In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TORY J. CORPENING,

Defendant and Appellant.

Case No. S228258

Fourth Appellate District, Division One, Case No. D064986
San Diego County Superior Court, Case No. SCS258343
The Honorable Francis M. Devaney, Judge

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Penal Code section 654 bars multiple punishment for crimes that arise from a single act. Given that the vast majority of crimes do not arise from a single physical act, this Court has interpreted section 654 to prohibit multiple punishment for crimes that emerge from a course of conduct driven by a single intent or objective. Indeed, this Court explained in *Neal v. California* (1960) 55 Cal.2d 11, 19, that whether a course of conduct is divisible into multiple acts, for purposes of section 654 application, *depends* upon the intent or objective of the actor.

Here, Tory Corpening and four cohorts sought to rob the victim of rare coins. They drove a truck and a car to the victim's house where they watched and waited as the victim and his son loaded the coins into a van. Once the coins were loaded, the son left the victim in the van to go lock the house. As the victim waited in the driver's seat of the idling van, one of the codefendants walked up, pointed a gun at the victim, and ordered him out of the van. The victim complied. But as the codefendant started to enter the van, the victim attacked and tried to wrest the gun away from him. The codefendant scared the victim into temporary submission by again pointing the gun at him. But as the codefendant again reentered the van, the victim again lunged for the gun to stop the robbery. The codefendant threw the van into reverse gear. The victim grabbed the steering wheel and clung to it as the codefendant accelerated the van backwards. The victim fell to the ground and was almost run over. The codefendant picked up a fellow cohort about 50 yards from the house, and then drove away from the scene. The other cohorts, including Corpening, fled in the other two cars and reunited with the van at an apartment complex. There, as they quickly unloaded the coins from the van and placed them in one of their cars, police apprehended them.

Corpening pled guilty to several crimes, including robbery and carjacking. On appeal, he urged that multiple punishment for the carjacking and robbery was barred under Penal Code section 654, because those crimes arose from a single act: the forceful taking of the van, which contained the coins. The Court of Appeal disagreed, finding that substantial evidence supported the trial court's conclusion that the crimes were separate. The court observed that the carjacking and robbery arose from a course of conduct motivated by multiple intents and objectives—the intent to steal the coins and the separate intent, close in time, to jack the victim of his van when the victim fought back and resisted the robbery.

For over half a century, the rule has been that whether a course of conduct giving rise to multiple crimes is divisible, allowing for multiple punishment, depends on the actor's intent and objective. Where multiple intents and objectives animate the course of conduct, multiple punishment is permitted. Under this rule, this Court should affirm the judgment because substantial evidence supports the trial court's conclusion that the robbery and carjacking were separate, arising from a course of conduct, motivated by multiple intents and objectives. The trial court properly considered all the facts and circumstances of the crimes and appropriately applied the intent and objective test when it concluded multiple punishment for the robbery and carjacking was permissible.

STATEMENT OF THE CASE

Corpening pled guilty to carjacking (Pen. Code, §215, subd. (a)); robbery (Pen. Code, §211); assault with a deadly weapon (Pen. Code, §245, subd. (a)(1)); receiving stolen property (Pen. Code, §496, subd. (a)); and witness intimidation (Pen. Code, §136.1, subd. (a)(1)). (1 RT 1-5; CT 11-13.)

Because Corpening pled guilty, there was no trial in which the facts of the offenses were presented and developed. Instead, the sentencing court

had to rely upon the probation report to ascertain the facts about what happened. (CT 166-169.) In that report, the probation officer noted that the facts surrounding the robbery and carjacking could be construed as a course of conduct involving separate intents, thus warranting separate punishment. (CT 178.) In a sentencing brief, the prosecutor suggested, without explanation or analysis, that Penal Code section 654 barred punishment for the robbery, separate and apart from the punishment for the carjacking. (CT 48.)

The sentencing court disagreed with the prosecutor that section 654 applied to the robbery, and stated, "I think that is a separate offense with the carjacking." (5 RT 839.) The court sentenced Corpening to six years, eight months in prison. The sentence consisted of the midterm of five years for the carjacking, with consecutive terms of one year for the robbery, and eight months for the witness intimidation. The court stayed the punishments for the assault with a deadly weapon and receiving stolen property convictions under section 654. (5 RT 839-840; CT 218.)

On appeal, Corpening asserted that the sentencing court erred by imposing a one-year consecutive term for the robbery conviction. He alleged that the robbery and carjacking arose from a single act and were punishable only once under section 654. The Court of Appeal thoroughly analyzed the evidence and concluded that substantial evidence supported the trial court's implied finding of separate intents and objectives for the robbery and carjacking. Thus, the court rejected the claim. (*People v. Corpening* (October 21, 2014, D064986) [nonpub. opn.].)

Corpening petitioned this Court for review and, for the first time, argued that *People v. Jones* (2012) 54 Cal.4th 350, required stay of the punishment for the robbery conviction. This Court granted review, vacated the Court of Appeal's opinion, and transferred the matter back to the Court of Appeal with instructions to reconsider its decision in light of *Jones*.

(*People v. Corpening* (February 11, 2015, S222900) [order granting review].)

Following additional briefing by the parties on *Jones*, the Court of Appeal again rejected Corpening's contention, holding that the robbery and carjacking occurred during a course of conduct with separate purposes. Thus, the court concluded that punishment for both convictions was permitted and appropriate. (*People v. Corpening* (June 24, 2015, D064986) [nonpub. opn.].)

This Court granted Corpening's petition for review.

STATEMENT OF FACTS[1]

Walter Schmidt, Sr. was a currency dealer, who specialized in buying and selling rare coins. (CT 166.) He maintained a booth at a swap meet in San Diego where he bought and sold coins. (CT 168, 170.) Tory Corpening and Eduardo Guerra frequently sold things at the same swap meet and occasionally visited Schmidt's booth where they saw his coins and other currency. (CT 168, 170.)

Corpening wanted to help Guerra, who owed a significant amount of money to a drug dealer. (CT 170.) One day, while he and Guerra were with

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[1] Corpening pled guilty. The factual basis for his plea amounted, in relevant part, to a statement that, "[he] unlawfully took a motor vehicle in possession of another against his will to permanently deprive him of said vehicle; that [he] unlawfully, by means of force, took personal property of another...." (1 RT 4; CT 13.) The probation report provided greater detail about the robbery and carjacking. (CT 166-169.) Consequently, the trial court relied upon the facts, as developed in the probation report to make its sentencing determination. This is consistent with the trial court's power to hold an evidentiary hearing to ascertain the necessary facts in order to properly exercise its sentencing power. (*People v. Ross* (1988) 201 Cal.App.3d 1232, 1240-1241; see also *People v. Rosenberg* (1963) 212 Cal.App.2d 773, 776-777 [trial court read and considered a probation report following entry of a defendant's guilty plea to supply the information necessary to determine whether section 654 applied].)

Jorge Aguila and Danny Molestina, they started talking about Schmidt's coin collection. Molestina offered to "jack the guy" – that is, to rob Schmidt. (CT 170.)

In preparation for the heist, Corpening and Guerra followed Schmidt home from the swap meet so they could determine where he lived and conduct surveillance. The night before executing the planned robbery, Guerra, Molestina, Aguila, and Celestina Rodriguez met together with Corpening in his garage to review and finalize their plans. (CT 168.) Guerra and Aguila were to park in front of Schmidt's house in Aguila's Pontiac. Corpening, Molestina, and Rodriguez were to park around the corner in Guerra's truck. Molestina was to then get out and hide behind some bushes. (CT 168, 170.) Guerra and Aguila were to report Schmidt's movements to Corpening via cell phone. Once it looked like Schmidt was ready to leave to go to the swap meet, Corpening was to issue the order to Molestina to commence the robbery. (CT 168.) Corpening had a facemask, gloves, and a stun gun. (CT 167, 169.)

In the early morning of July 22, 2012, Schmidt and his son packed their van, which was parked in the front driveway of their home, with the coins and other items they planned to sell at the swap meet. (CT 166.) They loaded the van with coins worth approximately $70,000. (CT 167.) After loading the van, Schmidt got into the driver's seat and turned on the ignition while his son returned to the house to lock it up. (CT 166.)

Suddenly, Molestina came out of hiding, pointed a gun at Schmidt's face and repeatedly yelled, "Get out of the car or I'll shoot you." Because Schmidt feared for his life, he got out of the car. As Molestina started to climb into the van, Schmidt attempted to wrestle the gun away from him. However, he was unable to disarm Molestina, who again pointed the gun at his face. Schmidt backed away. (CT 167.)

As Molestina tried to get into the van a second time, Schmidt tried again to stop the robbery, and lunged for the gun. However, this time, Molestina quickly put the van into reverse gear. As the van rolled backwards, Schmidt grabbed the steering wheel to avoid being run over. Molestina dragged him about 18 feet down the driveway and into the street until Schmidt lost his grip and crashed to the pavement, striking his head and body, and narrowly avoided being run over. (CT 167.)

Molestina drove about 50 yards away from the Schmidt home where he stopped momentarily and picked up Guerra. Molestina then drove off in the van. Aguila followed in his Pontiac and Corpening followed in the truck. (CT 167, 170.) The group met at an apartment complex. (CT 170.) Meanwhile, Schmidt called the police. (CT 167.)

Police located the robbers at the apartment complex as they were unloading the coins from the van and placing them in the Pontiac. They arrested Molestina and Aguila. (CT 167.) They arrested Guerra and appellant, who had fled when police arrived, some days later. (CT 168-169.)

ARGUMENT

WHETHER MULTIPLE CRIMES ARISE FROM A DIVISIBLE COURSE OF CONDUCT OR FROM A SINGLE ACT DEPENDS UPON THE FACT INTENSIVE INQUIRY INTO THE ACTOR'S INTENT AND OBJECTIVES

Penal Code section 654 bars multiple punishment for multiple crimes that emerge from a single act or from a course of conduct motivated by a single intent or objective and is supposed to ensure punishment commensurate with culpability. While there are some instances in which it is quite easy to discern multiple crimes emerging from a single physical act, the vast majority of crimes arise from a course of conduct involving multiple acts. In determining whether multiple punishment is barred or

permissible for crimes arising from a course of conduct, the rule for over half a century has been that the divisibility of the course of conduct is dependent upon the actor's intent and objective. In that half century, this Court has shaped the contours of, provided limitations to, and overall reaffirmed the vitality of, the intent and objective test.

A defendant's intent and objective is an intensely factual question. Sentencing courts are tasked with resolving this factual question and are granted broad latitude in answering the question as they exercise their inherent discretionary power to fashion a suitable punishment commensurate with the defendant's culpability.

The appellate court reviews the sentencing court's section 654 sentencing ruling for substantial evidence. That is, if the sentencing court imposes multiple punishment because it concludes multiple intents and objectives motivated the defendant's course of conduct, and that factual conclusion is supported by substantial evidence, then the sentence is affirmed. If substantial evidence does not support the trial court's factual conclusion, the sentence is reversed.

Often, sentencing courts are not explicit upon the record as to why or how they found multiple intents or objectives. In such cases, appellate courts review the record to determine whether substantial evidence supported the sentencing courts' implicit factual conclusion that multiple intents and objectives warranted multiple punishment.

In determining the facts for section 654 purposes, courts should consider the nature of the acts giving rise to the crimes, the facts and circumstances of the crimes, the intent elements for the crimes, whether a defendant had an opportunity for reflection before committing additional criminal acts, and any other factors that might provide insight about a defendant's intent and objective and his or her criminal culpability.

Here, under the facts and circumstances of the case, the trial court properly concluded that the robbery and carjacking were committed with independent intents and purposes. Because substantial evidence supports the trial court's conclusion, this Court should affirm the judgment.

A. Historical Developments in Penal Code Section 654 Jurisprudence

Penal Code section 654 provides, 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." As this Court has repeatedly recognized, the purpose of this section is to "ensure that the defendant's punishment will be commensurate with his culpability." (*People v. Sanders* (2012) 55 Cal.4th 731, 742; *People v. Jones* (2012) 54 Cal.4th 350, 367.) Deceptively simple in its construction, section 654's bar against multiple punishment has nonetheless bedeviled California courts for over a century. (*Jones*, *supra*, 54 Cal.4th at p. 361 (conc. opn. of Werdegar, J.).) One of the chief challenges section 654 presents in its application is what constitutes "an act." Additionally, how "an act" is defined (and thus, whether multiple punishment is permitted) can create tension between application of section 654 and its purpose to ensure punishment commensurate with culpability.

Sometimes, it is relatively simple to see that multiple crimes emerge from a single act. For example, in *Jones*, the defendant was a convicted felon who carried an unregistered, concealed, and loaded gun. By so doing, he violated three different laws: 1) being a felon in possession of a firearm; 2) carrying a concealed and unregistered firearm; 3) and carrying an unregistered loaded firearm in public. (*People v. Jones*, *supra*, 54 Cal.4th at p. 352.) This Court held that the three crimes emerged from a single act: the defendant unlawfully carried a firearm. This single act, though violating

multiple statutes, could only be punished once. (*Id.* at p. 358.) The Court reached this conclusion by relying upon the plain language in section 654: the crimes involved "a single act or omission that can be punished but once." (*Id.* at pp. 359-360.)

Similarly, in *People v. Mesa* (2012) 54 Cal.4th 191, 197-198, this Court explained that section 654 barred multiple punishment for street terrorism (Pen. Code, §186.22, subd. (a)) and the underlying felony for that crime. As defined by the Legislature, street terrorism requires active participation in a criminal street gang together with the commission of felonious conduct. (Pen. Code, §186.22, subd. (a); *People v. Lamas* (2007) 42 Cal.4th 516, 523.) In other words, felonious conduct is embedded within the crime of street terrorism. In *Mesa*, on two separate dates, the defendant gang member, who was already a convicted felon, shot two different victims. For each shooting, he was convicted of assault with a firearm and possession of a firearm by a felon; he was also convicted of street terrorism, the substantive gang crime. (*Mesa*, at pp. 193-195.) The assault and firearm possession were embedded felonies that enabled conviction for street terrorism. (*Id.* at p. 197.) This Court concluded that the defendant could not be punished for both the underlying crimes (assault with a firearm or possession of a firearm) *and* street terrorism because the street terrorism was based on the same underlying act as either the assault or the gun possession. Because there was a single criminal act (either assault or firearm possession), there could not be multiple punishment for the street terrorism grounded upon that single act.[2] (*Id.* at p. 200.)

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[2] Although the decision in *Mesa* rested upon the conclusion that the street terrorism crime was based upon the same "act" as its embedded felony, another analytical approach would have been to simply conclude that the embedded felony amounts to a lesser included offense, barring *conviction* of both. (See *People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

(continued...)

Jones and *Mesa* represent recent cases in which the literal language of section 654—barring multiple punishment for "an act or omission punishable in different ways by different provisions of law"—was determinative. But section 654's reach is not "confined to its literal language, that is where multiple convictions are based on what is truly a single act or omission." (*People v. Beamon* (1973) 8 Cal.3d 625, 637.) Section 654 also applies where multiple crimes arise from courses of conduct, involving multiple acts.

In 1960, this Court recognized that few crimes arise from a single physical act; instead, crimes usually arise from a course of conduct. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) In *Neal*, the defendant threw gasoline into the victims' bedroom and ignited it, causing the two victims to suffer severe burns. The defendant was convicted of two counts of attempted murder and one count of arson. (*Id.* at pp. 15, 18.) Because multiple punishment for different offenses arising from the same act is prohibited under section 654, the question in *Neal* was whether the arson and attempted murders constituted separate acts under that statute, or whether those crimes arose from a single act. (*Id.* at pp. 18-19.)

Noting that most crimes involve a course of conduct rather than a single act, the Court explained that "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor." (*Id.* at p. 19.) If a course of conduct, leading to multiple crimes, is animated by a single intent or objective, then multiple punishment is prohibited. (*Ibid.*) By

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Such an approach avoids the potential confusion when one considers that the underlying felonious conduct in many street terrorism contexts are not single-act felonies (like possession of a firearm) but felonies that involve several acts (such as assaults and drug sales), or a course of conduct.

contrast, if the course of conduct is animated by separate or independent intents or objectives, multiple punishment for the various resulting crimes is permitted. (*Id.* at pp. 19-20; see also *People v. Harrison* (1989) 48 Cal.3d 321, 335; *People v. Beamon* (1973) 8 Cal.3d 625, 639.) Thus, under *Neal*, the question of whether crimes arise from a single act, for which multiple punishment is barred, or a divisible transaction allowing multiple punishment, hinges upon the intent and objective of the actor.

Applying the intent and objective test, this Court concluded in *Neal* that the defendant could not be punished for both arson and the attempted murders. The Court explained that by throwing and igniting gasoline in the victims' bedroom, the defendant engaged in a course of conduct driven by a single intent: to kill the victims. Because there was only a single intent animating this course of conduct, the resultant crimes of arson and attempted murder could only be punished once. Arson was merely the instrumentality by which the defendant hoped to achieve his murderous intent and objective. He could not be punished for both arson *and* the attempted murders.[3] (*Neal*, *supra*, 55 Cal.2d at p. 20.)

In the years since *Neal*, this Court has shaped the contours of the intent and objective test. In theft cases, for example, multiple punishment cannot be imposed for the taking of multiple different objects on a single occasion. In *People v. Bauer* (1969) 1 Cal.3d 368, 372, for instance, the defendant and an accomplice entered a home, tied up its occupants, took numerous items of personal property over the course of two hours, and, after loading the property into one of the victim's cars, drove off in the car.

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[3] This Court also held that consecutive sentences for the two attempted murder convictions were appropriate because those crimes involved separate victims. (*Neal*, *supra*, 55 Cal.2d at pp. 20-21.) Unless Schmidt's son is also considered to have been a victim, the so-called multiple victim exception to section 654 is not at issue here.

The defendant was convicted of, and punished for both robbery and car theft. On appeal, he challenged the dual punishment for those crimes. (*Id.* at p. 375.) In explaining why multiple punishment was barred, this Court reiterated that double punishment is barred where a course of conduct violating more than one statute comprises an indivisible transaction. The divisibility of the transaction "depends upon the intent and objective of the actor." (*Id.* at p. 376.) Applying this principle the Court explained that "the taking of several items during the course of a robbery may not be used to furnish the basis for separate sentences.... [W]here a defendant robs his victim in one continuous transaction of several items of property, punishment for robbery on the basis of the taking of one of the items and other crimes on the basis of the taking of the other items is not permissible." (*Id.* at pp. 376-377, citing *In re Ward* (1966) 64 Cal.2d 672, and *People v. Quinn* (1964) 61 Cal.2d 551.) It is the intent and objective of the actor that is determinative. In a typical robbery, the robber harbors one intent: to steal as much as possible. Thus, in a typical robbery in which multiple objects are stolen, only one punishment is permitted.[4]

While the stealing of multiple objects during the course of a robbery and theft cannot give rise to multiple punishment, a string of burglaries on one night in the same building can be. (*People v. James* (1977) 19 Cal. 3d 99, 119.) In *James*, the defendant broke into three separate offices in the same building. Relying on *Bauer*, he argued that he could not be punished for more than one. This Court disagreed and held that the three separate burglaries were independent and could each be punished. (*Ibid.*) *James*

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[4] Viewed another way, the holding in *Bauer* is nothing more than an extension of the unremarkable rule that theft of various items in a continuing transaction is "but one offense and the loot may not be splintered into separate counts of theft for purposes of multiple convictions." (*People v. Rush* (1993) 16 Cal.App.4th 20, 25.)

suggests that if there is a meaningful way to divide crimes, even if they are committed with one main objective, then multiple punishment is permitted. In *James*, the burglar appeared to have the same singular objective that thieves generally have: steal as much as possible. But because his course of conduct could be reasonably broken into multiple burglarious entries of different locked offices, multiple punishment was appropriate. This illustrates a temporal limitation to the single intent and objective rule, or alternatively, a recognition of the different property rights at stake.

An additional limitation to the intent and objective rule occurs when a defendant engages in violence over and beyond what was originally intended. For example, in *People v. Massie* (1967) 66 Cal.2d 899, 908, the defendant held the victim at gunpoint and demanded his wallet. The victim first objected. However, after the defendant struck him with the gun, the victim surrendered his wallet. Because the victim was looking at him, the defendant demanded the victim to stop looking at him and fired a shot, which grazed the victim's temple. The defendant was convicted of robbery and attempted murder. On appeal he urged that he could not be punished for both offenses because the attempted robbery constituted a lesser included offense of the attempted murder. This Court disagreed, and explained that "[t]he attempted murder occurred as a separate and distinct act after the completion of the robbery; [defendant] contemplated an objective other than robbery." (*Ibid.*) Therefore, section 654 did not bar multiple punishment.

The conclusion in *Massie* reveals that where a defendant commences a crime with one intent or objective in mind, but then during the course of criminal conduct forms a separate intent to commit an additional crime, multiple punishment is warranted. It also suggests that gratuitous criminal acts of violence that are not necessary to the commission of the originally intended crime can be separately punished. (See also *People v. Nguyen*

(1988) 204 Cal.App.3d 181, 190-193 [observing that acts of violence whether gratuitous or to facilitate escape are not necessarily incidental to a robbery for section 654 purposes].) Thus, a defendant cannot avoid punishment commensurate with culpability by claiming that additional acts of violence were necessary to complete the originally intended crime.

Indeed, this Court has cautioned against "a 'broad and amorphous' view of the single 'intent' or 'objective' needed to trigger" section 654 application. (*People v. Harrison*, *supra*, 48 Cal.3d at pp. 335-336.) If the intent or objective is too broadly viewed, there is danger section 654 "would impermissibly 'reward the defendant who has the greater criminal ambition with a lesser punishment.'" (*Ibid.*) In *Harrison*, the defendant sexually penetrated the struggling and resistant victim three times during an attack that lasted seven to ten minutes. (*Id.* at p. 325.) The defendant argued that section 654 barred multiple punishment for the three sex acts because they amounted to an indivisible transaction in furtherance of a "single intent and objective of obtaining sexual gratification." (*Id.* at p. 335.) This Court disagreed, cautioning that broad and amorphous views of intent are not the standard for sex crimes and explaining that "there is no 'universal construction' directing section 654's application in every instance. (*Id.* at p. 335-336.)

The Court also rejected the defendant's argument that he would have only engaged in one sex act if the victim had not defended herself and resisted his attack. (*Harrison*, *supra*, 48 Cal.3d at p. 338.) The Court noted that each of the sex acts was "volitional, criminal, and occasioned by separate acts of force." (*Ibid.*) The Court further observed that the defendant should "not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his sexually assaultive behavior." (*Ibid.*)

Applying this Court's reasoning in *Harrison*, one court concluded that the defendant could be punished for each gunshot he fired at a pursuing police officer as he tried to escape. (*People v. Trotter* (1992) 7 Cal.App.4th 363, 367-368.) In *Trotter*, a police officer chased the defendant, who had stolen a taxi cab, down the freeway. (*Id.* at p. 365-366.) During the car chase, the defendant fired a gunshot at the pursuing officer. About a minute later, he fired a second shot. Within seconds, he fired the third and final shot. (*Id.* at p. 366.) At trial, he testified he was trying to shoot the officer's radiator to disable the police car. (*Id.* at p. 366.) He was convicted of three counts of assault on a peace officer with a firearm. (*Id.* at p. 365.) The trial court imposed consecutive sentences for two of the assaults and stayed punishment on the third. (*Id.* at p. 365.)

On appeal, the defendant urged that the trial court should have stayed punishment for all but one assault because those crimes were "'part and parcel' of a single course of conduct and were incidental to one objective." (*Trotter*, *supra*, 7 Cal.App.4th at p. 366.) The Court of Appeal saw no reason to limit this Court's holding in *Harrison* to sex crimes. (*Id.* at p. 367.) Recognizing that section 654's purpose is to ensure punishment commensurate with culpability, the court observed that with each successive shot, the defendant's conduct became more egregious, posing "separate and distinct risk" to the officer and the public at large. (*Id.* at pp. 367-368.) Barring multiple punishment under such facts "would violate the very purpose of [section 654's] existence." (*Id.* at p. 368.)

Harrison and *Trotter* demonstrate a further limitation to the one intent, one punishment rule. That is, if criminal acts directed toward a common objective are divisible, such that a defendant had an opportunity to reflect and even abandon the enterprise, multiple punishment is permitted.

Over the years (and even within the *Neal* case itself) the intent and objective test has been criticized. (See *People v. Latimer* (1993) 5 Cal.4th

1203, 1209-1211; *Neal*, 55 Cal.2d at at pp. 25-26 [J. Schauer dissenting]; *Seiterle v. Superior Court* (1962) 57 Cal.2d 397, 403-404 [J. Schauer concurring and dissenting].) However, despite the criticisms, the *Neal* intent and objective test, now over half a century old, remains firmly rooted as the applicable test for determining whether section 654 applies to bar multiple punishment for courses of conduct. In *Latimer*, this Court reaffirmed the vitality of the intent and objective test by relying on *stare decisis* and by noting that the Legislature had not amended section 654 in the wake of *Neal*. (*Latimer*, *supra*, 5 Cal.4th at p. 1216.) Thus, the *Neal* intent and objective test is an established part of California's criminal law fabric. (*Jones*, *supra*, 54 Cal.4th at p. 362-363 (conc. opn. of Wedergar, J).)

In *Latimer*, the defendant kidnapped the victim, drove her to an isolated area, and raped her. (*Latimer*, *supra*, 5 Cal.4th at p. 1205-1206.) The question was whether there were multiple criminal acts (kidnapping and rape) that could each be punished, or a course of conduct with a single intent and purpose that would only permit punishment for the most serious offense (rape). (*Id.* at p. 1205-1206.) This Court acknowledged the difficulty presented by the question: On the one hand, it could be argued that there were multiple criminal acts (acts amounting to the kidnapping and acts amounting to the rape); on the other, it could equally be argued, under *Neal*, that these criminal acts arose from a course of conduct with a single intent and purpose: to rape the victim. (*Id.* at p. 1216.) Applying the *Neal* test, this Court concluded that the defendant's actions amounted to a course of conduct with a single purpose and intent: to rape the victim. Therefore, the defendant could only be punished once; he could be punished for the rape but not for the kidnapping that was committed to facilitate the rape. (*Id.* at pp. 1216-1217.)

Aside from the difficulty in deciding how to parse the defendant's actions in *Latimer*, an additional difficulty in concluding he could only be

punished once (for the rape) lay in the seeming lack of respect for the victim and the indignity she suffered as she was both kidnapped *and* raped. As this Court acknowledged, "A victim, as in this case, who is forcibly transported into the desert, then raped, would be astonished to learn that the rape and the kidnapping were considered to be the same 'act or omission' (§ 654), and would find little consolation in the explanation that the defendant had only a single 'intent and objective.'" (*Latimer*, *supra*, 5 Cal.4th at p. 1211.) This presents, in stark relief, the conflict the *Neal* rule can create with the purpose of section 654: that is, "'to insure that a defendant's punishment will be commensurate with his culpability.'" (*Ibid.*, quoting *People v. Perez* (1979) 23 Cal.3d 545, 551.) Recognizing the conflict, this Court observed that the *Neal* test does not necessarily ensure that section 654's purpose is fulfilled. (*Latimer*, at p. 1211.)

As shown above, courts have limited the *Neal* test in an effort to overcome some of the conflict between the intent and objective test and section 654's purpose to ensure proper punishment. (*Latimer*, *supra*, 5 Cal.4th at pp. 1211-1212.) Courts have permitted multiple punishment where a defendant harbors *concurrent* or *simultaneous* multiple intents and objectives motivating a course of conduct.[5] (*Ibid.*) They have limited the rule so that acts of violence that exceeded the scope of the initially intended crime are also punishable. (See *Massie*, *supra*, 66 Cal.2d at p. 908; *Nguyen*, *supra*, 204 Cal.App.3d at pp. 190-193.) They have permitted multiple punishment where a defendant ignores opportunities to abandon the crimes

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[5] Examples of this are in drug possession cases in which courts have held that the simultaneous possession of multiple different drugs can be punished separately. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1296; see also (*People v. Jones*, *supra*, 54 Cal.4th at p. 358 [acknowledging that simultaneous possession of different contraband items are separate acts under section 654].)

and continues a criminal course of conduct against a resistant victim. (*Harrison*, *supra*, 48 Cal.3d at p. 338; *Trotter*, *supra*, 7 Cal.App.4th at pp. 366-368.) And they have narrowed the length of time in which a defendant is considered to have harbored a given objective before developing a separate, though related, objective. (*Latimer*, *supra*, 5 Cal.4th at pp. 1211-1212.)

Indeed, this Court has even stated that where a course of conduct directed toward a *single objective* is nonetheless divisible in time, multiple punishment is permissible. (See *People v. Beamon*, *supra*, 8 Cal.3d at p. 639, fn. 11; see also *People v. Kurtenbach* (2012) 204 Cal.App.4th 1264, 1289; *People v. Petronella* (2013) 218 Cal.App.4th 945, 964 [multiple punishment permitted even if a course of conduct, divisible in time, is directed toward one objective because "the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken"]; *People v. Green* (1996) 50 Cal.App.4th 1076, 1083-1085 [multiple punishment for robbery of a purse and carjacking proper where the carjacking happened some time after the robbery of the purse].)

In *Latimer*, this Court approved the limitations to the *Neal* intent and objective test; limitations designed to ensure punishment is commensurate with culpability. The Court explicitly stated that it did not wish to "cast doubt on any of the later judicial limitations of the *Neal* rule" and explained that multiple punishment continued to be appropriate where consecutive, and therefore, separate, intents or even different but simultaneous intents are found. (*Latimer*, *supra*, 5 Cal.4th at p. 1216.)

As stated in *Neal*, the vast majority of crimes arise from courses of conduct as opposed to single acts. (*Neal*, 55 Cal.2d at p. 19.) Therefore, looking at the defendant's intent and objective in determining whether

multiple punishment for multiple crimes is permissible, continues to work and is the established standard.

B. The Role of Trial Courts in Determining Facts

Determining a defendant's intent and objective is a highly fact intensive inquiry. Indeed, this Court has noted that despite the "apparent simplicity" of section 654's language, its application "often involves a difficult analytical problem. [Citation.] Each case must be determined on the basis of its own facts, and general principles applicable to one type of case may not apply to another." (*In re Adams* (1975)14 Cal.3d 629, 633.)

Because of how factual the inquiry under section 654 is, the sentencing court has a significant task in determining whether the defendant's crimes arose from a single act or from a course of conduct, and ultimately, what the defendant's intent and objective was. (*People v. Capistrano* (2014) 59 Cal.4th at 830, 886.) It is for this reason that, following a guilty plea, the court is permitted to hold a hearing to develop additional facts about the crimes. (*People v. Ross*, *supra*, 201 Cal.App.3d at pp. 1240-1241.) The court can also rely upon a probation report for ascertainment of the facts. (*People v. Rosenberg*, *supra*, 212 Cal.App.2d at pp. 776-777.) These procedures for developing the facts enable the sentencing court to have an adequate basis for making a section 654 determination. Indeed, it is incumbent upon the sentencing court, if insufficient facts are before it, "to pursue the matter further so that the question" whether section 654 applies can be properly resolved. (*Id.* at p. 776.)

Additionally, the trial courts are granted broad latitude in their section 654 determination. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564; *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) This makes sense in light of the trial court's inherent power and duty to shape a sentence commensurate with a defendant's culpability. (See *People v.*

Trotter, *supra*, 7 Cal.App.4th at pp. 367-368; see also *People v. Kramer* (2002) 29 Cal.4th 720, 724 [noting that "additional criminality must never be rewarded"].)

To permit multiple punishments for crimes arising from a course of conduct, there must be evidence to support the sentencing court's finding the defendant formed a separate intent and objective for each offense for which he was sentenced. (*Capistrano*, *supra*, 59 Cal.4th at p. 886; see also *People v. Osband* (1996) 13 Cal.4th 622, 730.) Whether a defendant harbored single or multiple intents is a factual question the trial court resolves and which the appellate court sustains on appeal if supported by substantial evidence. (*People v. Osband*, *supra*, 13 Cal.4th at p. 730; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) That is, appellate courts review the trial court's factual findings in the light most favorable to the judgment and presume in support of the trial court's order the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

That said, the applicability of section 654 to conceded facts is a question of law. (*Harrison*, 48 Cal.4d at p. 335, relying on *People v. Perez* (1979) 23 Cal.3d 545, 554, n. 5.) In other words, where the facts are conceded, appellate courts can determine the applicability of section 654 de novo.

Despite this settled standard of review, Corpening suggests that in situations where the facts are presented in a probation report and are thus "undisputed," the reviewing court should engage in its own independent fact finding to make the section 654 determination. He urges that the reviewing court should draw its own inferences from the probation report and reach its own factual conclusions. Thus, under his view, the sentencing court's resolution of factual questions is irrelevant when dealing with a probation report. (BOM at 9-15.)

At the outset, Corpening's argument is based on a false premise in this case: that the facts are undisputed. A defendant's intent is a factual question. (*Capistrano*, *supra*, 59 Cal.4th at p. 886.) Rather than dealing with conceded facts here, Corpening disputes the implicit factual conclusions the trial court drew when it imposed multiple punishment for the robbery and carjacking. He disagrees with the trial court's factual conclusions that the crimes arose from a course of conduct motivated by *separate* intents and objectives.

Corpening's assertion as to what the standard of review should be when dealing with conceded facts is also based upon a misapprehension of the law. He relies on *People v. Vasila* (1995) 38 Cal.App.4th 865, 873 and *People v. Maury* (2003) 30 Cal.4th 342, 404, to in advance his argument that reviewing courts should make de novo section 654 determinations. But those cases dealt with the question whether a defendant's tape-recorded incriminating statements to law enforcement were voluntary. Whether a defendant's statements are voluntary is a question of law, not a question of fact. (*People v. Williams* (1997) 16 Cal.4th 635, 659-660.) Because the interviews in *Vasila* and *Maury* were tape recorded, the facts about the interviews were undisputed and the reviewing courts were equipped to independently review the legal question as to whether the defendants' statements were voluntary. (*Vasila*, *supra*, 38 Cal.App.4th at p. 873; *Maury*, *supra*, 30 Cal.4th at p. 404.) By stark contrast here, what a defendant's intent is, for section 654 purposes, is a question of fact.

While it may be tempting to permit reviewing courts to reweigh the facts provided in a probation report, Corpening, in essence, proposes a standard of review that conflates two independent judicial tasks: (1) resolution of factual questions; and (2) resolution of legal questions. It is not surprising why he takes this approach. The factual question—whether he harbored multiple intents and objectives—was resolved against him in

the trial court. Under the ordinary standard of review, if substantial evidence supports the trial court's factual conclusion, Corpening stands to lose his section 654 claim.

In a sense, Corpening is seeking to engage in forum shopping. In the case of a guilty plea, if a lower court makes a factual determination based upon a probation report that a defendant harbored multiple intents Corpening wishes to be able to ask the reviewing court to independently determine, anew, the factual question whether multiple intents exist.

Reviewing courts do not find facts. Just as they do not reweigh evidence in sufficiency of evidence claims (see *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 166), so too there is no reason for reviewing courts to engage in the kind of independent factual review Corpening proposes. The test is simple, regardless of whether there was a trial or whether the facts came from a probation report: if the trial court's factual conclusions, including reasonable inferences, are supported by substantial evidence, then those factual conclusions remain. (*People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1005, citing *People v. Osband*, *supra*, 13 Cal.4th at pp. 730-731.)

Once the reviewing court concludes that substantial evidence supports a trial court's resolution of the factual question whether multiple intents and objectives animated a given course of criminal conduct, its task is to resolve the legal question whether section 654 bars multiple punishment under such circumstances.

C. Facts That Provide Insight Into a Defendant's Intent or Objective

As stated, when dealing with section 654 analyses, "each case must be determined on the basis of its own facts, and general principles applicable to one type of case may not apply to another." (*In re Adams* (1975)14 Cal.3d 629, 633.)

In the development of section 654 jurisprudence, various factors have become important in determining what a defendant's intent or objective was in a course of conduct. For example, the nature of the crimes that emerge from a course of conduct may help a court resolve whether the crimes arose from multiple intents. Indeed, there appear to be distinctions between possession of contraband crimes, crimes against the person, and property crimes.

Courts can also review the statutorily prescribed intent required to commit the crimes. The intent element of a crime can help a court determine whether the crimes emerging from a course of conduct arose out of independent intents.

The temporal spacing of crimes and whether the defendant had an opportunity for reflection and even abandonment of the criminal scheme may further inform whether the crimes are separable. This factor also informs the analysis about a defendant's culpability.

These are just some of the facts the trial court might rely upon in its section 654 analysis. Depending on the circumstances, there may be other facts courts can rely on. As this Court has noted, "[b]ecause of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an 'act or omission,' there can be no universal construction which directs the proper application of section 654 in every instance." (*People v. Beamon*, *supra*, 8 Cal.3d at p. 636.)

1. Nature of the Crimes

As stated, different types of crimes, seem to receive different kinds of treatment under section 654. Here, the defendants committed robbery and carjacking. Therefore, analysis of these crimes is appropriate.

"Robbery is 'the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.' (*People v. Williams* (2013) 57

Cal.4th 776, 781, quoting Pen. Code, §211, original italics omitted.) It is a specific intent crime which requires the robber to act with "a specific intent permanently to deprive the owner of his property." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 104.)

Carjacking is a species of robbery, but it is also quite different. It "is the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (Pen. Code, § 215, subd. (a).) The Legislature enacted the carjacking statute because of problems encountered with charging robbery for thieves who used force or fear (and often violence) to steal cars from the car occupants. (*People v. Lopez* (2003) 31 Cal.4th 1051, 1057.) One difficulty the robbery statute posed was in the intent element: Often the robbers did not have the intent to permanently deprive the car occupants of the car; instead they were only seeking a temporary thrill. Another difficulty came with the heightened seriousness of the crime: Carjacking posed greater risks of violence, including possible abduction, to all the car occupants, not just the possessor. The carjacking statute imposed greater punishment than the robbery statute did, and was designed to overcome the obstacles the robbery statute posed. (*Ibid.*)

Thus, where robbery requires a specific intent to *permanently* deprive the possessor of property, carjacking is more inclusive. (*People v. Lopez*, *supra*, 31 Cal.4th 1051, 1058.) The statute applies in cases where the intent is either to *permanently* or *temporarily* deprive the possessor of the car. It also adds its protective scope to passengers in the car. (*Ibid.*) In this way, carjacking has been described as more akin to a crime against the person as

opposed to merely a property crime, like robbery. (*People v. Hill* (2000) 23 Cal.4th 853, 860.)

A defendant can be charged with and convicted of both robbery (§ 211) and carjacking (§ 215) for robbing someone of their car. However, when the Legislature enacted the carjacking statute, it only barred multiple punishment for both crimes if they arise from the same robbery act: "This section shall not be construed to supersede or affect Section 211. A person may be charged with a violation of this section and Section 211. However, no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211." (§ 215, subd. (c).)

That the Legislature included this provision in the carjacking statute is significant. At first blush, it would seem to be completely unnecessary in light of section 654. After all, section 654 would seem to prohibit dual punishment for robbery and carjacking arising from the single act of robbing someone of their car. Under the rules of statutory construction, courts "avoid, if possible, interpretations that render a part of a statute surplusage." (*People v. Cole* (2006) 38 Cal. 4th 964, 980-981.) If section 654 did apply to bar multiple punishment for robbery and carjacking, then section 215, subdivision (c), would be mere surplusage. That the Legislature included subdivision (c) to explicitly bar multiple punishment for robbery and carjacking arising out of the same act, indicates that in some circumstances, the Legislature envisioned that section 654 would not apply.

One reason for the subdivision might be to overcome the multiple victim exception to section 654 if there are multiple occupants in the car. But another reason may be that the Legislature appreciated the significant intent differences between robbery and carjacking and recognized that carjacking is more akin to a crime against the person as opposed to robbery,

which is a crime against property. (*People v. Hill*, *supra*, 23 Cal.4th at p. 860.) Given the differences in intent for the two crimes, the Legislature may have realized that under the *Neal* test, a sentencing court could conclude that a car theft resulting in a robbery and carjacking was motivated by two separate concurrent intents: an intent to permanently deprive a person of their car and the intent to further victimize that person for the thrill of doing so. In enacting the carjacking statute, the Legislature contemplated that carjacking and robbery were sufficiently distinct from each other that section 654's multiple punishment bar would not apply. But in enacting section 215, subdivision (c), the Legislature did not prohibit multiple punishment for robbery and carjacking outright. Instead, it carved out a limited multiple punishment bar for carjackings and car robberies that arise from the *same robbery act*—an exception that does not apply here.

2. Statutory Intent

Aside from the nature of the crimes, trial courts can also review the intent required to commit the crimes in determining whether independent intents were at play in a defendant's course of criminal conduct. When *Neal* established the intents and objectives test, it did not address a nuance at play in that case that can illuminate the separate intent analysis. In *Neal*, the defendant committed arson and attempted murder. Arson is a general intent crime. (*People v. Atkins* (2001) 25 Cal.4th 76, 84.) By contrast, attempted murder is a specific intent crime. (*People v. Chandler* (2014) 60 Cal.4th 508, 517.) General intent crimes require a mental state that "entails only an intent to do the act that causes the harm." (*Atkins*, at p. 86.) In other words, general intent crimes merely require the intent to act willfully in doing something illegal. By contrast, specific intent crimes require a mental state that "entails an intent to cause the resulting harm." (*Ibid.*) Arson, as a general intent crime, simply requires the actor to willfully burn something that should not be burned, like a building or a forest. (*Ibid.*, citing Pen.

Code, §451.) Attempted murder, as a specific intent crime, requires a specific intent to kill. (*People v. Chandler* (2014) 60 Cal.4th 508, 517.)

In *Neal*, this Court concluded there was a single intent or objective—that is, to kill the victims. The defendant had a specific intent to kill and that specific intent led the defendant to engage in criminal conduct (arson) that merely required a general intent to act. The specific intent to kill for the murder could be viewed to have subsumed the general intent for the arson so that there really was only one dominant criminal intent driving the overall course of conduct.

The statutorily required intent for crimes may help a trial court resolve whether a defendant, who engaged in a course of conduct giving rise to multiple crimes, harbored separate or independent intents or objectives under *Neal*. Looking to the nature of the intent can also help achieve harmony with the purpose of section 654: to ensure punishment commensurate with the crime. When the crimes arise from independent criminal intents—particularly independent *specific* intents—there is a heightened degree of culpability, an aggravated mens rea, warranting harsher punishment.

3. The Temporal Element and Opportunity for Reflection and Penitence

Even if a course of conduct is directed toward one objective, if the emergent crimes are divisible in time, multiple punishment may be permitted. (*People v. Beamon, supra*, 8 Cal.3d at p. 639, n. 11, citing *People v. Quinn, supra*, 61 Cal.2d at p. 556.) "This is particularly so where the offenses are temporally separated in such a way as to afford the defendant opportunity to reflect and to renew his or her intent before committing the next one, thereby aggravating the violation of public security or policy already undertaken." (*People v. Gaio* (2000) 81 Cal.App.4th 919, 935.)

Opportunity for reflection is significant. In *Harrison*, the three-sex-act case, the defendant insisted that he would have only engaged in one sex act if the victim had not defended herself and resisted his attack. (*Harrison*, *supra*, 48 Cal.3d at p. 338.) In rejecting the claim, this Court noted that each of the sex acts were voluntary, criminal, and involved separate acts of force. The Court also observed that the defendant should "not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, he voluntarily resumed his sexually assaultive behavior." (*Ibid.*) In other words, where a victim resists a defendant's attack and, despite the resistance, the defendant continues to press on, committing additional crimes, the defendant's disregard for the opportunity for reflection and penitence creates a circumstance in which multiple punishment is warranted.

Similarly in *Trotter*, after firing the first gun shot at the pursuing police officer, the defendant had an opportunity to reflect before firing the second and third shots. (*People v. Trotter*, *supra*, 7 Cal.App.4th at pp. 367-368.) Barring multiple punishment under such circumstances would have violated the purpose of section 654, to ensure punishment commensurate with culpability (*Ibid.*)

Trial courts should evaluate the temporal aspect of the crimes that arise from a course of conduct. If they are temporally separable or if there is an opportunity for reflection and abandonment of the criminal enterprise, yet the perpetrator continues to press onward with the conduct, multiple punishment should be permissible.

D. Corpening's Characterization of the Robbery and Carjacking as Arising from a Single Act is Flawed

Relying on *Jones* (which barred multiple punishment for three crimes arising from single possession of a firearm) and *Mesa* (barring multiple punishment for the gang crime and embedded felonies), Corpening

asserts that the carjacking and coin robbery arose from a single act: the taking of the victim's van by force. Framed this way, he insists he can only be punished for one crime—the carjacking. (BOM 15-36.) The trouble with Corpening's argument is that while the evidence may have supported his view of the facts, the evidence also supported the trial court's implicit finding that this was not a single act case but a course of conduct case involving multiple intents and objectives. The sentencing court simply applied *Neal*: "[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 *depends* on the intent and objective of the actor." (*Neal*, 55 Cal.2d at p. 19, italics added.)

In advancing his argument, Corpening asserts that the multiple punishment bar in section 654 requires a discretely *punishable act*. In other words, an "act" continues until the crime has been completed. At the point of completion the "act" becomes punishable. Under his rationale, if an act is not punishable, section 654 analysis does not apply to it. (BOM 21.) Following this premise, Corpening parses Molestina's physical acts into several parts: Molestina's initial pointing of the gun at Schmidt, in an attempt to take control of the van and the coins inside; his second pointing of the gun, to gain control of the car and coins; and his driving off with Schmidt hanging on, to achieve the asportation of the car and coins. (BOM 25-26.) Corpening urges that until the crimes of robbery and carjacking were completed, none of the individual physical acts leading up to the completed crimes were punishable within the meaning of section 654, and therefore none of those acts could be used to support multiple punishments for the carjacking and robbery. He insists that the proper view of the crimes is that there was one act: the forceful taking of the car, which contained the coins. Thus, one act, one punishment. (BOM 22-23.)

Corpening's argument is flawed in three respects. First, he overlooks that acts can be simultaneous and when directed at independent and different objectives, can be individually punished. (*Latimer*, *supra*, 5 Cal.4th at pp. 1211-1212.) The acts leading to the robbery and acts amounting to the carjacking could be construed as simultaneous acts animated by separate intents.

Second, Corpening fails to appreciate that each of the physical acts he identifies, *was* punishable. Those acts amounted to multiple assaults, attempted robbery, and attempted carjacking.[6] Moreover, all the acts constituted overt acts as part of an overarching conspiracy to steal the coins. It is not as though Molestina had committed no crimes until the robbery and carjacking were complete. Every one of the acts leading to the completed robbery and carjacking was also a punishable criminal act. Section 654 does not speak in terms of completed crimes; it speaks in terms of acts: "an act or omission that is punishable in different ways by different provisions of law...." (§ 654.) That Corpening was not charged with, or convicted of the crimes that led to the completed robbery and carjacking is immaterial. These crimes would have been subsumed by the completed greater crimes as lesser included offenses. The point is that the acts themselves were punishable.

Third, Corpening ignores the clear teaching of *Neal*: the vast majority of crimes arise from a course of conduct, the divisibility of which *depends* upon the actor's intent and objective. (*Neal*, 55 Cal.2d at p. 19.) Ironically, by parsing Molestina's physical acts, Corpening has actually

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[6] An attempted crime requires the specific intent to commit the target crime, together with a direct but ineffectual step toward completion of the crime. (Pen. Code, §21a.)

shown that the crimes arose from a course of criminal conduct instead of a single physical act.

Still, citing *People v. Ortega* (1998) 19 Cal.4th 686 and *People v. Dominguez* (1995) 38 Cal.App.4th 410, Corpening insists that the carjacking and robbery arose from a single act. However, *Ortega* dealt with a different issue entirely, and *Dominguez* is factually distinguishable. In both cases, the defendants were convicted of robbery and carjacking. However, in both, part of the targeted loot for the robbery was the same as the only loot possible for the carjacking: the car.

In *Ortega*, the defendant carjacked the victim and took his wallet and pager. The defendant was charged with and convicted of carjacking, robbery, and theft. (*Ortega*, 19 Cal.4th at pp. 690-691.) The stolen property for all three crimes included the car: The stolen property for the carjacking was, obviously, just the car; the stolen property for the robbery and theft included the car, wallet, and pager. (*Id.* at pp. 693-694, 699-700.) Thus, there was no real distinction between the stolen property for purposes of the carjacking, robbery, and theft; all three crimes included theft of the car. The question on appeal was whether the defendant could be *convicted* of each of these crimes which arose from the same course of conduct. (*Id.* at pp. 690, 692.) This Court explained that the defendant could be convicted of both carjacking and theft of the car because these two crimes involved different elements. (*Id.* at p. 693.) The Court also explained that the defendant could be convicted of both carjacking and robbery (of the car). (*Id.* at p. 700.)

However, multiple punishment for the carjacking and car robbery was impermissible. (*Ortega*, 19 Cal.4th at p. 700.) But not under section 654; instead, this Court simply applied section 215, subdivision (c), which, as explained above, bars multiple punishment for robbery and carjacking based on the same conduct: car theft. (*Ibid.*) Under section 215, subdivision

(c), a person can be convicted of both carjacking and car robbery, but cannot be punished for both. (*Ibid.*)

Corpening's reliance on *Ortega* does not help him. *Ortega* dealt with whether the defendant could be *convicted* of multiple different crimes emerging from the same conduct—a different question from the one here. And in barring multiple punishment for carjacking and robbery of a car, the Court relied on the carjacking statute, not section 654. *Ortega* is also factually distinguishable: the carjacking and robbery were based on the same act, the car theft. By contrast, Corpening's robbery was aimed at acquiring the coins to the exclusion of the van; the carjacking was aimed at taking the van.

Corpening's reliance on *Dominguez* is also misplaced. There, the defendant entered the victim's car, held a gun to the victim's head and demanded all of the victim's property. (*Dominguez*, *supra*, 38 Cal.App.4th at pp. 414-415.) The victim relinquished his jewelry and fled from the car. (*Id.* at p. 415.) The defendant was convicted of both carjacking and robbery. (*Id.* at p. 414.) The trial court recognized that multiple punishment was improper, but instead of staying the punishment for the robbery, simply imposed it concurrently. (*Id.* at p. 420.) On appeal, the defendant argued he could not be convicted of both carjacking and robbery. The court rejected this claim, holding that conviction for both crimes is permissible. (*Id.* at pp. 418-420.) The court went on to explain, however, that punishment for both was inappropriate because the robbery of the car and the carjacking were based upon the same act: the car theft. (*Id.* at p. 420.) Thus, *Dominguez* is factually distinguishable. Unlike in *Dominguez* (and *Ortega*), the targeted object of Corpening's robbery *differed* from the targeted object of his carjacking. This factual distinction renders *Dominguez* unhelpful.

In a similar vein, any assertion that the carjacking and robbery here were simply a single-occasion theft involving multiple objects (the coins

and the van) has no merit. As explained earlier, a defendant cannot be punished separately for different objects taken during the course of a single-occasion theft. (*People v. Bauer*, *supra*, 1 Cal.3d at p. 376-377.) The single-occasion theft rule in *Bauer* is not applicable here. First, *Bauer* dealt exclusively with theft crimes—crimes involving an intent to permanently deprive the owner of property. Carjacking does not require such an intent. An intent to temporarily deprive the car occupant of the vehicle is sufficient. (§ 215, subd. (a); *People v. Lopez*, *supra*, 31 Cal.4th at p. 1057.) Second, *Bauer* predated the Legislature's enacting of the carjacking statute and its recognition that carjacking is inherently different from robbery and theft. As noted above, carjacking is more akin to a crime against the person. (*People v. Hill*, *supra*, 23 Cal.4th at p. 860.) By taking a person's car, the carjacker personally victimizes the car occupant. In this way, the carjacking victim is rendered more vulnerable than the ordinary robbery victim. (*Lopez*, 31 Cal.4th at pp. 1057.) Third, the facts here show that this was not a single-occasion theft with the intent to take multiple objects (other than multiple coins). The defendants planned on stealing the coins and took steps toward that end. The carjacking only arose when victim resisted. As Schmidt tried to stop the robbery, Molestina turned on him and commenced with the carjacking, separate and apart from the coin robbery. A reasonable trier of fact could well have concluded that Molestina committed the unplanned carjacking with the intent to temporarily deprive Schmidt of the van as punishment for his resistance. This would not have constituted a theft, because there was no intent to keep the van once it was unloaded. Nor was it a necessary incident of the theft of the coins. Instead, it was a separate act designed to make Schmidt pay for his noncompliance. Given the differences between robbery and carjacking, including the intent differences, and heightened vulnerability for a carjacking victim, this did not qualify as a single-occasion theft involving multiple objects.

In sum, Corpening is mistaken in his assertion that the robbery and carjacking arose from a single act. His own description of Molestina's actions reveals that the crimes emerged from a course of conduct.

E. The Sentencing Court and Court of Appeal Properly Applied the *Neal* Test in Concluding that the Robbery and Carjacking Emerged from a Course of Conduct Motivated By Multiple Intents and Objectives

The trial court and Court of Appeal disagreed with Corpening's characterization of the facts and concluded that the robbery and carjacking were separate, arising from a course of conduct consisting of divisible acts and animated by multiple intents and objectives. Substantial evidence supported the trial court's conclusion that the crimes were separate.

To be sure, neither the trial court's nor Corpening's view of the evidence was particularly unreasonable. Depending upon how the conduct is framed, the crimes could be viewed, debatably, as having arisen from a single act, as Corpening urges. But the crimes could also be viewed as having arisen from a course of conduct with divisible acts, animated by multiple intents and objectives, as the trial court implicitly found.

Because most crimes arise from a course of conduct and because what constitutes "the act" here is reasonably debatable, the trial court had to resolve whether the defendants' course of conduct was divisible. Under *Neal*, that depended upon whether the conduct was motivated by a single intent and objective or by multiple intents and objectives.

On appeal, the question is no longer what may have been a reasonable determination of fact. The factual conclusions are left to the trial court. Instead, the question on appeal, is whether those factual conclusions are supported by substantial evidence and whether, based on those facts, the court abused its sentencing power under section 654. (*People v. Osband*, *supra*, 13 Cal.4th at p. 730; *People v. Harrison, supra,* 48 Cal.3d at p. 335.) Here, the defendants engaged in multiple actions—a course of conduct—

giving rise to the different crimes. But even if it were debatable, the *Neal* intents and objectives test provides the benchmark to determine whether multiple punishment was permissible under section 654.

In his concurrence in *Jones*, Justice Liu pointed out that "[i]n applying section 654, reasonable minds can and often do differ on how to define the 'act' that constitutes a crime...." (*Jones*, *supra*, 54 Cal.4th at p. 369 (conc. opn. of Liu, J.).) Indeed, the majority in *Jones* acknowledged the challenge: "In some situations, physical acts might be simultaneous yet separate for purposes of section 654." (*Id.* at p. 358.) The majority offered the simultaneous possession of different items of contraband as one such example. (*Ibid.*, see also *In re Adams*, *supra*, 14 Cal.3d at p. 365; *People v. Menius*, *supra*, 25 Cal.App.4th at p. 1296.) Although the majority considered the defendant's possession of the firearm as a single act, Justice Liu pointed out that another reasonable conclusion was that the defendant's actions could be parsed into the *possessive act* and *carrying act*. (*Id.* at p. 371.) The acts could be construed as (1) the defendant's initial taking possession of the firearm; and (2) his hiding the gun in his car and transporting it. (*Ibid.*) Justice Liu even suggested a third potential act: defendant's loading the gun with ammunition. (*Idid.*)

Given the potential for debate as to what constitutes "an act," Justice Liu proposed simply relying on the *Neal* precedent. "In situations where it is debatable whether separate crimes arise from a single physical act, we have determined the applicability of section 654 by examining the "intent and objective of the actor" and prohibiting multiple punishment "[i]f all of the offenses were incident to one objective." (*Jones*, *supra*, 54 Cal.4th at p. 369, 373 (conc. opn. of Liu, J.).) Under this test, the trial court in *Jones* would have asked whether the possession of the firearm was for a single purpose, or whether that conduct was driven by multiple objectives. In *Jones*, the defendant explained to police that he possessed and carried the

loaded and concealed gun for the purpose of protection; nothing suggested any other purpose. (*Id.* at pp. 373.) Thus, under the *Neal* test, the trial court would readily have concluded that the defendant's actions were directed to a single objective and he could only be punished for one of the emergent crimes.

Here, the *Neal* test shows that multiple punishment was appropriate for the robbery and carjacking. The trial judge rejected the prosecutor's passing suggestion that section 654 barred multiple punishments for the robbery and the carjacking. The court viewed them as separate offenses, although it applied section 654 to other offenses at sentencing. (5 RT 839.) Substantial evidence supported the trial court's sentencing ruling. This evidence included facts about the defendant's physical actions, the nature of the different crimes, the intent required to complete those crimes, and the opportunities the defendants had to stop the crimes when their victim resisted the attack. Taken together, the facts show a course of conduct driven by separate and independent intents. They also show a course of conduct with escalating criminality that increased the risk of harm to the victim. Under the facts and circumstances of this case, the trial court correctly concluded multiple punishment was appropriate—commensurate with the crimes.

1. Physical Acts

The physical acts at play supported the trial court's conclusion that the robbery and carjacking emerged from a course of conduct. In *Neal*, the defendant threw gasoline into the victims' bedroom and ignited it in an attempt to kill the victims. This amounted to a course of conduct: throwing the gasoline into the room and igniting it.

Here, Corpening and his cohorts drove to Schmidt's house in a truck and a car, parked, and watched for the right moment to strike. (CT 168, 170.) If they had planned to take Schmidt's van all along, there was no

reason for them to bring two cars. The group waited until Schmidt was alone, and then gave Molestina clearance to go in and scare Schmidt away with the gun and secure the van. (CT 168.)

As Molestina went in, the others remained in their cars parked nearby, ready to spring into action once Schmidt was gone. That they had facemasks and gloves (CT 167, 169) tends to support that the plan was to pull up, quickly unload the coins, and then flee. After all, Corpening and Guerra, who had been to Schmidt's booth at the swap meet, would have needed facemasks to prevent the possibility of Schmidt recognizing them if he could have seen them from a vantage point of safety. That the robbers intended on emptying the van quickly on the spot is also underscored by the fact that after they fled the scene and reunited at the apartment complex, they quickly unloaded the van to put the coins into the Pontiac. (CT 167.)

The robbery did not go as planned when Schmidt unexpectedly fought back. Instead of running away to safety, as most people might have done, he lunged for the gun and tried to stop the robbery. Schmidt backed off when Molestina pointed the gun at him a second time. But as Molestina again tried to get into the van, Schmidt tried to stop him yet again. This led Molestina to throw the van into reverse gear and drive backwards as Schmidt grabbed and clunk to the steering wheel, eventually falling to the ground. (CT 167.)

If throwing gasoline into a bedroom and igniting it amounted to a course of conduct (*Neal*, 55 Cal.2d at p. 18), then so too was the conduct here. The trial court properly concluded that the robbery and carjacking emerged from a course of conduct rather than from a single act.

2. The Nature of Robbery and Carjacking and the Intent Elements

The nature of the crimes and the intent required to commit them also supported the trial court's conclusion that the robbery and carjacking were

driven by separate intents. The defendants committed robbery and carjacking. Both robbery and carjacking are specific intent crimes. Robbery requires a specific criminal intent to permanently deprive a victim of property. (*People v. Anderson* (2011) 51 Cal.4th 989, 994; Pen. Code, § 211.) Carjacking requires a specific criminal intent to either permanently or temporarily deprive the victim of the car the victim occupies. (*People v. Ortega*, *supra*, 19 Cal.4th at p. 693; Pen. Code, § 215, subd. (a).) From just the required mens rea for these two crimes, it is manifest that two different, independent, and separate intents motivated the defendants' criminal course of conduct: the intent to steal the coins and the separate intent to take the van.

Additionally, the robbery and carjacking statutes are aimed at preventing distinguishable evils, with robbery primarily viewed as a property crime and carjacking viewed as a crime against the person. (*People v. Hill*, *supra*, 23 Cal.4th 853, 860.) This distinction is particularly apparent under the facts and circumstances here where the robbers intended to scare Schmidt off with the gun and then unload the coins with him out of the picture. When Schmidt resisted and tried to stop Molestina, the attack became personal, and led to the carjacking.

In pleading guilty to robbery and carjacking, Corpening admitted he had the specific intent to permanently deprive Schmidt of his rare coins; he also admitted he had the specific intent to permanently deprive Schmidt of his van. (1 RT 4; CT 13.) Because Corpening harbored these independent specific intents to achieve separate and distinct harms (the taking of the van and the stealing of the coins), Corpening exhibited greater culpability for which multiple punishment was warranted.

Of course, the retort to this is that the robbery and carjacking were both aimed toward a single objective: to get the coins by whatever means necessary. The carjacking became the means to accomplish the end.

However, as stated above, this Court has cautioned against letting broad and amorphous views of an intent or objective trigger section 654 application. (*People v. Harrison*, 48 Cal.3d at pp. 335-336.) If the intent or objective is too broadly viewed, there is danger section 654 "would impermissibly 'reward the defendant who has the greater criminal ambition with a lesser punishment.'" (*Ibid.*) Permitting Corpening to avoid his heightened culpability by construing the robbery and carjacking as directed toward a single intent—to get the coins—runs afoul of this Court's caution in *Harrison*.

Furthermore, while the carjacking can be viewed as *a means* to the end of taking the coins, the evidence shows it was not *the means* originally intended. The robbers had brought two vehicles with them for the robbery. From this, it is reasonable to infer that there was no intent to take the van, initially. That intent arose later. In *Neal*, the defendant used the arson as the means to kill the victims. Multiple punishment was barred under such a circumstance. But there remains a question if the same result would have obtained had the defendant originally employed a different means to achieve the killing, but then resorted to arson when the first means failed. For example, if the defendant had first shot at the victims, but missed, and then set fire to the bedroom to accomplish his murderous intent, it would seem that multiple punishment would have been permissible. (See *Harrison*, *supra*, 48 Cal.3d at p. 338; *Trotter*, *supra*, 7 Cal.App.4th at p. 367-368.) After all, first firing the shots to kill, and then committing arson when the gunshots failed to work, demonstrates a significantly higher degree of culpability than just using arson to kill. To permit section 654 to bar multiple punishment when a defendant continues to escalate the criminal activity to achieve the original goal is absurd—especially in light of the purpose behind the statute. Because the facts show that the defendants here originally intended a means other than carjacking to

effectuate the robbery, but then resorted to carjacking to personally victimize Schmidt in addition to proceeding with the robbery, multiple punishment should be permitted.[7]

There is yet another way the defendants' intent can be analyzed: through the lens of conspiracy law. In California, a conspiracy is an agreement to commit an unlawful act and requires commission of an overt act in furtherance of the agreement. (*People v. Johnson* (2013) 57 Cal.4th 250, 258-59; Pen. Code, §§182, 184.) Though no conspiracy was charged here, the record shows that Corpening and his cohorts conspired to rob Schmidt of his coins. In furtherance of their conspiratorial agreement, they engaged in multiple overt acts in furtherance of the agreement and toward the commission of the robbery. These overt acts included staking out Schmidt's property, conducting surveillance while Schmidt and his son loaded the coins, and sending Molestina in for the take down. Had Corpening been charged with and convicted of conspiracy to commit robbery (in addition to robbery and carjacking), he would not have been

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[7] Appellant suggests that the taking of the van was merely a *means of escape*. He asks this Court to extend the escape rule, which is used in felony-murder situations to show the duration of a robbery, to apply in section 654 analyses. (BOM 41-45.) There is no reason for such an extension. As the Court of Appeal in *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1007, noted, the purpose of the escape rule is to "measure the duration of a robbery in order to determine whether a killing or some other act has occurred in the perpetration or commission of the robbery." The court agreed with other Courts of Appeal, which have also held that the escape rule has nothing to do with whether section 654 applied, and explained that because "a defendant may harbor 'separate and simultaneous intents' in committing two or more crimes, for purposes of section 654," there is no place for the escape rule in a trial court's sentencing determination. (*Ibid.*; see also *People v. Nguyen*, *supra*, 204 Cal.App.3d at pp. 190-193 [acts of violence whether gratuitous or to facilitate escape are not necessarily incidental to a robbery for section 654 purposes])

punishable for both the conspiracy and the completed robbery. However, he could have been punished for both the conspiracy to commit robbery and the carjacking. This is because the carjacking would have fallen outside the objective of the conspiracy. (*In re Cruz* (1966) 64 Cal.2d 178, 181 ["If, however, a conspiracy had an objective apart from an offense for which the defendant is punished, he may properly be sentenced for the conspiracy as well as for that offense."].) Thus, under such a scenario, Corpening would have been independently punishable for both the conspiracy and the carjacking.

This is an anomaly. Corpening clearly engaged in a conspiracy to commit robbery. Under the conspiracy statute, he would have been subject to the same punishment for the conspiracy as he was for the completed robbery. (Pen. Code, § 182.) Yet, under his rationale that the robbery and carjacking arose from one act or were directed toward one intent (to get the coins), he is subject to less punishment than if he had been charged with and convicted of conspiracy to commit robbery. This should not be so; "additional criminality must never be rewarded." (*People v. Kramer*, *supra*, 29 Cal.4th at p. 724.)

In sum, the facts show that there were independent intents driving the conduct here. This supported the trial court's view that the robbery and carjacking were separate.

3. The Defendants' Opportunity for Reflection

The circumstances also show that there was an opportunity for Molestina to reflect and walk away from the entire enterprise. Just as this Court rejected the defendant's claim in *Harrison* that the multiple crimes would not have arisen had the victim not resisted and fought back, so too the defendants here should "not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim," they voluntarily pressed on with the assaultive behavior. (*Harrison*, *supra*, 48

Cal.3d at p. 338.) When a defendant ignores opportunities to walk away from the criminal scheme, and instead allows criminal conduct to become more egregious, posing separate and distinct risks to the victim, barring multiple punishment would violate section 654's purpose. (*Trotter*, *supra*, 7 Cal.App.4th at pp. 367-368.)

Just as the victim in *Harrison* did, Schmidt struggled with and resisted the attacker. To fend off Schmidt's initial countering, Molestina pointed the gun at Schmidt a second time to get him to back off again. However, Schmidt remained determined and again lunged for the gun. Rather than take the opportunity to reflect and repent, Molestina put the van into reverse gear, leading Schmidt to grab on to the steering wheel. Molestina accelerated the van backwards to get Schmidt to drop away. By repeatedly pointing the gun at Schmidt and accelerating the van the way he did, Molestina significantly increased the risk of harm to Schmidt. The defendants should "not be rewarded where, instead of taking advantage of an opportunity to walk away from the victim, [they] voluntarily resumed [their criminal] assaultive behavior." (*Harrison*, *supra*, 48 Cal.3d at p. 338.)

4. The Facts and Circumstances Supported the Trial Court's Conclusion that the Robbery and Carjacking were Separate

The foregoing shows that substantial evidence supported the trial court's implicit conclusion that there were multiple intents and objectives driving the robbery and carjacking. The robbers' primary intent was to rob Schmidt of the rare coins. The intent to carjack him was a secondary, independent intent, that arose as Schmidt resisted the robbery. The defendants' actions were informed by the dynamics of what unfolded during the criminal enterprise. Unlike in *Jones*, where the defendant's possession of a single gun ran afoul of multiple criminal statutes, this case involved a fluid situation in which the defendants initially sought to scare off the victim, drive up, quickly unload the coins, and make off in their get-away cars.

Molestina first targeted the coins. When Schmidt resisted, Molestina turned on him with the carjacking. His actions of repeatedly threatening Schmidt with the gun significantly increased the risk and danger that Schmidt would be shot and possibly killed. Molestina escalated the risk when he accelerated the van in reverse as Schmidt held on to the steering wheel. Schmidt was nearly run over when he finally fell to the ground. Punishment for both the robbery and the carjacking was appropriate because it was commensurate with the heightened culpability Molestina exhibited through his course of escalating violence.

The trial court's sentencing decision comported with the broad latitude it had in making the section 654 determination. (*People v. Garcia*, *supra*, 167 Cal.App.4th at p. 1564) It also ensured a punishment commensurate with the crimes where the defendants engaged in conduct that increased the risk of harm to the victim over the course of the entire transaction. (*People v. Sanders*, *supra*, 55 Cal.4th at p. 742; *People v. Trotter*, *supra*, 7 Cal.App.4th at pp. 367-368.)

In short, substantial evidence supported the sentencing court's conclusion that multiple intents and objectives motivated the course of criminal conduct. Because the record discloses substantial evidence supporting this conclusion, this Court should affirm the judgment. (*People v. Osband*, *supra*, 13 Cal.4th at pp. 730-731.)

CONCLUSION

The judgment should affirmed.

Dated: May 11, 2016.

Respectfully submitted,

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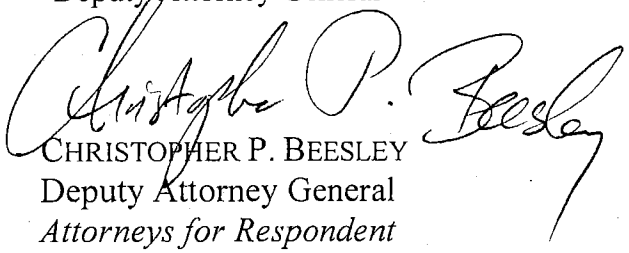

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CERTIFICATE OF COMPLIANCE

I certify that the attached answer brief on the merits uses a 13 point Times New Roman font and contains 13,962 words.

Dated: May 11, 2016.

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Corpening** No.: **S228258**

I declare:

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

On May 12, 2016, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Fourth Appellate District, Division One
750 B Street, Suite 300
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San Diego County Superior Court
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Honorable Francis M. Devaney
For delivery to:
The Honorable Francis M. Devaney Judge
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Chula Vista, CA 91910

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71(f)(1)(A)-(D), I electronically served a copy of the above document on May 12, 2016 by 5:00 p.m., on the close of business day to the following.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 12, 2016, at San Diego, California.

M. I. Salvador-Jett
Declarant

Signature

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