SUPREME COURT NO. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner and Respondent, v. TORY J. CORPENING, Defendant and Appellant.	Court of Appeal No. D064986 Court Case No. SCS258343

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO COUNTY

Honorable Francis M. Devaney, Judge;
Honorable Kathleen M. Lewis, Judge

APPELLANT'S PETITION FOR REVIEW FROM THE UNPUBLISHED OPINION OF DIVISION ONE OF THE FOURTH DISTRICT COURT OF APPEAL PER JUSTICE HUFFMAN FILED ON JUNE 24, 2015

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By appointment of the Court of Appeal under the Appellate Defenders, Inc. independent case program.

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SUPREME COURT NO. _____

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Pursuant to Rules 8.500 subdivision (b)(1) of the California Rules of Court, appellant Torry J. Corpening ("petitioner") respectfully petitions for review of the opinion of the California Court of Appeal, Fourth Appellate District, Division One, filed June 24, 2015, and not certified for publication. A copy of that opinion is attached hereto as Appendix A.

Petitioner requests this Court grant review to resolve a split of authority and clarify the law on three related issues: (1) whether a forceful taking of a van in order to obtain its contents involves a single act or a course of conduct for purposes of Penal Code section 654; (2) whether taking a van in order to obtain the coins contained in its trunk involves a separate objective from taking the coins themselves; and (3) whether deferential review applies or whether it is a question of law.

ISSUES PRESENTED FOR REVIEW

I. Where an assailant uses force to take a van and the valuable coins held in the van's trunk, is the use of force to acquire possession of the van and its content a single act or a course of conduct for

purposes of Penal Code section 654 with respect to separate convictions of carjacking and robbery?

II. If it is a course of conduct, where the assailant takes the van in order to asport the coins contained in its trunk, is using the van to "escape" with the coins incidental to the primary objective of taking the coins themselves?

III. Where the facts of the incident are undisputed, is the application of Penal Code section 654 principals to those facts a question of law subject to de novo review?

NECESSITY FOR REVIEW

Petitioner seeks review pursuant to rule 8.500 (b)(1) to clarify the law regarding Penal Code[1] section 654 as it applies to forceful takings of vehicles and their contents and to resolve splits of authority on the issues raised. The Court of Appeal's opinion reflects a radical departure from prior precedent (§§ 215, 654; *People v. Jones* (2012) 54 Cal.4th 350 (*Jones*); *People v. Mesa* (2012) 54 Cal.4th 191 (*Mesa*)) and

[1] All further statutory references are to the Penal Code unless otherwise specified.

embodies a split of authority with other Courts of Appeal (*People v. Dowdell* (2014) 227 Cal.App.4th 1388 (*Dowdell*); *People v. Martin* (2005) 133 Cal.App.4th 776 (*Martin*); *People v. Dominguez* (1995) 38 Cal.App.4th 410 (*Dominguez*)).

STATEMENT OF THE CASE

Petitioner plead guilty to all charged counts without a plea agreement or any indicated sentence by the trial court. (RT 2; CT 11-14.)[2] The counts included Count 1, carjacking (§ 215, subd. (a)), Count 2, robbery (§ 211), Count 3, assault with a deadly weapon (§ 245, subd. (a)(1)) and Count 4, possession of stolen property (§ 496, subd. (a))[3]. The trial court sentenced petitioner to the midterm of five years on

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[2] References to the record are as follows: RT means Reporter's Transcript; CT means Clerk's Transcript; AAOB means Appellant's Amended Opening Brief; RB means Respondent's Brief; ARB means Appellant's Reply Brief; 10/14 Opn. means the original unpublished opinion dated October 21, 2014; RP means Appellant's Petition for Rehearing; Opn. means the post-transfer unpublished opinion dated June 24, 2015.

[3] Petitioner was also charged with witness intimidation for an incident occurring while in custody that is not relevant to this petition.

Count 1 (carjacking) and a consecutive sentence of one year on Count 2 (robbery). (4 RT 839; CT 163, 218; Opn. 2.)

Petitioner appealed his sentence, arguing Count 2 (robbery) should have been stayed pursuant to section 654 based on the conviction in Count 1 (carjacking). The Court of Appeal affirmed that portion of the sentence in an unpublished opinion filed on October 21, 2014. (10/14 Opn.) On December 3, 2014, petitioner filed a Petition for Review (CSC No. S222900), asking the matter be transferred to the Court of Appeal to address petitioner's argument that a single criminal act formed the basis of both the robbery and carjacking and to apply the holding in *Jones, supra,* 54 Cal.4th 350. This court ordered a transfer on February 11, 2015. Petitioner and respondent submitted additional briefing and presented oral argument. On June 24, 2015, a new opinion issued, again affirming the sentence.

STATEMENT OF FACTS

This case involved a classic heist-style robbery. There was evidence that petitioner brought several co-defendants together to

steal valuable coins from a rare-coin dealer, Walter Schmidt, Sr.[4] (Opn. 6.) Petitioner and co-defendant Arturo Guerra were aware of Schmidt Sr.'s coins because they had sold goods at a local swap meet where Schmidt Sr. would operate a stall. (Opn. 6.) Petitioner played a support role during the robbery itself (surveillance and making the order to begin the carjacking), while co-defendant Danny Molestina committed the actual taking. (Opn. 3, 6-7.)

On July 22, 2012, at approximately 5:50 a.m., Schmidt Sr. and his son were at their residence loading Schmidt Sr.'s van with the coins. (Opn. 3.) Schmidt's son had gone to lock the residence while Schmidt sat in the driver's seat with the van running. (Opn. 3.) Molestina approached Schmidt, pointed a gun at him, and demanded that Schmidt get out of the car. (Opn. 3.) Schmidt exited the van, but as Molestina attempted to enter the van, Schmidt tried to wrestle the gun from Molestina's hand. (Opn. 3-4.) Molestina pointed the gun in Schmidt's face and Schmidt backed off. (Opn. 4.) Molestina entered

[4] Petitioner denied being the leader and claimed co-defendant Danny Molestina called the shots. (CT 54.)

the van and Schmidt lunged for the gun again. (Opn. 4.) This time, Molestina placed the van in gear and quickly reversed. (Opn. 4.) Schmidt Sr. grabbed onto the steering wheel and was dragged approximately 18 feet down the driveway before losing his grip and falling to the pavement. (Opn. 4.)

Molestina stopped the van about 50 yards from the residence to pick up another co-defendant. (Opn. 4.) Another car, driven by co-defendant Jorge Aguila, followed the van. (Opn. 4.) They drove to another area where Molestina, Guerra, petitioner and Aguila began unloading the coins from the van into the car. (Opn. 4.) Officers intervened, and Aguila and Molestina were arrested. (Opn. 4.) Petitioner and Guerra escaped and managed to sell some of the coins before being arrested later. (Opn. 7-8.)

APPELLATE HISTORY

Petitioner argued below that the trial court erred in not staying his robbery sentence pursuant to section 215, subdivision (c) and section 654. Petitioner asserted that there was a single criminal act by Molestina, a forceful taking of a van and its contents that could be

punished only once. (AAOB 7.) Respondent contended that separate punishment was warranted because there was substantial evidence to support a finding that Molestina harbored separate objectives in taking the van and taking the coins, citing *Neal v. California* (1960) 55 Cal.2d 11 (*Neal*). (RB 5.) In reply, petitioner pointed out that the *Neal* objective and intent test only applies where there are multiple acts creating a single indivisible transaction, but where there is a single act, intents and objectives are irrelevant.[5] (ARB 2-9.) Because there was only one criminal act- a taking by force- that accomplished both the taking of the van and the taking of the coins, section 654 required that the robbery conviction be stayed. (ARB 2-9.)

The Court of Appeal initially applied the *Neal* test and held that there were distinct objectives without considering whether there were multiple acts. (10/21/14 Opn.) This court transferred the matter to

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[5] Petitioner also pointed out in oral argument that the "separate" objectives relied on by respondent were not separate for purposes of section 654 because taking the van was the means to accomplish the ultimate goal of taking the coins, citing *Dowdell, supra,* 227 Cal.App.4th at pp. 1415-1416 which discusses the distinction between incidental versus primary goals. This argument is addressed in Issue II, below.

consider whether there was a single act per *People v. Jones*. After transfer, the Court of Appeal concluded there was not a single act because:

> Twice the victim tried to disarm the robber, was forced away and ultimately dragged some distance when he tried to hold onto the steering wheel. It took several discrete physical acts to complete these crimes.

(Opn. 12.)

The Court of Appeal referred to this as a "course of conduct" and held it distinguished petitioner's case from *Jones*, which "dealt with the single act of possessing a firearm, which violated several penal code sections." (Opn. 11.) The court again held that there was substantial evidence of separate intents to take the coins and escape from the crime scene. (Opn. 10.)

Petitioner contends that the Court of Appeal erred in several related manners in reaching this holding and that these errors warrant review as an important issue of state law.

ARGUMENT

I.

THE OPINION DEMONSTRATES THE NEED FOR FURTHER CLARIFICATION REGARDING THE DISTINCTION BETWEEN A SINGLE ACT AND A COURSE OF CONDUCT FOR PURPOSES OF PENAL CODE SECTION 654.

Petitioner contends the Court of Appeal's interpretation of what constitutes an act for purposes of section 654 is legally incorrect and lead to an improper application of the law set forth in *People v. Jones, supra*. As such, petitioner requests review to clarify how *Jones* should be applied.

In *Jones* this court reiterated that there is a difference in analysis between a single act that violates multiple statutes and an indivisible course of conduct that violates multiple statutes. (*Jones, supra,* 54 Cal.4th at 358.) A single physical act can only be punished once, regardless of whether there may be different objectives underlying various statutes that punish that single act. (*Ibid.*) On the other hand, where a course of conduct violates multiple statutes, the court must decide whether the defendant harbored different intents in violating

the different statutes per *Neal*. (*Id.* at p. 359.) This court noted, "We recognize that what is a single physical act might not always be easy to ascertain. In some situations, physical acts might be simultaneous yet separate for purposes of section 654." (*Id.* at p. 358.)

The Court also held that *Jones* did not apply because "it took several discrete physical acts to complete these crimes." (Opn. 11-12.) The Court of Appeal therefore described the transaction as a "course of conduct" subject to the *Neal* test. This characterization constitutes an arbitrary parsing of the crime into multiple "acts" to avoid *Jones* while ignoring the unitary nature of the *operative* act that accomplished both crimes- the use of force to take the van and its contents. This therefore runs afoul of another recent Supreme Court decision, *People v. Mesa, supra,* which was cited in petitioner's briefing before the Court of Appeal. In *Mesa,* this Court held that it is the act that accomplishes the crime that is the act for purposes of section 654. (*Mesa, supra,* 54 Cal.4th at p. 200.)

Regardless of how the opinion describes it, petitioner's case did not involve a *divisible* course of conduct because none of the earlier

shows of force accomplished either crime. While Schmidt Sr.'s resistance did require Molestina to display his weapon twice and drive in reverse before Schmidt Sr. relinquished control of the van and its contents, these were not separate "acts" for purposes of section 654 because it was the overall show of force that eventually allowed Molestina to accomplish the carjacking *and* robbery when he gained possession of the van.[6]

The opinion also contradicts the stance taken in an earlier Court of Appeal opinion and represents a split of authority. In *People v. Dominguez, supra,* the Second Appellate District addressed a nearly identical fact pattern and concluded that the force used to take a van and personal property constituted a single act. (*Dominguez, supra,* 38 Cal.App.4th 410.) In *Dominguez,* the defendant pointed a gun at the victim and demanded "everything he had." (*Id.* at p. 420.) The victim

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[6] The Court of Appeal's reasoning would be sound if, for example, Molestina had used one show of force to take possession of the van and then, with that possession accomplished, used a separate show of force to make Schmidt load additional coins into the van. Then there would be a separate acts of force used to accomplish the robbery of the additional coins and the *Neal* test would apply.

gave the defendant his jewelry and then fled and the defendant took both the van and the property. (*Ibid.*) The court noted the longstanding rule that the theft of multiple items is but one offense and thus found that the carjacking and the robbery resulted from the "same act" essential to both offenses and therefore prevented multiple punishment under both section 215, subdivision (c) and section 654. (*Ibid.*)

In its opinion, the Court of Appeal dismissed *Dominguez* as not on point citing procedural differences. Therefore the court declined to address any of the reasoning set forth in that case.[7]

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[7] The Court of Appeal ignored the actual rationale in *Dominguez,* stating the ruling was based on a concession by the district attorney that the trial court agreed with. (Opn. 11.) While *Dominguez* did note that the concession and trial court finding supported application of section 654, it did not base its conclusion on these procedural grounds. These were simply alternative "even if" holdings in addition to the primary holding that, as a matter of law, a single forceful taking of a car and other possessions is a single act for purposes of sections 215 and 654. (*Dominguez, supra,* 38 Cal.App.4th at p. 420.)

While this opinion is not published, it still warrants review because it involves an important question of law generally applicable in many cases. Review is apparently necessary to further clarify the distinction between a course of conduct and a single act that this Court eluded to in its 2012 rulings.

II.

THIS COURT SHOULD GRANT REVIEW TO RESOVE A SPLIT OF AUTHORITY AND CLARIFY WHETHER THE USE OF FORCE TO TAKE A VAN AND THE ITEMS CONTAINED THEREIN CAN SUPPORT A FINDING OF SEPARATE INTENTS AND OBJECTIVES WHERE TAKING THE VAN IS THE METHOD OF ASPORTING THE CONTENTS.

Although petitioner believes this case unquestionably involves a single act, assuming arguendo that taking the van was a distinct act from taking the coins, petitioner also believes the Court of Appeal erred in finding substantial evidence supported the trial court's implicit decision that there were distinct objectives and intents under the *Neal* test. The Court of Appeal based this conclusion on finding substantial evidence that the defendants took the van "to escape."

This represents a split of authority as to what is an incidental objective versus a separate primary objective in robbery crimes. Therefore, petitioner requests that this Court also grant review on this issue.

The Court of Appeal, after concluding that the trial court's implicit finding of multiple acts must be upheld, declared there was substantial evidence in the record to support an implicit finding of separate criminal intents and objectives underlying the taking of the van and the taking of the coins. (Opn. 10-11.) The court stated, "clearly the objective was to steal the coins and escape." (Opn. 10.) "There is sufficient evidence in this record from which the court could have concluded there were two intents, close in time. The intent to steal the coins is clear. The [trial] court could easily infer the intent to take the van arose as a separate goal of escaping from the crime scene." (Opn. 10.)

The Court of Appeal appears to hold that using the van *in order to* escape with the coins is a separate objective permitting separate punishment under section 654.[8] This holding ignores the asportation

[8] The wording of the opinion suggests there is evidence the plan changed during the robbery due to Mr. Schmidt's resistance: "The

element of robbery and is in direct contradiction to published authority. A crime committed to escape *after* another crime is accomplished can constitute a separate objective. (See *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-191, 193 [shooting an *unresisting* witness after a robbery is successfully underway has a separate objective from the taking].) But where the "escape" is designed to asport the target property, it is the means of accomplishing the primary objective of robbery.

In the recent case of *Dowdell, supra,* 227 Cal.App.4th 1388, the Sixth District Court of Appeal noted the distinction between primary and incidental intents and objectives for purposes of section 654. The

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robbers had two vehicles available to them in order to carry out their scheme. However, their scheme was complicated by the victim's resistance. Ultimately they pushed the victim out of the way and fled in his van." (Opn. 10.) It is not clear where the record contains any "evidence" of a change in plans. As the Court of Appeal notes, the only facts available to the trial court were those in the probation report. (Opn. 3.) The probation report makes it clear that the defendants always planned to take the coins by taking the van. (Opn. 7.) In any event, whether the intent to take the van was initially planned or arose during the incident, it still was an incidental objective and therefore does not affect the grounds for review included in this petition.

court in *Dowdell* noted that where the primary objective is taking a valuable (in that case, money from ATMs), any other crimes, such as kidnapping, committed in order to achieve the taking are incidental and must be stayed. In *Dowdell*, the defendants attempted to rob the victim at a carwash. (*Id.* at 1394-1395.) When he resisted, they forced him into the truck and drove him to an ATM. (*Id.* at pp. 1395, 1415.) When they could not obtain money from that ATM, the victim begged them to try another. (*Id.* at pp. 1395, 1415.) The defendants were charged with three counts of kidnapping- one during a carjacking, one for extortion and one for robbery. (*Id.* at p. 1393.)

The Court of Appeal held that the many distinct movements could be viewed as separate acts of kidnapping. (*Dowdell, supra,* 227 Cal.App.4th at p. 1415.) However, this did not mean there were separate objectives. The primary objective of all the acts was obtaining the victim's money. (*Ibid.*) The Court of Appeal rejected the Attorney General's argument that the kidnapping was "motivated by a desire to avoid detection," because any desire to avoid detection was incidental to the primary goal of getting the

victim's money. (*Id.* at p. 1415-1416.) *Dowdell* cited *People v. Beamon* (1973) 8 Cal.3d 625, 639 which held section 654 requires a stay where a kidnapping is committed to facilitate a robbery. The ruling is also in line with the rationale in *Neal,* which pointed to earlier cases distinguishing acts to complete the robbery from acts after the robbery. (*Neal, supra,* 55 Cal.2d at p. 19-20, citing *People v. Logan* (1953) 41 Cal.2d 279, 290 [knocking victim out in order to rob him involved single objective] and *In re Chapman* (1954) 43 Cal.2d 385, 387 [assault after a robbery results in two punishable acts].)

The current law prior to this opinion is that where a separate crime is committed to accomplish a robbery, the primary objective is to take the property. Thus a crime committed to facilitate completion of that robbery has the same primary objective as the robbery. A crime committed to avoid prosecution (such as escaping) *after* the robbery is accomplished can constitute a separate objective, but a crime committed in order to accomplish the robbery (in this case, to more conveniently asport the target coin collection) is incidental to the primary objective of taking the coins. Therefore, the holding in

this opinion represents a split of authority from prior case law. Petitioner requests that if this Court grants review, it also consider whether taking a van in order to escape with its contents can be considered a separate primary intent or objective from that of taking the contents themselves.

III.

THIS COURT SHOULD GRANT REVIEW TO CLARIFY THE STANDARD OF REVIEW APPLICABLE TO RESOLVING WHETHER A CASE WITH UNDISPUTED FACTS INVOLVES A SINGLE ACT OR A COURSE OF CONDUCT.

The Court of Appeal opinion resulted in part from applying an overly deferential standard of review. The opinion states, "The question of whether there were multiple acts or multiple objectives is one of fact," citing *People v. Martin, supra,* 133 Cal.App.4th 776, 781. (Opn. 10.) The opinion places great weight on the trial court's implied finding that there were "multiple acts occurring in the same course of conduct." (Opn. 12.)

The *Martin* court is accurately quoted in this opinion and has been cited for this proposition in numerous unpublished opinions.

(See, e.g., *People v. Scottzsha* (Mar. 13, 2014, A137284) [2014 Cal.App.Unpub.LEXIS 1805, 20-21]); *In re I.D.* (Jul. 30, 2013, E055052) [2013 Cal.App.Unpub.LEXIS 5340, 17-18].)[9] However, to the extent the Court of Appeal interpreted *Martin* to mean the reviewing court owes deference to the application of section 654 to the facts of a particular case, it constitutes a split of authority. A number of cases have held that the application of section 654's legal principles to the facts is a question of law that is reviewed de novo. (See *Dowdell, supra,* 227 Cal.App.4th at p. 1414 ["Whether the facts and circumstances reveal a single intent and objective within the meaning of Penal Code section 654 is generally a factual matter; the dimension and meaning of section 654 is a legal question"]; see also *People v. Tarris* (2009) 180 Cal.App.4th 612, 628 [whether 654 prohibits imposition of a fine as a condition of probation is a legal question].) Even *Martin* itself did not appear to grant deference on the legal question it considered, as it applied the substantial evidence standard to determine the

[9] The unpublished opinions cited herein are not presented as authority as defined in Rule 8.1115(a), but only to demonstrate the frequent reliance on *Martin* by the Courts of Appeal.

underlying facts but then answered the legal question of whether the multiple-victim exception applied to the charges as a legal question. (*Martin, supra,* 133 Cal.App.4th at p. 781.)

Here, the facts were undisputed: Molestina pointed his gun at Schmidt Sr. several times and drove in reverse until Schmidt Sr. relinquished the van and its contents. The questions arising from these facts are solely legal questions: (1) whether these undisputed facts represent a course of conduct or a single act as a question of law, and (2) whether taking the van to take its contents can involve a separate primary objective from that of taking its contents. The Court of Appeal's application of *Martin* to give deference to the trial court on these legal questions reflects a split in authority on the appropriate standard of review which needs to be addressed.

IV.

CONCLUSION

In conclusion, petitioner requests that this Court grant review to determine whether (1) the use of force to take a van and its contents is a single act or a course of conduct; (2) whether taking a van in order

to obtain the coins contained in its trunk involves a separate objective from taking the coins themselves; and (3) the standard of review to be used in reviewing the trial court's application of section 654 to the facts in a given case.

Date: August 3, 2015

Respectfully submitted,

Cynthia M. Jones
State Bar No. 226958

CERTIFICATION OF WORD COUNT

I, Cynthia M. Jones, hereby certify, pursuant to California Rules of Court Rule 8.360(b), that according to the computer program used to prepare this document, this brief contains 3,885 words not including the caption and tables.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 3rd day of August, 2015 in Clackamas County, Oregon.

Cynthia M. Jones

APPENDIX A

Court of Appeal Opinion

Filed 6/24/15

OPINION ON REMAND FROM THE CALIFORNIA SUPREME COURT

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TORY J. CORPENING, Defendant and Appellant.	D064986 (Super. Ct. No. SCS258343)

APPEAL from a judgment of the Superior Court of San Diego County, Frances M. Devaney, Judge. Affirmed in part and reversed in part.

Cynthia M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Scott C. Taylor, Robin Urbanski, Barry Carlton and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Tory J. Corpening entered guilty pleas to carjacking (count 1; Pen. Code,[1] § 215, subd. (a)); robbery (count 2; § 211); assault with a deadly weapon (count 3; § 245, subd. (a)(1)); receiving stolen property (count 4; § 496, subd. (a)); and witness intimidation (count 7; § 136.1, subd. (a)(1)).

Corpening filed a motion to withdraw his guilty plea, which was denied after an evidentiary hearing. He was thereafter sentenced to a determinate term of six years eight months in prison.

Corpening filed a timely notice of appeal.

In his appeal, Corpening contended the trial court erred in imposing a one-year consecutive term for the robbery in count 2. He contended section 654 bars such sentence because the carjacking and the robbery were committed by a single act with a single purpose. He also contended the court erred in imposing a stayed sentence for receiving stolen property in count 4 because a person cannot be convicted of robbery and receiving the stolen property taken from the robbery. The People correctly agreed with the latter contention. In an unpublished opinion filed October 21, 2014, we dismissed the receiving stolen property conviction and otherwise affirmed the judgment as modified.

On February 11, 2015, the Supreme Court granted review and transferred the case to us with directions to reconsider our opinion in light of *People v. Jones* (2012) 54 Cal.4th 350 (*Jones*).

We have received additional briefing and have reconsidered our opinion in light of *Jones, supra,* 54 Cal.4th 350. After again reviewing the record, we are satisfied the

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1 All further statutory references are to the Penal Code unless otherwise specified.

crimes in this case occurred during a course of conduct with separate purposes and did not involve a single physical act. Therefore, we will again affirm the judgment as modified with directions to dismiss the receiving stolen property conviction.

STATEMENT OF FACTS

This appeal arises from guilty pleas. As such, the only statement of the facts before the trial court is contained in the report of the probation officer. Since the parties have emphasized differing parts of the facts in their briefs, we think the most accurate basis for our review is the probation officer's summary. We therefore set forth that summary verbatim:

"As to Counts 1-4

"On July 22, 2012 at approximately 5:50 a.m., Walter Schmidt Sr., the victim, and his son Walter Schmidt Jr. were at their residence loading their van, which was parked in the front driveway, with coins and other items they were going to sell at a local swap meet. Schmidt Sr. is a currency dealer who specializes in the buying and selling of rare coins. After loading the van, Schmidt Sr. got into the driver's seat, turned on the ignition and waited for Schmidt Jr., who went to lock up their residence.

"As Schmidt Sr. was waiting in the driver's seat, he was suddenly approached by an adult Hispanic male who was pointing a gun in his face and yelling words similar to 'Get out of the car or I'll shoot you.' Mr. Schmidt Sr. heard this phrase shouted three times. The suspect was later positively identified as Danny Jorge Molestina. Fearing for his life, Mr. Schmidt Sr. got out of the driver's seat and relinquished his vehicle to Molestina. As Molestina attempted to enter the van, Mr. Schmidt Sr. attempted to

wrestle the gun out of his hand. He failed to disarm Molestina and found the gun once again pointed directly in his face, at which point he backed off. Mr. Schmidt Sr. later described the gun as a small dark colored handgun, possibly a .22 caliber or a 'Saturday Night Special,' to officers.

"When Molestina attempted to get into the driver's seat of the van a second time, Mr. Schmidt Sr. felt that he had another opportunity to try and stop the robbery. He again lunged for the gun, but Molestina placed the van into gear and quickly reversed out of the driveway. Mr. Schmidt Sr. grabbed onto the steering wheel to avoid being run over. He was dragged approximately 18 feet down the driveway and onto the street, until he lost his grip and fell to the pavement. Mr. Schmidt Sr. struck his head and body on the asphalt, while narrowly avoiding being run over by the speeding vehicle.

"Molestina stopped the van momentarily, approximately 50 yards from the residence, to pick up a second suspect. That suspect was later identified as Eduardo Arturo Guerra. Molestina and Guerra drove away in Mr. Schmidt's van, which contained approximately $70,000 worth of property in coins. They were followed by a second vehicle, driven by a suspect later identified as Jorge Antonio Aguila. Mr. Schmidt Sr. called 911 and waited for [Chula Vista Police Department (CVPD)] officers to arrive.

"Mr. Schmidt Jr. informed officers that his cell phone, which was equipped with GPS, was inside of the stolen van. The vehicle was tracked to the 6800 block of Quebec Court in the City of San Diego. Unbeknownst to CVPD, San Diego Police Department [(SDPD]) received a report of a vehicle burglary in progress at that location, after residents observed the suspects unloading items from a white van into a gold Pontiac,

which was registered to Aguila. SDPD officers initiated a felony stop of the Pontiac, and Aguila, the driver, was taken into custody at gunpoint. Molestina, the vehicle passenger, jumped out of the vehicle and fled on foot through a condominium complex. Officers gave chase and captured him a short time later. A third suspect was also seen running from the area at the same time, but he was not captured. That suspect may have discarded items of evidence to include a stun gun baton, multiple gloves and a facemask, which were discovered near 6828 Panamint Row. Some of the coins that were stolen during the carjacking were recovered from inside of the Pontiac.

"Mr. Schmidt Sr. and Mr. Schmidt Jr. were both transported to the 6800 block of Panamint Row for a curbside line-up. They both positively identified Molestina as the person who committed the carjacking. Neither man recognized Aguila. They also assisted officers in identifying stolen property, including their van and items seized from the interior of Aguila's Pontiac. Mr. Schmidt Sr. went to the hospital for injuries to his head, back, shoulder, hand and arm.

"Two independent witnesses, who reported the suspected vehicle burglary on Quebec Court to SDPD, positively identified Molestina and Aguila as two of the three individuals that were loading boxes from Mr. Schmidt Sr.'s van into Aguila's Pontiac.

"Molestina and Aguila were arrested for their roles in the carjacking and they were transported to CVPD headquarters for processing. Aguila refused to make a statement. Molestina made a spontaneous statement and declared that he had just been walking around the area and "those guys" offered to pay him $1,000.00 if he helped unload boxes from the van into the Pontiac. Molestina denied being involved in the carjacking.

"Search warrants were secured for both of the cellular phones that were confiscated from Molestina and Aguila incident to their arrest. Molestina's phone was found to have made and received several calls to Guerra's cellular phone before, during and after the carjacking. The cellular phone that was located on Aguila's person during his arrest was determined to be owned by Guerra. That phone was discovered to have placed multiple calls to Molestina and Tory Joel Corpening, the defendant, before, during, and after the carjacking. Just prior to the carjacking, Guerra's cell phone received an incoming text message asking, 'Where are you?' Approximately five minutes after the carjacking, a reply was sent from Guerra's phone that read, 'Just working with my crew.'

"On August 12, 2012, Guerra was arrested at the South Bay Courthouse. He was admonished of his rights and admitted participating in the planning and execution of the carjacking. Guerra was the registered owner of a 2001 Ford F150 pickup, the same type of vehicle that witnesses reported was in the area during the carjacking. He identified Corpening as the 'leader' of the group of individuals that committed the crime. Guerra stated that he and Corpening would sell items regularly at the Kobey Swap Meet in San Diego, where Mr. Schmidt Sr. had a booth to buy and sell coins. Guerra and Corpening visited Mr. Schmidt Sr.'s booth on occasion, where they viewed his collection of coins and other currency.

"Guerra reported that Corpening came up with the idea to rob Mr. Schmidt Sr. Corpening assembled a group of individuals together to execute the 'big job.' The group included Molestina, Aguila, and Celestina Maria Rodriguez. Guerra stated that he and Corpening followed Mr. Schmidt Sr. home from the swap meet one day and conducted

surveillance on his home prior to committing the instant offense. The group of suspects met in the garage of Corpening's residence the night before the crime occurred and reviewed their plan, which called for Guerra and Aguila to park in front of Mr. Schmidt Sr.'s home in Aguila's Pontiac, while Corpening, Molestina and Rodriguez were to park around the corner in Guerra's F150 truck. Guerra and Aguila were to report to Corpening, via cellular phone, and provide information regarding Mr. Schmidt Sr.'s movements. Corpening was to call Molestina, with the order to commit the actual carjacking, once Mr. Schmidt Sr. was getting ready to leave his residence. The group of suspects drove to the victim's residence, en masse, following their planning meeting to commit the carjacking.

"Guerra admitted he was inside of Aguila's vehicle before, during and after the carjacking. He identified Aguila as the individual who reported Mr. Schmidt Sr.'s movements to Corpening. Upon Corpening's command, Molestina executed the carjacking. After Molestina carjacked Mr. Schmidt Sr.'s vehicle, Corpening jumped in the passenger seat of the stolen van and they drove off. Rodriguez fled the area in Guerra's F150 truck. Guerra and Aguila followed Molestina and Corpening to Quebec Court, where Molestina, Corpening and Aguilar unloaded the stolen items from the van and placed them in Aguila's Pontiac.

"Guerra identified Corpening as the individual who wore a facemask and gloves during the offense. It was likely Corpening whom discarded the facemask, gloves, and stun gun baton that were recovered on Panamint Row. Guerra was able to flee successfully from the scene and made his way back to Corpening's residence. He stated

that Corpening appeared there with a box full of rare coins and precious metals. A few days after the carjacking, Guerra, Corpening, and Giana Steina Lupo, Corpening's girlfriend, travelled to Lake Tahoe, where they sold the stolen merchandise to an unknown coin dealer. Lupo was later discovered to have pawned some of Mr. Schmidt Sr.'s coins at a local pawn shop."

DISCUSSION

The remaining issue to be addressed in this case is whether the trial court erred in imposing a consecutive, one-year sentence for robbery, based upon the contention that the sentence should have been stayed pursuant to section 654. Based upon our review of the record we believe the trial court made an implied finding that the robbery and carjacking were separate acts with different objectives, even though they arose out of the same transaction.

A. Background

The court imposed a five-year term for the carjacking. It then imposed a consecutive one-year term for robbery (one-third the midterm) and a consecutive eight months for witness intimidation (one-third the midterm). In the People's sentencing memorandum submitted to the trial court the prosecutor recommended the court stay the robbery sentence under section 654. At the time of sentencing the trial court said the following about the robbery sentence:

> "On count two, the robbery, I think [the prosecutor] you wrote in your papers that you think that should be 654. I think that it is a separate offense with the carjacking. I disagree. I'm going to impose one-third the midterm of count two. Midterm is three years. One-third is one year. That will be served consecutively."

B. Legal Principles

Section 215, subdivision (c) permits a defendant to be charged with both robbery and carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 700.) However, a defendant may not be punished under both statutes for the same act which constitutes a violation of two sections.

Similarly, section 654, subdivision (a) provides: "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." In order to determine whether there is a single act, or a course of conduct involving multiple violations of statutes requires an examination of the intent or objective of the actor. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) The real question is whether during a single transaction there is really only one act or one objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 639.)

In *Jones, supra*, 54 Cal.4th 350, the court further refined its analysis of section 654. In cases where there is but one physical act, which gives rise to more than one criminal offense, the court held that such act can only be punished once. (*Jones, supra*, at p. 358.) The offenses in *Jones* were firearms violations arising out of one act of possession which could only be punished once. However, where there is a course of conduct, as opposed to a single physical act, the multiple objectives test is still applicable. (*Id.* at pp. 359-360.) The court also observed that in a given case it may be difficult to determine whether the conduct is a single physical act, or a series of physical acts in

pursuit of an objective. The court said: "In some situations, physical acts might be simultaneous yet separate for purposes of section 654." (*Jones, supra*, at p. 358.)

The question of whether there were multiple acts or multiple objectives is one of fact. (*People v. Martin* (2005) 133 Cal.App.4th 776, 781.) A trial court's decision as to the existence of multiple objectives is reviewed under the substantial evidence standard of review, whether the finding is express or implied. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Nelson* (1989) 211 Cal.App.3d 634, 638.)

C. Analysis

These crimes arose from a plot to steal valuable coins from the victim when he left in the early morning for the swap meet. Clearly the objective was to steal the coins and escape. The robbers had two vehicles available to them in order to carry out their scheme. However, their scheme was complicated by the victim's resistance. Ultimately they pushed the victim out of the way and fled in his van. The robbers then abandoned the van a short distance away after taking the coins from the van.

The trial judge specifically rejected the prosecutor's suggestion that section 654 barred multiple punishments for the robbery and the carjacking. The court viewed them as separate offenses, although he applied section 654 to other offenses at sentencing.

There is sufficient evidence in this record from which the court could have concluded there were two intents, close in time. The intent to steal the coins is clear. The court could easily infer the intent to take the van arose as a separate goal of escaping from the crime scene. (*People v. Nguyen* (1988) 204 Cal.App.3d 181, 191.)

Accordingly, we find the trial court's implied finding of separate intents or purposes to be supported by substantial evidence.

Corpening relies on *People v. Dominguez* (1995) 38 Cal.App.4th 410, 416-420 (*Dominguez*), to support his argument that section 654 should apply to this case. His reliance on *Dominguez* is misplaced. Although that case involved a carjacking and robbery, the discussion of section 654 in that case has little relevance to the issues in this case.

In *Dominguez* the principal argument for application of section 654 was that there could not be a conviction for both robbery and carjacking. The court rejected that argument and held such dual convictions were permitted. (*Dominguez, supra,* 38 Cal.App.4th at pp. 418-419.) The argument regarding sentences was much different than here. First, the prosecutor there conceded section 654 barred dual punishment. The trial court agreed with that position, however, instead of staying the sentence for robbery, the court imposed it concurrently. Not surprisingly, the court in *Dominguez* ordered the sentence to be stayed.

As we have discussed above, the court in *Jones, supra,* 54 Cal.4th 350, held that only one punishment can be imposed for crimes arising out of one physical act. *Jones*, of course, dealt with the single act of possessing a firearm, which violated several penal code sections. Thus, in that case the defendant could only be punished for one offense, and punishment for the remaining counts had to be stayed pursuant to section 654. Here, the question is whether the actions of the defendant in forcing the victim out of the car, struggling with him as he attempted to resist, then again struggling with the victim, then

driving off with the van is but one physical act. Certainly the actions here are far more complex than one act of possessing one firearm and are far more analogous with a finding of a course of conduct, rather than one "physical act."

As we have discussed, the trial court found multiple objectives and multiple acts occurring in the same course of conduct. Corpening and his cohorts were there to steal the coins, not the van. Twice the victim tried to disarm the robber, was forced away and ultimately dragged some distance when he tried to hold onto the steering wheel. It took several discrete physical acts to complete these crimes. The experienced trial court impliedly found different objectives and different physical acts when it expressly rejected the application of section 654 to the robbery count. *Dominguez, supra,* 38 Cal.App.4th 410 and *Jones, supra,* 54 Cal.4th 350, are distinguishable from the facts and procedure presented here. They are of no assistance to the appellant in this case.

DISPOSITION

The conviction for receiving stolen property (count 4) is reversed. In all other respects the judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.

PROOF OF SERVICE BY ELECTRONIC MEANS

(Cal. Rules of Court, rules 2.251(i)(1)(A)-(D) & 8.71(f)(1)(A)-(D).)
People v. Corpening D064986

I, Cynthia Jones, declare that: I am over the age of 18 years and not a party to the case; my business address is 19363 Willamette Drive, No. 194, West Linn, OR 97068.

I caused to be served the following document(s):

APPELLANT'S PETITION FOR REVIEW FROM THE UNPUBLISHED OPINION OF DIVISION ONE OF THE FOURTH DISTRICT COURT OF APPEAL PER JUSTICE HUFFMAN FILED ON JUNE 24, 2015

I declare I electronically served from my electronic service address of jjones@avatarlegal.com the **above-referenced document** on August 3, 2015 at approximately 11:15 a.m. to the following entities:

CALIFORNIA COURT OF APPEAL 4th District, Div. 1, by e-filing

APPELLATE DEFENDERS INC, eservice-criminal@adi-sandiego.com

ATTORNEY GENERAL'S OFFICE, ADIEService@doj.ca.gov

SAN DIEGO DISTRICT ATTORNEY'S OFFICE, DA.Appellate@sdcda.org

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 3, 2015

Server signature:

Cynthia M. Jones

PROOF OF SERVICE BY MAIL

Re: Tory Corpening, Court Of Appeal Case: D064986, Superior Court Case: SCS258343

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On August 3, 2015, I served a copy of the attached Petition for Review (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

San Diego County Superior Court
Dept. 9
500 3rd Avenue
Chula Vista, CA 91910

Jerry Leahy

105 West F Street
#215
San Diego, CA 92101
(Trial Counsel)

Tory J. Corpening #AR3130
B-142
Pelican Bay State Prison
PO Box 7500
Crescent City, CA 95532-7500

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 3rd day of August, 2015.

Teresa C. Martinez
(Name of Declarant)

Teresa C. Martinez
(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Tory Corpening, Court Of Appeal Case: D064986, Superior Court Case: SCS258343

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 1235 Eleanor Ave., Rohnert Park CA. On August 3, 2015 a PDF version of the Petition for Review (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

State of California Supreme Court
Supreme Court
San Francisco, CA 94102-4797

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 3rd day of August, 2015 at 11:22 Pacific Time hour.

Teresa C. Martinez
(Name of Declarant)

(Signature of Declarant)