

**In the Supreme Court of the State of California**

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

**v.**

**MAURICE DION SANDERS,**

**Defendant and Appellant.**

Case No. S191341

SUPREME COURT  
FILED

SEP 27 2011

Frederick K. Union Clerk

Fifth Appellate District, Case No. BF126309A  
Kern County Superior Court, Case No. F059287  
The Honorable Michael E. Dellostritto, Judge

Deputy

**PETITIONER'S REPLY BRIEF ON THE MERITS**

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**I. BECAUSE IT IS IMPOSSIBLE TO COMMIT A VIOLATION OF PENAL CODE SECTION 12021.1 WITHOUT ALSO COMMITTING A VIOLATION OF SECTION 12021, THE LATTER IS A LESSER INCLUDED OFFENSE**

Appellant asserts that petitioner's analysis of the lesser included offense issue "appears to be correct as far as it goes." He argues, however, that petitioner's analysis does not apply to the specific facts of the instant case. Appellant maintains that Penal Code section 12021, subdivision (a)(1)<sup>1</sup> is the greater offense because, by definition, it includes all of the enumerated felonies in section 12021.1, subdivision (a). (AB<sup>2</sup> 2.)

This Court's recent decision in *People v. Milward* (2011) 52 Cal.4th 580, 257 P.3d 748, 752, supports petitioner's analysis of this issue. There the Court reiterated that ". . . a crime is a lesser offense necessarily included within a greater crime *only if it is impossible to commit the greater crime without also committing the lesser.*" (*Ibid.*, emphasis added.) It is impossible to violate section 12021.1, subdivision (a), without also violating section 12021, subdivision (a)(1). The following examples buttress this conclusion.

If an individual has been convicted of any of the violent offenses listed in subdivision (b) of section 12021.1, such as murder, mayhem, rape, sodomy by force, or attempted murder, and the individual possesses a firearm, all of the elements of section 12021, subdivision (a)(1), are satisfied. The reverse is not true. If one previously suffered a conviction for a nonviolent felony, such as embezzlement or possession for sale of a controlled substance, and the individual possesses a firearm, the elements

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<sup>1</sup> Hereafter, all statutory references are to the Penal Code, unless otherwise indicated.

<sup>2</sup> "AB" refers to appellant's answering brief on the merits, which is mistitled as "Appellant's Reply Brief on the Merits."

of section 12021.1, subdivision (a), would not be met because these nonviolent offenses are not included in section 12021.1, subdivision (b). Likewise, here, where appellant suffered prior convictions for kidnapping (§ 207) and assault with a firearm (§ 245, subd. (a)(2)) (1 CT 293; 4 RT 587-588)—both violent felonies under section 12021.1, subdivision (b)—he could be convicted under either section 12021.1, subdivision (a), or section 12021, subdivision (a)(1), for his possession of two shotguns. However, absent suffering a violent felony conviction, appellant could not be convicted under section 12021.1, subdivision (a).

For these reasons, section 12020, subdivision (a)(1) is a lesser included offense of section 12021.1, subdivision (a).

## **II. THE TRIAL COURT PROPERLY SENTENCED APPELLANT TO CONCURRENT TERMS FOR HIS SIMULTANEOUS POSSESSION OF TWO FIREARMS**

Appellant relies on *People v. Hall* (2000) 83 Cal.App.4th 1084 (*Hall*), to support his argument that the Court of Appeal correctly decided that imposition of sentence on count three should have been stayed pursuant to section 654. (AB 5-6.) In *Hall*, the court held that a violation of section 417, subdivision (c) (brandishing a firearm at a peace officer), did not fall within the multiple-victim exception to section 654 because the crime does not constitute an act of violence committed “with the intent to harm more than one person or by a means likely to cause harm to several persons.” (*Id.* at p. 1095, quoting *Neal v. State* (1960) 55 Cal.2d 11, 20.)

In this case, petitioner is not relying on the multiple victim exception to section 654 as support for the trial court’s imposition of concurrent terms for appellant’s simultaneous possession of two firearms. Because this case does not involve multiple victims, the reasoning of *Hall* is inapplicable. Rather, petitioner relies on the express language of section 654 and the Legislature’s 1994 amendment to section 12001, subdivisions (k) and (l), as

support for petitioner's argument that each violation of section 12021.1 constitutes a distinct and separate offense supporting separate punishment for each additional firearm illegally possessed by a felon.

By enacting section 654, the Legislature recognized that there could be instances where the same prohibited conduct violated more than one code section, and in those cases, the individual should only be subject to one punishment. Section 654 therefore addressed a concern that an "act or omission" that gives rise to liability under different provisions of law would subject an individual to additional punishment for the same prohibited conduct. (See *People v. Harrison* (1989) 48 Cal.3d 321, 335 ["The statute itself literally applies only where [double] punishment arises out of multiple statutory violations produced by the 'same act or omission.' [Citation.]".]) That same concern does not exist when a person is properly convicted of multiple violations of the same provision of law.

When a person repeatedly violates the same provision of law, he has, by definition, committed separate acts. (See *People v. Trotter* (1992) 7 Cal.App.4th 363, 368 [consecutive punishment proper for each shot fired at pursuing police officer].) In *People v. Perez* (1979) 23 Cal.3d 545 (*Perez*), the defendant committed a series of sexual acts on the victim during a single course of conduct. The trial court stayed imposition of multiple punishment for several criminal acts after finding the defendant's sole intent and objective was to obtain sexual gratification. (*Id.* at p. 549-550.) This Court reversed, reasoning that

[s]uch an intent and objective is much too broad and amorphous to determine the applicability of section 654. Assertion of a sole intent and objective to achieve sexual gratification is akin to an assertion of a desire for wealth as the sole intent and objective in committing a series of separate thefts. To accept such a broad, overriding intent and objective to preclude punishment for otherwise clearly separate offenses would violate the statute's purpose to insure that a defendant's punishment will be

commensurate with his culpability. [Citation.] It would reward the defendant who has the greater criminal ambition with a lesser punishment.

(*Id.* at p. 552.) Consequently, section 654 should not apply to multiple valid convictions of the same provision of law.

The Legislature has determined that each firearm a felon possesses is a separate violation of the Penal Code. (§ 12001, subds. (k) & (l).) Appellant's illegal act of possessing two firearms should not be minimized by applying section 654 to his case. Clearly a convicted felon in possession of multiple firearms is more dangerous and has engaged in more egregious conduct than a convicted felon in possession of a single firearm. To achieve section 654's goal of ensuring that appellant's punishment is commensurate with his culpability, appellant should be separately punished for each violation of section 12021.1, subdivision (a).

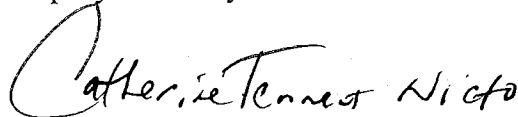
For these reasons, the trial court properly sentenced appellant to concurrent terms for illegally possessing two firearms.

**CONCLUSION**

Accordingly, petitioner respectfully requests that the Court of Appeal's judgment be reversed.

Dated: September 26, 2011      Respectfully submitted,

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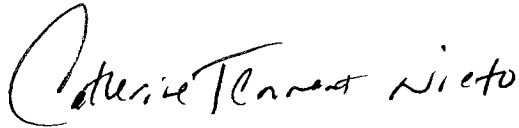


**CERTIFICATE OF COMPLIANCE**

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 1,153 words.

Dated: September 26, 2011

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink that reads "Catherine Tennant Nieto". The signature is written in a cursive style with a large initial "C".

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**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **People v. Sanders**

No.: **S191341**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On September 26, 2011, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 26, 2011, at Sacramento, California.

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Declarant