *Bradford* has been on the books for 34 years. "At this time, it is impossible to determine whether, or how, statutory law might have developed differently had this court's interpretation of section 654 been different." (*People v. Latimer*, *supra*, 5 Cal.4th at p. 504.) It is now up to the Legislature to make such changes. (*Id*. at p. 1216.)

G. Should This Court Fashion A New Rule For Penal Code Section 654 Focusing On Legislative Purpose, It Should Not Be Applied Retroactively to Appellant.

If this Court decides to adopt a new "statutory-purpose" test for the application of Penal Code section 654, it should not be applied to appellant. "'If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the

conduct in issue," it must not be given retroactive effect.'" (*People v. King* (1993) 5 Cal.4th 59, 79-80, quoting *Bouie v. City of Columbia* (1964) 378 U.S. 347, 354 [84 S.Ct. 1697, 1702-1703, 12 L.Ed.2d 894].) To do so would violate due process. (*U.S. v. Lanier* (1997) 520 U.S. 259, 266].) A "statutory-purpose" test for interpreting section 654 would be both unexpected and unforeseeable because it is not only completely at odds with *Neal*, but also with the legislative purpose of section 654 itself- to ensure the defendant's punishment is commensurate with his culpability. Due process requires appellant's case be considered in light of this Court's precedent at the time.

CONCLUSION

The reasoning of the appellate court in the case, as well as that of the *Harrison* court confuses the perpetrator's intent, which is the inquiry under *Neal*, with the intent of the Legislature in enacting the laws. In effect, the Court of Appeal tried to judicially amend the statute and ignored the principles enunciated by this Court in *Neal* and *Bradford*. Therefore, the decision of the Court of Appeal for the Third Appellate District should be reversed to the extent that it upheld concurrent sentences on counts one and two.

Dated: July 16, 2010

Respectfully Submitted,

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CERTIFICATE OF LENGTH

I, Sandra Uribe, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is **7986** words, excluding the tables, this certificate, and any attachment permitted under rule 8.360(b)(1). This brief therefore complies with the rule which limits a computer-generated brief to 25,500 words. This document was prepared in Word Perfect, and this is the word count generated by the program for this document.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Sacramento, California, on July 16, 2010.

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DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my business address is 2407 J Street, Suite 301, Sacramento, CA 95816.

On July 16, 2010, I served the attached

APPELLANT'S OPENING BRIEF ON THE MERITS

by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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