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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Honorable Kathleen M. Lewis, Judge[1]

APPELLANT'S OPENING BRIEF

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 The Court of Appeal affirmed that portion of the sentence in an unpublished opinion filed on October 21, 2014.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.

Notably, the physical components do not necessarily have to be carried out by separate actions. For example, the force need not be a separate action from the taking itself, so long as it is a quantum more than what is necessary to accomplish mere seizing of the property. (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1259.) If a thief grabs the property and must use force to overcome resistance, the force element is satisfied based on the same physical action that constitutes a taking of the property. (*Ibid.*) Similarly, caption and asportation could easily be satisfied by a single movement.

Although a carjacking or robbery could in some cases be described as involving multiple actions – an act of applying force in some manner coupled with a separate act of gaining possession and then a further act of physically moving it some distance -- it is still considered a single unitary criminal act of a taking by force for purposes of section 654. This is demonstrated in *People v. Vargas* (2014) 59 Cal.4th 635, 640 (*Vargas*).

In *Vargas,* this court addressed whether two strike convictions imposed for *a single act,* one of which was subject to a stay, could both

be used to elevate a later sentence under the three strikes sentencing scheme. (*Vargas, supra,* 59 Cal.4th at p. 640.) This court held that where multiple strike convictions were based on a single act, there was only one prior strike for purposes of enhanced sentencing. (*Id.* at p. 637.) The defendant's prior strikes at issue were carjacking and robbery convictions "based on the same act of taking the victim's car by force." (*Id.* at p. 640.) "Defendant's two prior felony convictions – one for robbery and one for carjacking – were not only tried in the same proceeding and committed during the same course of criminal conduct, they were based *on the same act*, committed at the same time, against the same victim." (*Id.* at p. 638, emphasis added.)

Notably, the earlier Court of Appeal decisions on the issue under consideration also involved single act cases of carjacking and robbery. (*Vargas, supra,* 59 Cal.4th at pp. 643-645, discussing *People v. Burgos* (2004) 117 Cal.App.4th 1209 [attempted robbery and attempted carjacking for same act of forcibly attempting to take victim's car], and *People v. Scott* (2009) 179 Cal.App.4th 920 [prior

strike convictions for robbery and carjacking based on same act of forcibly taking the victim's car].)

Vargas specifically distinguished carjacking/robbery convictions as single-act-based stays as compared to a stay of multiple prior strikes involving a course of conduct. (*Vargas, supra,* 59 Cal.4th at pp. 642-643, citing *People v. Benson* (1998) 18 Cal.4th 24 [holding course of conduct stay did not require dismissal of the prior strike under *People v. Romero* (1996) 13 Cal.4th 497].) As a matter of law, a forceful taking as used in the robbery and carjacking statutes is a single criminal act of for purposes of section 654. It is not a course of conduct made up of separate criminal acts.

In this case, because the coins were contained in the van, the criminal act of taking the vehicle by force and the criminal act of taking the coins by force involved the same act of taking the van and coins it contained by a display of force. Molestina initially displayed force by pointing a gun at Schmidt Sr., but was unable to accomplish the taking of either the van or coins, because Schmidt Sr. attempted to wrestle the gun from him before Molestina had entered the van.

(Opn. 3-4.) Neither the carjcaking nor the robbery was completed at this point. Molestina therefore used force again. This allowed him to take possession of the van and constructive possession of the coins it contained. (Opn. 4.) But he was not able to complete the second step of the taking, asportation, because Schmidt Sr. grabbed the steering wheel. (Opn. 4.) Neither the robbery nor the carjacking had been completed because Molestina had moved neither the van nor the coins. Finally, Molestina drove down the driveway, moving the van and the coins and achieving asportation. (Opn. 4.) Both the robbery and carjacking were completed by this final movement.

There was no separate conduct that was aimed at the taking of the van but not at the taking of the coins or vice versa. All of the force used by Molestina was needed to obtain possession of and asport both the coins and the van. Where an action is necessary to accomplish two crimes, it must make up part of the criminal acts for both crimes.

Any force Molestina applied toward taking the vehicle was also necessarily applied toward taking its contents. Because the coins were in the vehicle, the robbery was completed at the exact same

instant as the carjacking and as a result of the exact same criminal act – using force to take possession of the vehicle and moving it a sufficient distance to constitute asportation. E*very* display of force by Molestina was a component of the criminal act of taking the van by force and of taking the coins by force. This was therefore a single act case, where one act of forceful taking was punishable in different ways by different provisions of law.

D. The Van Cannot Be Parsed From the Items Taken As Part of the Robbery In Order to Create Two Separate Acts.

In *Jones*, this court acknowledged 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." (*Jones, supra,* 54 Cal.4th at 358.) Although Molestina took both a van and coins, this was still but a single forceful taking and cannot be described as simultaneous acts of taking under section 654.

Here, of course, Molestina did not just take Schmidt Sr.'s vehicle. He also took the valuable coin collection in its trunk which was the primary goal of the taking. This does not, however, change the act of forceful taking from a single act into a course of conduct.

The taking of multiple items by a single use of force is still but a single *act* of taking. It does not appear from the record that Molestina could have taking the coins without also taking the van.

The central element of robbery is the use of force or fear. (See *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1308.) Regardless of how many items are involved, the offense is based on the act of forceful taking and it, therefore, cannot be parsed by item. A single forceful taking from one individual constitutes a single offense of robbery, even where multiple items of property are taken. (*Ibid.*; see also *People v. Brito* (1991) 332 Cal.App.3d 316, 326 (*Brito*), cited with approval in *People v. Oretega* (1998) 19 Cal.4th 686, 699 (*Ortega*) ["A defendant commits only one robbery no matter how many items he steals from a single victim pursuant to a single plan or intent"].)

This distinguishes robbery from crimes like narcotics possession, where the criminal offenses are not centered on the possession of drugs generally, but on the possession of a specific form of narcotic enumerated in the statute. Thus possession of different types of narcotics may involve simultaneous but distinct acts of

possession, while forceful taking of multiple items is only a single act of taking. (See *Jones, supra,* 54 Cal.4th at p. 358.)

The fact that one of the items taken in a robbery happens to be a vehicle, an item accorded special treatment under other sections of the Penal and Vehicle Codes, does not destroy the unitary nature of the robbery. It is well established that the robbery cannot be parsed to exclude the taking of the vehicle in these circumstances.

For instance, in *Ortega,* the defendants used force to pull a victim from a van, made the victim turn over his wallet and pager, and then drove away in the victim's van. (*Ortega, supra,* 19 Cal.4th at pp. 690-691.) This court held the robbery could not be parsed to include only the wallet and pager so that the taking of the van could support a separate grand theft auto conviction. (*Id.* at p. 699.) The robbery necessarily included taking the van as well.[14] (*Ibid.*)

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[14] *Ortega* also held it was appropriate to stay the sentence on the robbery conviction in light of a sentence imposed for a carjacking conviction. (*Ortega, supra,* 19 Cal.4th at pp. 692-693.) However, trial court had already held a stay appropriate and the issue presented concerned whether the robbery conviction should instead have been stricken as a lesser included offense of carjacking; therefore the opinion had no need to address whether the stay was based on single act or a course of conduct with a singular objective. (*Ibid.*)

Here, the conclusion that the robbery necessarily included taking the van as well as the coins is even more compelling. In *Ortega,* the defendants used force to eject the driver from the van and took the wallet and pager from him once he was out of the van. (*Ortega,* 19 Cal.4th at pp. 690-691.) The defendants then entered the van and drove away. Thus possession of the wallet and pager was accomplished before possession of the van, yet it was still one taking. Here, by contrast, Molestina took possession of the coins by taking possession of the van.

A very similar fact pattern was addressed by the Second Appellate District in *People v. Dominguez, supra* 38 Cal.App.4th 410 (*Dominguez*). In *Dominguez,* the victim was sitting in the driver's seat of his recently parked van. (*Id.* at p. 414.) The defendant entered the van through a side sliding door, put a "cold metallic object" against the victim's neck and demanded everything he had. (*Ibid.*) The victim simultaneously handed over possession of his jewelry and his van and fled. (*Id.* at p. 415.) The van was driven to another location where it was abandoned by the defendant. (*Ibid.*)

The defendant was convicted of both robbery and carjacking and the trial court imposed an upper term sentence for the carjacking and a concurrent middle term for the robbery. (*Dominguez, supra,* 38 Cal.App.4th at pp. 414-415.) After first deciding that convictions for both robbery and carjacking were proper,[15] the Court of Appeal addressed the application of section 654. (*Id.* at pp. 419-420.) The Attorney General argued that section 215, subdivision (c) indicated an intent to abrogate the *Neal* course of conduct stay when it said there could be no double punishment of carjacking and robbery based on "the same act." (*Id.* at p. 419.) The Court of Appeal chose not to reach this argument as "the carjacking and robbery here constituted 'the same act,'" and not a course of conduct. (*Id.* at p. 420) The court noted appellant held a cold metallic object to the back of the victim's neck causing the victim to simultaneously hand over his jewelry and the van. (*Id.* at p. 421.) "[T]he same act was essential to both offenses and thus is not separately punishable under Penal Code section 654."

[15] The case was decided prior to *Ortega, supra.*

(*Ibid.*) In light of the authorities discussed above, the reasoning in *Dominguez* is entirely sound.

Here, the taking of the coins is even more closely tied to the taking of the van than the property in either *Ortega* or *Dominguez*. In *Ortega* and *Dominguez*, the defendants demanded property generally and, after the victims had turned over items on their person, the defendants also proceeded to take their vehicles. Here, the primary target of the crime was Schmidt Sr.'s coin collection. The most efficient method of removing the coins from Schmidt Sr.'s possession was to do so by taking the van that held them. Thus, the van was not an item sought for its independent value but as a convenient container for carrying the coins. It was the taking of the van that accomplished the taking of the coins. This was a single criminal act of taking a vehicle and its contents.

E. Even had Molestina Formed the Intent to Take the Van During the Course of the Robbery, the Van Was Still Part of the Property Taken in the Robbery and thus Both Crimes Involved a Single Act.

In the opinion, the Court of Appeal placed great weight on the possibility that Molestina's intent to take the van arose after the

robbery had commenced. (Opn. 10.) Appellant disagrees that this is a reasonable inference from the record. According to the probation report, the coin collection was apparently valued at $70,000 and stored in multiple boxes, indicating a large volume of coins. (CT 51.) Apparently there were sufficient number of boxes that all four men were actively involved in moving them from the van into the waiting cars. (CT 51.) Guerra, one of the accomplices, told officers that appellant "was to call Molestina, with the order to *commit the actual carjacking,* once Mr. Schmidt Sr. was getting ready to leave his residence." (CT 52.) Appellant told the probation officer that the plan came about when he happened to mention Schmidt Sr.'s coin collection and Molestina "volunteered to 'jack the guy.'" (CT 54.) All of the vehicles converged at a pre-planned location where they intended to dole out the stolen property. (CT 54.) This evidence indicates that the defendants always intended to carjack the van in order to take the coins. There is no contrary evidence in the record to support an inference that the intent to take the van only arose after Schmidt Sr. resisted a taking of the coins.

Regardless, even if the Court of Appeal's inference is supported by the record, it does not change the taking from a single act into a course of conduct. The scope of a robbery includes all items taken by the display of force regardless of when the intent to take a specific item arose. (*Brito, supra,* 332 Cal.App.3d at p. 326.)

In *Brito,* the defendant Brito was hitchhiking on a freeway onramp with a gasoline can in his hand. (*Brito, supra,* 232 Cal.App. 3d at p. 319.) When a driver opened the passenger door to give him a lift, Brito pointed a gun at the driver's face and demanded gold or money. (*Ibid.*) The driver fled from the vehicle, and Brito shot him in the back. (*Ibid.*) Brito then drove away in the car. (*Ibid.*)

Brito was convicted of robbery, among other crimes. On appeal, Brito argued the jury should have received theft as a lesser included offense on the theory that the intent to steal the van could have arisen after the foiled attempted robbery of "money and gold," and, therefore, the jury could have concluded there was no force involved with the taking of the car. (*Brito, supra,* 232 Cal.App.3d at p. 324.) The Court of Appeal rejected this theory, because, regardless of

when the intent to steal the car arose, it was achieved by the initial threat of force that was applied with the intent to take property. (*Id.* a p. 326.) The court noted "we see no rationale for limiting the scope of the robbery only to the specific items on which the defendant has focused at the time he initially applies the force." (*Ibid.*)

Under *Brito*, even if Molestina initially only planned to take the coins and decided to take the vehicle as events unfolded, the robbery still included both the vehicle and the coins. The intent at issue was the intent to take property by force, including property targeted initially as well as any property targeted during the course of the robbery. As such, the vehicle was still part of the property taken in the robbery.

Where a defendant obtains possession of a vehicle and its contents by a use of force, the resulting convictions for carjacking and robbery are based on a single act for purposes of section 654. (*Ortega, supra,* 19 Cal.4th at p. 699; *Dominguez, supra,* 38 Cal.App.4th at p. 421.) As such, the defendant can be convicted of both, but one conviction must be stayed as a matter of law. Here, the record showed that

Molestina took the van and the coin collection it contained by a single display of force. There is no substantial evidence which could support parsing his conduct into separate criminal acts. As such, appellant's sentence for robbery must be stayed.

II.

THE COURT OF APPEAL AND TRIAL COURT ERRED IN HOLDING THE ACTS WERE NOT COMMITTED WITH A SINGLE INTENT AND OBJECTIVE.

A. Introduction.

Although appellant believes this case unquestionably involves a single act, assuming arguendo that taking the van was a distinct act from taking the coins, the trial court and Court of Appeal still erred in finding the evidence showed distinct objectives and intents under the *Neal* test. The Court of Appeal found substantial evidence that Molestina took the van "as a separate goal of escaping from the scene of the crime," rather than with the goal of stealing the coins. (Opn. 10.)

According to the Court of Appeal, it could be reasonably inferred from the record that Molestina initially intended to overcome

Schmidt Sr. with violence so that they could load the coins from the van into their own vehicle in the driveway without ever taking the van. (Opn. 10.) When faced with Schmidt's resistance, Molestina opted to push the victim out of the way, fleeing in the van instead. (Opn. 10.) The robbers then abandoned the van a short distance away after taking the coins from the van. (Opn. 10.)

As noted above, appellant disagrees that it can be reasonably inferred from this record that Molestina only decided to take the van once faced with resistance, because the statements in the probation report indicate the defendants always planned to take the coins by taking the van. (CT 51-52, 54.) Regardless, even if it could be reasonably inferred that the plan changed mid-robbery, and that this represented a course of conduct rather than a single act, taking the van was still incidental and facilitative to the criminal objective of stealing the coins, thereby requiring a stay as a matter of law.

Without any real discussion, the opinion holds otherwise, stating, "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." (Opn. 10.) This holding is erroneous because what the court refers to as "escaping from the crime scene" is not the type of after-the-fact escape discussed in *People v. Nguyen* (1988) 204 Cal.App.3d 181, 191, (discussed below) on which the Court of Appeal relies. Rather, it is simply another way of describing asportation of the coins, an element of the robbery and carjacking itself. Under the undisputed facts, stealing the coins was, as a matter of law, accomplished *by* taking the van, therefore the intent of taking the van was incidental and facilitative of the intent to steal the coins. Because this was an act committed to facilitate an element of the robbery, it was necessarily committed with the same intent and objective as the robbery itself.

B. If One Crime Is Committed to Accomplish Another Crime, It Is Necessarily Facilitative and a Stay is Required as a Matter of Law.

In addition to prohibiting multiple punishment of a single act, section 654 has long been interpreted as prohibiting punishment for an indivisible course of conduct carried out incident to one objective. (*Neal, supra,* 55 Cal.2d at p. 19.) When one crime is committed in order to accomplish another crime, they share an underlying objective. (*Id.*

at p. 20 [arson must be stayed when it was the means used to commit attempted murder].) "The *Neal* court explained that where a defendant commits another crime as 'the means of perpetrating the crime,' section 654 applies. (*People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1006 (*Rodriguez*).)

In the recent case of *Dowdell, supra,* 227 Cal.App.4th 1388, the Sixth District Court of Appeal discussed the distinction between primary and incidental intents and objectives for purposes of section 654. The 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. (*Dowdell, supra,* 227 Cal.App.4th at pp. 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 Sixth District 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 those committed 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].)

A crime committed *after* another crime is accomplished may not require a stay. Where one crime is completed and another crime committed in its wake, there may be a question of fact as to whether they crimes involve the same or separate intents and objectives. This was the basis of the holding in *Nguyen* and *Rodriguez.*

In *Nguyen* the defendant and an accomplice entered a market and committed an armed robbery. (*Nguyen, supra,* 204 Cal.App.3d at p. 184.) The accomplice escorted the store clerk to a rear bathroom, took money and a passport from him, and forced him to lie faced down on the floor. (*Id.* at p. 185.) Nguyen, from the front of the store, yelled a "Vietnamese battle phrase to be used when 'someone was to kill or be killed," and the accomplice kicked the clerk in the ribs and shot him in the back. (*Ibid.* at p. 185.) Fortunately, the clerk survived. (*Ibid.*) Nguyen was convicted of robbery and attempted murder based on the incident. (*Id.* at p. 184.) The trial court did not stay the robbery sentence. (*Id.* at p. 189.)

In upholding the trial court's decision, the appellate court noted that, at the time of the shooting, the victim had already been relieved of his valuables and was not resisting. (*Nguyen, supra,* 204 Cal.App.3d at p. 190.) Unlike this case, the shooting was not a use of force committed to *accomplish* the robbery. "This act constituted an example of gratuitous violence against a helpless and unresisting victim which has traditionally been viewed as not 'incidental' to robbery for the purposes of Penal Code section 654." (*Ibid.*)

Similarly, in *Rodriguez,* the defendant committed another crime (evading arrest) after the robbery had been completed and therefore no stay was required because the evading did not facilitate the robbery. In *Rodriguez* the defendant robbed a bank. (*Rodriguez, supra,* 235 Cal.App.4th at p. 1003.) "*After obtaining the money,* Rodriguez fled the building and got into the back of a waiting vehicle." (*Ibid.,* emphasis added.) After the vehicle was pulled over and the driver and a passenger exited, Rodriguez climbed into the driver's seat and proceeded to lead officers on a high speed chase. (*Ibid.*) He was convicted of robbery and evading arrest by reckless driving. (*Id.* at p.

1002.) The appellate court upheld the trial court's imposition of separate sentences, distinguishing the situation from that where one crime is committed as a means of committing a robbery. (*Id.* at p. 1006.)

> Rodriguez's act in evading arrest in this case was not the method by which he obtained the bank's money. That is demonstrated by the fact that Rodriguez could have attained the objective of the robbery (obtaining money) *without* evading arrest, if the police had not given chase. The same cannot be said of the assault in *Logan*, [*supra*, 41 Cal.2d 279] which had the *same* objective as the robbery, namely, obtaining the victim's valuable. In short, since a defendant does not evade arrest as a means of perpetrating a robbery, a trial court may reasonably find that a defendant who commits a robbery and evades arrest within the meaning of Vehicle Code section 2800.2, subdivision (a) acts with multiple objectives.

(*Rodriguez, supra*, 235 Cal.App.4th at p. 1006.)

As discussed in Argument I, Section C, *ante*, a robbery is not completed until the defendant takes possession of the property and carries the property at least some distance. (*People v. Gomez, supra*, 43 Cal.4th at p. 255.) Thus, if Molestina, due to Schmidt Sr.'s resistance, could not take the coins without taking the van, then taking the coins *by* taking the van was facilitative of the primary intent to steal the

coins. This is true regardless of whether taking the van was part of the initial plan or arose mid-robbery.[16]

Furthermore, if appellant's conviction is held to not require a stay solely because Molestina may have decided to take the van to obtain the coins *during* the robbery instead of before the robbery began, it leads to an absurd result. One of the goals of section 654 is to make punishment commensurate with his criminal liability. (*Neal, supra,* 55 Cal.2d at p. 20.) If the applicability of the stay depended on when Molestina decided take the car to achieve the robbery, it would thwart this goal of tying stays to criminal culpability.

In a situation where Molestina had always planned to take the coins by committing a carjacking, he can only be sentenced for the carjacking. (*Neal, supra,* 55 Cal.2d at p. 19-20.) Per the Court of Appeal's logic, if he only decided to commit the carjacking once it proved an easier method of taking the coins, he should receive

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[16] There is no evidence in the record that Molestina asported the coins prior to the carjacking and therefore this court need not address an ancillary issue discussed in *Rodriguez, supra,* 235 Cal.App.4th at p. 1007, whether a crime committed *after* asportation, done to facilitate reaching a place of temporary safety, must be stayed.

separate punishment. In both cases, Molestina is equally criminally liable. He has shown a willingness to take the van to achieve the robbery. Yet if he first attempts to take the coins *without* taking the van he receives a greater punishment than if he planned on taking the van from the start. The assailant who plans to commit a robbery by carjacking all along is not somehow less culpable than an assailant who only resorts to a carjacking once he is unable to succeed by show of force alone. Denying a stay in the latter situation is not a commensurate result.

Because Molestina took Schmidt Sr.'s van as a means of accomplishing the taking of the coins, section 654 requires a stay as a matter of law, regardless of when his intent to take the van arose. As such, there is no substantial evidence in the record to support a finding that he had a separate intent or objective in taking the van.

III.

CONCLUSION

Appellant's sentence for robbery must be stayed.

Dated: February 8, 2016

Respectfully Submitted,

Cynthia M. Jones
Attorney for Tory Corpening
Defendant and Appellant

CERTIFICATION OF WORD COUNT

I, Cynthia M. Jones, hereby certify in accordance with California Rules of Court, rule 8.520(c)(1) that this brief contains 8,770 words as calculated by Microsoft Word, the software in which it was written.

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

Dated: February 8, 2016

Cynthia M. Jones

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 S228258

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 OPENING BRIEF

I declare I electronically served from my electronic service address of cjones@avatarlegal.com the **above-referenced document** on February 8, 2016 by 5:00 p.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 February 8, 2016

Server signature:

Cynthia M. Jones

PROOF OF SERVICE BY MAIL

Re: Tory Corpening, Court Of Appeal Case: S228258, 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 February 8, 2016, I served a copy of the attached Appellant's Opening Brief (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:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 8th day of February, 2016.

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: S228258, 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 February 8, 2016 a PDF version of the Appellant's Opening Brief (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated and/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 8th day of February, 2016 at 10:16 Pacific Time hour.

Teresa C. Martinez
(Name of Declarant)

(Signature of Declarant)