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November 23, 2010

Frederick K. Ohlrich
Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *The People of the State of California v. Victor Correa.*, Case Number S163273

Dear Mr. Ohlrich:

On October 13, 2010, this Court asked counsel to brief three specified questions regarding the continued application of the current interpretation of the reach of Penal Code[1] section 654.

Respondent, in its *Supplemental Letter Brief* of November 12, 2010, asserts that the answer to the first two of these questions is "No," and to the third it is "Yes." Not surprisingly, appellant finds that the opposite response is far more compelling. And, as to the third question, appellant adds, but if the answer is yes, and this Court adopts a change in the interpretation of section 654, then that change cannot apply to appellant.

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1 All references are to this Code unless otherwise noted.

A. *The Court's First Question*

Appellant's response to this first question also provides the background to appellant's response to the second and third questions. Support for each response is found in a compelling source, the Legislative history of section 654.

We begin in 1872, when Penal Code section 654 was enacted. "It is axiomatic that in assessing the import of a statute, we must concern ourselves with the Legislature's purpose at the time of the enactment. (See *People v. Harvey* (1980) 112 Cal.App.3d 132, 138-139 [169 Cal.Rptr. 153].)" (*In re Pedro T.* (1994) 8 Cal.4th 1041, 1048.)

In 1872 the section provided in pertinent part:

> An *act or omission* which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; .... (Emphasis added.)

The task before this Court is easily stated, what is meant by "act or omission" and "provisions" within the meaning of section 654? When a phrase is accorded a particular meaning in one part of a law, it should be accorded the same meaning in other parts of the same law. (California Teachers Assn. v. Governing Bd. Of Rialto Unified Sch. Dist. (1997) 14 Cal.4th 627, 643; see also Dept. of Revenue v. ACF Industries, Inc. (1994) 510 U.S. 332, 342 [114 S.Ct. 843, 127 L.Ed.2d 165] ["'normal rule of statutory construction' [is] that '" identical words used in different parts of the same act are intended to have the same meaning,'"" (citations)].)

In 1872, section 656 was also enacted and used these terms that are the objects of this Court's questions. Section 656 provided:

> Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, Government, or country, founded upon the *act or omission* in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense. (Emphasis added.)

In the Commissioners' Notes to the Penal Code of 1872, is the following notation, with original emphasis:

> This section is intended to apply in cases where the foreign acquittal or conviction took place in respect to the particular *act or omission* charged against the accused upon the trial in this State, and is not restricted to cases where the accused was tried abroad under the same *charge*. (The Penal Code, *Annotated by* Creed Haymond and John C. Burch, of the California Code Commission (1872 1st Ed.), p. 241.)

Thus, the phrase "act or omission" in section 654, as that in section 656, is meant to identify the action to be punished regardless of how it may be labeled or what statute it might fall into. Therefore, the effect of "provision" in section 654 should not be limited solely to disparate substantive offenses but it should be interpreted to apply to any provision from which a punishment may emanate.

The provisions of section 654 that are the focus of the Court's questions have undergone miniscule change in the 138 year history of the application of the section. In 1976 the section was amended, but made no substantive changes to the pertinent part of the section under scrutiny here.[2] That part remained:

> An *act or omission* which is made punishable in different ways by different *provisions* of this code may be punished under either of such provisions, but in no case can it be punished under more than one; .... [Emphasis added.] (Stats. 1976, c. 1139, p. 5137, § 264.)

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[2] A single non-substantive change un-capitalized the word "code."

In 1977 the section underwent another amendment, but with no change to the provisions that are the focus here. In pertinent part it provided:

> An *act or omission* which is made punishable in different ways by different *provisions* of this code may be punished under either of such provisions, but in no case can it be punished under more than one; ... [Emphasis added.] (Stats. 1977, c. 165, p. 644, § 11.)

In 1997, the section underwent its final change. It now provides in pertinent part:

> (a) 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. [Emphasis added.] (Stats. 1997, c. 410 (S.B. 914), p. 95, § 1.)

This amendment reflects a Legislative recognition that criminal sanctions can be found in codes in addition to the Penal Code[3] and a legislative will to impose the longest sentence of the applicable provisions.

Over the 88 years since the section's passage and this Court's decision in *Neal v. State of California* (1960) 55 Cal.2d 11, California's courts, as evidenced by their decisions, have routinely been focused on the "act or omission" and not on whether the provisions were the same or not in deciding whether a defendant could suffer multiple punishments. (See, e.g., *People v. Shotwell* (1865) 27 Cal. 394, 400 [wherein the court observed, "'setting up a gaming table, it has been said, may be an entire offense; keeping a gaming table and inducing others to bet upon it, may also constitute a distinct offense; for either,

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[3] For example, in 1872 there was no Vehicle Code, Welfare and Institutions Code, etc.

unconnected with the other, an indictment will lie. Yet, when both are perpetrated by the same person, at the same time, they constitute but one offense, for which one count is sufficient, and for which but one penalty can be inflicted' [citation omitted];" *People v. Clemett* (1929) 208 Cal. 142 [improper to convict defendant of two counts of the same act relating to stills and other devices for the manufacture or production of intoxicating liquor for beverage purposes where one count was premised upon possession of the still and the other upon operating the still]; *People v. Nor Woods* (1951) 37 Cal.2d 584, 586-587 [both the car and the money were taken at the same time as part of a single transaction whereby the defendant defrauded the victim of the purchase price of car]; *People v. Roberts* (1953) 40 Cal.2d 483, 491 [the defendant transported, furnished, and possessed heroin, each a violation of section 11500 of the Health and Safety Code; the three acts are charged and adjudged as separate crimes; however, "'co-operative acts constituting but one offense when committed by the same person at the same time, when combined, charge but one crime and but one punishment can be inflicted'" [citation omitted].)

As noted in this Court's order for supplemental briefing, three of the above authorities were cited by this Court in *Neal v. State of California* (*Roberts, Clemett, and Nor Woods*) in footnote 1. In *Neal* the Court was addressing the petitioner's convictions for arson and attempted murder the result of him throwing gasoline into the bedroom of the victims and igniting it. Of course, arson and attempted murder did not involve the same offense. But, the Court was focused on the *act*: "'It is the singleness of the act and not of the offense that is determinative.'" Citing *People v. Knowles* 35 Cal.2d 175, 187. (*Neal v. State of California, supra,* at p. 19.) This statement was made in the

context of footnote 1 in *Neal* now under scrutiny here. That footnote provided:

> FN1 Although section 654 does not expressly preclude double punishment when an act gives rise to more than one violation of the same Penal Code section or to multiple violations of the criminal provisions of other codes, it is settled that the basic principle it enunciates precludes double punishment in such cases also. People v. Brown, 49 Cal.2d 577, 591, 320 P.2d 5; see People v. Roberts, 40 Cal.2d 483, 491, 254 P.2d 501; People v. Clemett, 208 Cal. 142, 144, 280 P. 681; People v. Nor Woods, 37 Cal.2d 584, 586, 233 P.2d 897.

It can thus be seen, that even though this footnote was not determinative of the outcome in *Neal*, it did provide an accurate summary of the focus of reviewing courts since the inception of section 654: it is the "act or omission" and not on whether the provisions were the same or not that determines whether a defendant could suffer multiple punishments. In short, the authority cited in this footnote supports the "the basic principle in such cases.[4]"

B. *The Court's Second And Third Questions*

Since this Court's decision in *Neal v. State of California*, California's courts have maintained that the focus on the "act or omission" of the defendant is essential to resolution of the applicability of section 654. The following cases illustrate applications of this approach where it has been found that section 654 applies in instances of multiple convictions for the same offense. (See, e.g., *People v. Kenefick* (2009) 170 Cal.App.4th 114, 125 [multiple counts of forgery with a single victim]; *People v. Davey* (2005) 133 Cal.App.4th 384, 390-

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[4] *People v. Brown* (1958) 49 Cal.2d 577, cited in the footnote, bore facts (a conviction of abortion resulting in the death of a woman and the murder of that woman) analogous to those in *Neal*.

391 [multiple counts of indecent exposure the result of a single act, but multiple victims]; *People v. Hall* (2000) 83 Cal.App.4th 1084 [multiple counts of exhibiting a firearm in the presence of peace officers the result of a single act]; *People v. Hooker* (1967) 254 Cal.App.2d 878, 880 [shoplifting a number of items is only one kind of crime, hence, only one punishable theft]; *People v. Wasley* (1966) 245 Cal.App.2d 383, 386-387 ["If possession of the two weapons were but a single 'course of conduct', the double punishment proscription would apply"]; *Witkin, California Criminal Law* (3d ed. 2000), *Punishment*, § 171, p. 241 and supplement thereto, citing *In* re Johnson (1966) 65 Cal.2d 393 [involving a conviction of two counts of sales of heroin, both occurring within two hours, to the same undercover agent. The agent told defendant he wanted to try the stuff out, so five spoons were delivered shortly after 9 p.m., and five more at 11 p.m., after the agent had tested it. Held, the two acts of delivery were substantially contemporaneous, and there was only one punishable offense]; *In re Adams* (1975) 14 Cal.3d 629, 635 ["the principal inquiry is whether defendant entertained a single criminal objective or multiple criminal objectives. Here, defendant simultaneously transported a variety of illegal drugs with the single intent and objective of delivering them to G. "[I]t would be unreasonable to fragment that single objective into five separate objectives, namely, to transport benzedrine, to transport heroin, to transport seconal, etc. Instead, the entire transaction should reasonably be viewed as constituting an indivisible course of conduct analogous to the theft of several articles of personal property which," ... results in the commission of a single punishable offense].)

As recently as last year, this Court in *People v. Rodriguez* (2009) 47 Cal.4th 501, 507 reaffirmed, "Whether *a course of criminal conduct* is

divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor."

Focus on the acts or omissions of the actor that make up a course of criminal conduct does not mean that all repeated offenses are treated the same. Those acts committed at significantly different times are not governed by section 654. (See e.g., *People v. Von Latta* (1968) 258 Cal.App.2d 329, 339 ["defendant possessed marijuana in his garage in the morning, then later in the day had marijuana in a neighboring town in the same county. *Held*, this constituted two distinct acts of possession at different times and places, and separate convictions were proper"]; *In re Noelle M.* (2008) 169 Cal.App.4th 193, 195 [five counts of sale of methadone to five separate persons during course of football game did not constitute indivisible transaction; consecutive sentences were proper]; *People v. Davis* (2002) 102 Cal.App.4th 377, 381 [sex offender registration law, occurs each time person who is required to register enters jurisdiction and fails to register].)

So too, repeated violations of the same sex offense with the same victim, even though occurring in a single event, are of a different kin because of the significant impact each offense has on the victim. (*People v. Harrison* (1989) 48 Cal.3d 321, 332 ["Multiple violations ... are no less separate or offensive when they occur in sequence than when they are punctuated by violations of other statutes"].) Also illustrative are cases where injury has been inflicted to a victim. (See, e.g., *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1474 [defendant may receive multiple convictions for corporal injury to cohabitant where convictions are based on multiple injuries, even though they are inflicted during single course of conduct].)

From the above it can be seen that over the course of 138 years of application of section 654, reviewing courts have ably sorted out a methodology for resolving when section 654 should apply and when section 654 not apply. The legislative history of section 654 supports the view that the Legislature too has concluded that the *Neal* Court's interpretation of the statute accurately reflects the Legislature's intent.

"The goal of statutory construction is to ascertain and effectuate the intent of the Legislature. [Citations]" ... "When the language is susceptible of more than one reasonable interpretation, ... we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." [Citations] (*People v. Jefferson* (1999) 21 Cal.4th 86, 94.)

The Legislature is deemed to be aware of existing law and judicial decisions. (*People v. Cruz* (1996) 13 Cal.4th 764, 775 [We presume that the legislators were aware of the law of burglary in enacting section 1192.7(c)(18), and of judicial decisions interpreting the language they chose to employ]; *In re Harris* (1989) 49 Cal.3d 131, 136 [Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source]; *People v. Overstreet* (1986) 42 Cal.3d 891, 897 [In addition, the Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them.])

Thus, the Legislature is deemed to be aware of this Court's decision and interpretation of section 654 in 1960 in *Neal v. State of*

California, supra and the 88 year history of relevant case law that preceded the judicial decision in *Neal v. State of California.*

As discussed in Part A, above, the Legislature made changes to the section in 1976, 1977, and 1997. Again, they are deemed aware of the consistent application of footnote 1 in *Neal* by the reviewing courts of this state. Had the Legislature not been content with the scope of section 654 as defined by statute and the interpretation of the section by the courts of this state, they surely would have addressed the issue when they made the changes that they did in 1976, 1977, and 1997. But they did not. They left the applicable portion of the section exactly the way it had always been.

Respondent has not addressed this issue. Respondent has reached their position by ignoring the 138 year history of the application of section 654. Respondent has offered not a single reason why this course should now be changed. Respondent has not suggested why after 138 years of experience by this state's reviewing courts resolving whether a *course of criminal conduct* is divisible should now arbitrarily exclude from consideration those cases where there are multiple violations of the same statutory provisions.

The purpose of section 654 is to ensure that a defendant's punishment will be commensurate with his culpability. (*People v. Kramer* (2002) 29 Cal.4th 720, 723.) Whether a course of conduct is a divisible transaction depends on the intent and objective of the actor and the determination of whether there was more than one objective is a factual one. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

In Mr. Correa's case, there is no evidence that possession of the firearms was incident to but a single objective.

C. *A Sentence For One Count Will Provide Appellant A Sentence Of 25 Years To Life*

Respondent expresses concern that abandoning the 138-year interpretation of section 654 to exclude cases like that of appellant will not ensure that appellant's punishment will be commensurate with his culpability. (Resp. Sup. Letter Brief, p. 11.) Should appellant's position prevail, his sentence will likely be reduced to a sentence of 25 years to life; a sentence so severe that it is prescribed for first degree murder. Respondent does not explain how such a sentence could not possibly be commensurate with appellant's culpability.

After a remand for resentencing, appellant's punishment will be commensurate with his culpability.[5]

D. *A New Limitation Upon The Application Of Section 654 Cannot Be Applied To Appellant*

If the penumbra of section 654 is now reduced after 138 years of application by this states' courts, any reduction in the protection of section 654 cannot be applied to appellant. Such an application to appellant's case would violate his federal and state constitutional rights of due process.

A criminal statute enacted with a retroactive application is invalid as an ex post facto law if it punishes an act innocent when done, or increases the punishment, or takes away a defense related to an element of the crime or an excuse or justification for the conduct, or alters the rules of evidence so that a conviction may be obtained on less or different testimony than was required when the crime was

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[5] Appellant was sentenced to state prison for 200 years to life—25 years to life for each of the eight counts for which he had been found guilty, each to be served consecutively to the others. (CT 273-274.)

committed. (See *Beazell v. Ohio* (1925) 269 U.S. 167 [70 L.Ed. 216, 46 S.Ct. 68]; *Collins v. Youngblood* (1990) 497 U.S. 37 [111 L.Ed.2d 30, 110 S.Ct. 2715]; *People v. Frazer* (1999) 21 Cal.4th 737.) Ex post facto laws are prohibited by the federal Constitution (Art. I, §§ 9, 10) and the California Constitution (Art. I, § 9). (Witkin, *California Criminal Law 1, Nature of Criminal Law*, (3rd ed. 2000) § 10, p. 21.) "The California ex post facto provision affords the same protection as the federal provision." (*Id.* at p. 23.)

However, where the courts make such a change in the law, the Due Process Clause of the Fifth Amendment has been violated.

> The Ex Post Facto Clause is a limitation upon the powers of the legislature... and does not of its own force apply to the Judicial Branch of government.... But the principle on which the clause is based the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutional liberty.... As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment. [Citations omitted.] (*Marks v. United States* (1977) 430 U.S. 188, 191-192 [51 L.Ed.2d 260, 97 S.Ct. 990]; accord *Clark v. Brown, supra*, 442 F.3d 708, 721-722.)

> "(A)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, s 10, of the Constitution forbids. . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction." (*Marks v. United States, supra*, at p. 192.)

In Parts *A* and *B*, above, and incorporated here, for 138 years section 654 has been interpreted to apply to multiple convictions of the same provision of the law. If that interpretation is now changed, such

a change in the law has increased the punishment for the acts appellant has been convicted of committing and removed a defense to multiple punishment. As a result, its first application to appellant is proscribed by the Due Process Clause of the Fifth Amendment. (See *Beazell v. Ohio, supra,* 269 U.S. 167; *Marks v. United States, supra,* 430 U.S. 188, 191-192; *People v. Welch* (1993) 5 Cal.4th 228, 237-238.)

E. *Conclusion*

For the foregoing reasons, appellant's sentence should be reversed and the case remanded for sentencing.

Dated: November 23, 2010.

Sincerely,

Conrad Petermann

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CASE NUMBER: S163273

DECLARATION OF SERVICE

I, undersigned, say: I am a citizen of the United States, a resident of Ventura County, over 18 years of age, not a party to this action and with the above business address.

On the date executed below, I served the *Appellant's Supplemental Letter Brief* by depositing a copy thereof in a sealed envelope, postage thereon fully prepaid, in the United States Mail at Ojai, California. Said copies were addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 23, 2010, at Ojai, California.

Conrad Petermann
Attorney for Appellant