IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. TORY J. CORPENING, Defendant and Appellant.	S228258 Court of Appeal No. D064986 Superior Court Case No. SCS258343

APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO

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

APPELLANT'S OPENING BRIEF

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By appointment of the Supreme Court
under the Appellate Defenders, Inc.

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ISSUES PRESENTED

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

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[1] Judge Lewis, Ret., presided over appellant's change of plea, while Judge Devaney presided over appellant's subsequent motion to withdraw the plea and the sentencing hearing.

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? (See Standard of Review (Issue III), below.)

STATEMENT OF THE CASE

Appellant pleaded 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 (Penal Code[3] § 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)).[4] The trial court sentenced petitioner to the midterm of five years on 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 The Court of Appeal affirmed that portion of the sentence in an unpublished opinion filed on October 21, 2014.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

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

[4] Appellant was also charged with witness intimidation for an incident occurring while in custody that is not relevant to this appeal.

for Review (CSC No. S222900), asking the matter be transferred to the Court of Appeal to address appellant's argument that a single criminal act formed the basis of both the robbery and carjacking and to apply the holding in *People v. Jones* (2012) 54 Cal.4th 350 (*Jones*). This court ordered a transfer on February 11, 2015. Appellant and respondent submitted additional briefing and presented oral argument. On June 24, 2015, a new opinion issued, again affirming the sentence.

This court granted appellant's petition for review on September 30, 2015.

STATEMENT OF FACTS

This case involved a classic heist-style robbery. There was evidence that appellant brought several co-defendants together to steal valuable coins from a rare-coin dealer, Walter Schmidt, Sr.[5] (Opn. 6.) Appellant 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; CT 52.) Appellant

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

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; CT 51-52, 54.)

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; CT 50.) Schmidt Sr.'s son had gone to lock the residence while Schmidt Sr. sat in the driver's seat with the van running. (Opn. 3; CT 50.) Molestina approached Schmidt Sr., pointed a gun at him, and demanded that Schmidt Sr. get out of the car. (Opn. 3; CT 51.) Schmidt Sr. exited the van, but as Molestina attempted to enter the van, Schmidt Sr. tried to wrestle the gun from Molestina's hand. (Opn. 3-4; CT 51.) Molestina pointed the gun in Schmidt Sr.'s face and Schmidt Sr. backed off. (Opn. 4; CT 51.) Molestina entered the van and Schmidt Sr. lunged for the gun again. (Opn. 4; CT 51.) This time, Molestina placed the van in gear and quickly reversed. (Opn. 4; CT 51.) 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; CT 51.)

Molestina stopped the van about 50 yards from the residence to pick up another co-defendant. (Opn. 4; CT 51.) Another car, driven by co-defendant Jorge Aguila, followed the van. (Opn. 4; CT 51.) The van contained $70,000 in coins. (CT 51.) They drove to another area where Molestina, Guerra, appellant and Aguila began unloading the coins from the van into the car. (Opn. 4; CT 51.) Residents observed the defendants unloading boxes from the van into Aguila's car and reported the situation to police. (CT 51.) Officers intervened, and Aguila and Molestina were arrested. (Opn. 4.; CT 52) Appellant and Guerra escaped with "a box full of rare coins," some of which appellant managed to sell before being arrested later. (Opn. 7-8; CT 52-53, 54.)

APPELLATE HISTORY

Appellant argued below that the trial court erred in not staying his robbery sentence. (§§ 215, subd. (c), 654.)[6] Appellant asserted that

[6] § 215 allows convictions under both § 211 and § 215 for a carjacking but prohibits double punishment for a carjacking and robbery "for the same act which constitutes a violation of both this section and section 211." Section 215 is a provision making clear the Legislature's intent that carjacking is not a special statute supplanting the use of a more general statute punishing robbery and that section 654 applies to it,

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.[7] (ARB 2-9.) Because there was only one criminal act -- a taking by force -- which accomplished both the taking of the van and

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allowing double conviction but not punishment. (See *People v. Dominguez* (1995) 38 Cal.App.4th 410, 417-418.) Thus, the court applies the same analysis under both statutes in determining whether multiple punishment is permitted. (*Ibid.*)

[7] 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 *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1415-1416 (*Dowdell*) which discusses the distinction between incidental versus primary goals. This argument is addressed in Issue II, below.

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 consider whether there was a single act per *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.)

STANDARD OF REVIEW (ISSUE III)

A trial court's decision to stay or not stay a sentence under section 654 involves a mixed question of law and fact. The court must decide whether the crimes committed arose from a single act or multiple acts and, if multiple, whether they were committed with a single intent and objective. The first part of this process involves a factual determination regarding what acts were committed and with what intent. The second is a legal determination of applying the law to those facts. In this particular case, both steps of the process are subject to de novo review.

A. The Factual Determinations in This Case Are Subject to Independent Review, Because the Sole Source of Evidence Was a Probation Report Equally Accessible to the Trial and Reviewing Court.

A section 654 analysis begins with a factual determination regarding what acts were committed and why. Some of this determination may require the court to draw inferences from the evidence. Determining the actor's intent, for example, is a fact typically inferred from the evidence as a whole. (See, e.g., *People v. Davis* (2009) 46 Cal.4th 539, 606 ["specific intent may be and usually

must be, inferred from circumstantial evidence"]; *People v. Smith* (2005) 37 Cal.4th 733, 744 [same regarding intent to kill]; *People v. Carter* (2005) 36 Cal.4th 1215, 1260-1261 [same regarding felonious intent for burglary].)

Often, this inquiry is best performed by the finder of fact who is in a position to make credibility determinations. (See *People v. Cromer* (2001) 24 Cal.4th 889, 895 (*Cromer*).) When the evidence requires judging the credibility of testimony the trial court is in the best position to make that judgment call. (*Ibid.*) In these cases, factual determinations are upheld so long as they are supported by substantial evidence. (See *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312-1313; *People v. Evers* (1992) 10 Cal.App.4th 588, 604.)

However, factual determinations do not always call upon a trial court's first-person vantage. Sometimes, the evidence that must be weighed comes in a form that is equally accessible to the reviewing court. For instance, a tape-recorded interview can be listened to and judged by the reviewing court as easily as the trial court. The trial court is no better position to decide what inferences may be drawn

from the recording. (See, e.g., *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.) In these cases, the facts "are undisputed, and the appellate court may independently review the trial court's determination." (*Ibid.*; see also *People v. Maury* (2003) 30 Cal.4th 342, 404.)

Here, the only evidence describing the carjacking and robbery came in the form of a probation report. (Opn. 3 ["the only statement of the facts before the trial court is contained in the report of the probation officer"].) The trial court did not hear any testimony on this point and so no credibility determination was involved. (5 RT 801, 803.) As such, the facts are undisputed and may be independently reviewed. The trial court's inferences drawn from these undisputed facts are not subject to deference.

B. The Legal Determinations Which Form the Core of this Appellate Challenge Are Subject to De Novo Review.

As part of the section 654 analysis, the court is called upon to decide whether a stay is legally mandated by section 654. This is an application of law to fact and is a legal determination subject to de novo review. "Although the question of whether defendant harbored a 'single intent' within the meaning of section 654 is generally a

factual one, the applicability of the statute to conceded facts is a question of law." (*People v. Harrison* (1989) 48 Cal.3d 321, 335; see also *Cromer, supra,* 24 Cal.4th at pp. 893-894 [de novo review appropriate "where historical facts are admitted or established, the rule of law is undisputed, and the issue is . . . whether the rule of law as applied to the established facts is or is not violated"]; *People v. Waidla* (2000) 22 Cal.4th 690, 730 [de novo review of denial of motion to suppress "insofar as the trial court's underlying decision entails a measurement of the facts against the law"].)

Both of the issues raised in this challenge fall into the second category. The facts, all of which came from the probation report, are undisputed and established. The primary question is whether those facts, and the reasonable inferences to be drawn therefrom, require a stay under section 654. Appellant argues that the "multiple acts" implicitly found by the trial court, according to the Court of Appeal, are not multiple acts as defined by section 654 jurisprudence. This is a question of law subject to de novo review. Appellant also argues that the "separate intent and objective" underlying the carjacking

cited by the Court of Appeal is, as a matter of law, incidental to and facilitative of the robbery and, therefore, not legally sufficient to warrant separate punishment under section 654. Again, this is a question of law subject to de novo review.

The Court of Appeal treated the entirety of the trial court's decision as a question of fact, and therefore erroneously applied deferential review. The opinion states, "The question of whether there were multiple acts or multiple objectives is one of fact," citing *People v. Martin* (2005) 133 Cal.App.4th 776, 781. (Opn. 10.) The *Martin* court is accurately quoted in the opinion. But to the extent the Court of Appeal interpreted *Martin* to mean the reviewing court owes deference to the application of section 654 to established facts, it is incorrect. A more accurate statement is given in *Dowdell, supra,* 227 Cal.App.4th at p. 1414 (emphasis added), "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."[8] (See also *People v. Valli* (2010) 187 Cal.App.4th 786, 794; *People v. Tarris* (2009) 180 Cal.App.4th 612, 628.)

Where the core question at the heart of an appellate challenge involves a question of statutory interpretation, that interpretation must first be resolved first, applying de novo review, before the law can be applied to the evidence in the record. (See, e.g., *People v. Prunty* (2015) 62 Cal.4th 59, 71 [challenge encompassing the sufficiency of evidence to sustain a sentencing enhancement first required de novo review of a core question of statutory interpretation].) A lower court's decision on the appropriate application of section 654 to the facts is therefore not subject to deferential review.

C. The Court of Appeal Erred In Applying Deferential Review to the Undisputed Facts and Application of Law to Facts.

In summary, a section 654 decision involves both a factual determination and a legal determination. In many cases, the nature of the evidence requires weighing by the court with first-person

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[8] In this case, as noted *ante*, the factual determinations in this case were not subject to deference, because the evidence came in the form of a probation report.

vantage. When this is the case, the factual determination by the court with first-person vantage is subject to deferential review. But where the evidence comes solely in the form of a written probation report, the reviewing court is equally equipped to draw inferences therefrom and no deference is required. Any legal determination about the meaning and scope of section 654 is always subject to de novo review.

In this case, the Court of Appeal improperly applied a deferential standard of review both to inferences drawn from undisputed facts and to the application of law to those facts. This court should apply de novo review to the issues raise.

ARGUMENT

I.

WHERE APPELLANT TAKES A VAN AND ITS CONTENTS, THE TAKING IS A SINGLE ACT FOR PURPOSES OF SECTION 654.

A. Introduction.

The undisputed facts regarding the robbery and carjacking are as follows: Schmidt Sr. had loaded the coins into his van and was in the driver's seat with the ignition on when Molestina approached him, pointed a gun in his face, and ordered him out of the car. (Opn.

3.) Schmidt Sr. got out of the driver's seat, relinquishing the van to Molestina. (Opn. 3.) As Molestina attempted to enter the van, Schmidt Sr. attempted to wrestle the gun from his hand. (Opn. 3-4.) He failed to disarm Molestina who pointed the gun in his face again, at which point he backed off. (Opn. 4.) Molestina attempted to get into the van a second time, and Schmidt Sr. again lunged for the gun, but Molestina placed the van into gear and quickly reversed out of the driveway. (Opn. 4.) Schmidt Sr. grabbed the steering wheel and was dragged approximately 18 feet down the driveway before losing his grip and falling to the pavement. (Opn. 4.)

The Court of Appeal held that there was substantial evidence of multiple physical acts, 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.) This was error, because the court improperly parsed Molestina's conduct into separate "acts" to uphold the trial court's decision. The criminal act at issue was that of *taking* the van and coins by use of force. All of

Molestina's conduct was part of this single forceful taking. As such, there was only one act of taking by force and imposing a consecutive sentence for the robbery was unauthorized.

B. Section 654 Prohibits Double Punishment for a Single Act.

Section 654 states, in relevant 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.) The statute was originally enacted in 1872 and has changed remarkably little during its nearly 150 year history. Over time, it has been judicially interpreted to prevent double punishment for a criminal course of conduct that violates two statues, when that course of conduct involves closely connected crimes committed with a single criminal objective. However, this court has recently emphasized, in accord with the plain language of the statute, a *single* act may not be punished

more than once regardless of the underlying intent.[9] (*Jones, supra,* 54 Cal.4th at p. 358; *People v. Mesa* (2012) 54 Cal.4th 191, 198-199 (*Mesa*).)

"Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law." (*Jones, supra,* 54 Cal.4th at p. 358.) In *Mesa,* this court explained that where there is a single act, double punishment is prohibited, notwithstanding multiple underlying objectives and intents. "Our case law has found multiple criminal objectives to be a predicate for multiple punishment only in circumstances that involve, or arguably involve, multiple acts. The rule does not apply where, as here and as in *Herrera,*[10] the multiple convictions at issue were indisputably based upon a single act. The rule was not intended to permit multiple punishment in such

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[9] In many cases (perhaps even most cases), the distinction between what constitutes a course of conduct versus a single act will be irrelevant, as there will also be a single intent or objective necessitating a stay under either theory. This appears to have muddied the case law somewhat, as courts will often refer to the existence of a single intent and objective when upholding or imposing a stay in a case that appears to involve a single act. Appellant notes that his case falls into this category, because, as discussed in Issue II, Molestina acted with a single intent and objective requiring a stay even if his actions are characterized as a course of conduct.

[10] *People v. Herrera* (1999) 70 Cal.App.4th 1456

cases because it would violate the plain language of section 654." (*Mesa, supra,* 54 Cal.4th at p. 199.)

C. Both Carjacking and Robbery Involve a Single Criminal Act of Taking Property by Force.

The appellate court interpreted the "single act" situation discussed in *Jones* and *Mesa* too narrowly. The court treated "act" as synonymous with any physical conduct occurring during the crime (opn. 11-12) rather than as the criminal act prohibited by the statute. Under the Court of Appeal's interpretation, any offense that involves multiple physical components does not involve a single act. Thus, per this logic, a single act stay under *Jones* or *Mesa* could only occur where two particular criminal offenses can be accomplished by a single physical action. This is an incorrect interpretation of what is meant by a single act for purposes of section 654.

"A crime or public offense is *an act* committed or omitted in violation of a law forbidding or commanding it, and to which is annexed" an enumerated punishment. (§ 15, emphasis added.) All crimes also require a union of the proscribed act with a criminal intent. (See § 20.) The proscribed act is also referred to as the "*actus*

reus" or "gravamen" of the offense. (See, e.g., *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349.)

Of course, many offenses consist of more than one element involving physical conduct in some form. However, that does not mean the offenses include multiple criminal act. The "*actus reus*" of a crime is "the wrongful deed that comprises the *physical components* of a crime and that generally must be coupled with mens rea to establish criminal liability." (Black's Law Dict. (10th ed. 2014 [Westlaw]), emphasis added.) It is "the voluntary act or omission, the attendant circumstances, and the social harm caused by a criminal act, all of which make up the *physical components* of a crime." (*Ibid.*, emphasis added.) The physical components do not necessarily need to be criminal in and of themselves. Sometimes, they become so because they are coupled with other conditions,[11] or by virtue of being tied to a specific intent,[12] or other physical components.[13] While a criminal

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[11] Possessing a gun becomes criminal when done by a felon. (§ 29800, subd. (a)(1).)

[12] Touching a child's leg becomes criminal when coupled with lewd intent. (§ 288, subd. (a).)

[13] For example, intercourse becomes criminal when coupled with payment. (§ 266e.)

act may only require a single physical component, many do consist of multiple physical components.

Thus, when section 654 refers to "an act or omission *that is punishable* in different ways by different provisions of law," the language is referring to the "criminal act" – consisting of the physical components prohibited by statute to which punishment attaches -- not just physical conduct generally. It means the *actus reus* committed by the defendant, which may be composed of multiple physical components. When the defendant's actions form the *actus reus* of two separate offenses, there is a single act regardless how many physical components are involved in that act.

Both robbery and carjacking fall into the category of offenses involving a single criminal act made up of multiple physical components. The statutes are aimed at the criminal act of *taking* property when accomplished by the use of force or fear. (§§ 211, 215, subd. (a).) A "taking" "has two aspects: (1) achieving possession of the property, known as caption, and (2) carrying the property away, or asportation." (*People v. Gomez* (2008) 43 Cal.4th 249, 255; see also

People v. Hodges (2013) 213 Cal.App.4th 531, 540.) While a robbery may continue until the defendant reaches a place of temporary safety, asportation is completed upon the slightest movement. (*People v. Gomez, supra,* 43 Cal.4th at p. 255.)

The "taking" language used in section 215 for carjacking has the same meaning. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1060-1061.) Thus, it also requires caption and asportation of the vehicle. (*Id.* at pp. 1060-1063.) Even after a defendant obtains possession of the vehicle, it must be moved some distance to satisfy the asportation requirement before the carjacking can be considered completed rather than attempted. (*Id.* at p. 1063.)

Both robbery and carjacking also require the taking be accomplished by the use of force or fear. (*People v. Gomez, supra,* 43 Cal.4th at p. 255.) "All of the elements must be satisfied before the crime is completed." (*Id.* at p. 254.) But these elements do not constitute multiple criminal acts within each statute. Rather, the criminal acts of robbery and of carjacking involve three physical components: use of force, achieving possession, and carrying away.