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 REPLY BRIEF ON THE MERITS

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

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APPEAL FROM THE SUPERIOR COURT OF SAN DIEGO

Honorable Francis M. Devaney, Judge;

Honorable Kathleen M. Lewis, Judge[1]

APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

This appeal asks a seemingly simple, but deceptively complex question – what is an "act" for purposes of Penal Code[2] section 654? (§ 654.) Appellant, Tory Corpening, contends it is the actus reus of

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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.

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

the different provisions of law under comparison. Where the same actus reus underlies two convictions, the matter must be stayed under the plain language of section 654. (See Argument I, below). Where the two convictions are based on two distinct actus rei, the court must apply the test set forth in *Neal v. California* (1960) 55 Cal.2d 11 (*Neal*) to determine whether the convictions form part of an indivisible course of conduct. An indivisible course of conduct exists where the actus reus of one provision is facilitative of or incidental to the actus reus of the other. (See Argument II, below.) Construing section 654 in this manner provides an objective test that can readily and easily be applied in all cases.

Respondent, on the other hand, favors a subjective analysis. Respondent would reject the existence of a single act any time a trial court chooses to describe the actus reus committed by the defendant as multiple physical actions. Respondent also favors a highly subjective version of the *Neal* test in which a course of conduct is not indivisible so long as a court can articulate different "motives" for the crimes, even where the actus reus of one was facilitative or incidental

of the actus reus of the other. Respondent's construction should be rejected as it does not comport with the plain language of section 654. It also contradicts the rationale underlying *Neal*.

STANDARD OF REVIEW (ISSUE III)

In the opening brief on the merits,[3] Corpening discussed the appropriate standard of review of a trial court's decision to not impose a stay under section 654. The parties agree there is a factual component to this analysis. (AOBM 10; ABM 19-20.) However, the parties disagree on the deference required as a result of this factual component.

Corpening acknowledges that most section 654 decisions involve credibility determinations that must be made by the trial court based on first-hand evaluation of testimonial evidence. In these typical cases, the trial court's factual determinations are properly accorded deference. However, this does not mean that every decision

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[3] References to the record are as follows: RT means Reporter's Transcript; CT means Clerk's Transcript; AOBM means Appellant's Opening Brief on the Merits filed in this Court. ABM means respondent's Answer Brief on the Merits filed in this Court; Opn. means the post-transfer unpublished opinion dated June 24, 2015.

the trial court makes is a factual determination subject to deference. The application of law to facts is a legal determination which is reviewed de novo by the reviewing court. This is true both for application of law to undisputed facts and the application of law to a trial court's resolution of disputed facts.

Respondent looks to general statements about deference made in typical cases and incorrectly concludes that every section 654 decision is therefore entitled to deference. This incorrectly confounds the actual "factual inquiry" conducted by a trial court -- i.e. determining what happened -- with the legal determination of what those facts mean.

A. The Correct Analytical Framework for Review of Trial Court Decisions Involving a Factual Component and Legal Component.

As this court has recognized:

> There are three steps involved in deciding a mixed fact/law question. The first step is the establishment of basic, primary or historical facts. The second is the selection of the applicable law. The third is the application of law to the facts. All three trial court determinations are subject to appellate review.

(*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800 (*Ghirardo*).)

1. Step One: Establishing the Basic, Primary or Historical Facts.

The first step involves determining "in common parlance, what happened." (*Ghirardo, supra,* 8 Cal.4th at p. 801.) This raises a question of fact. (*Ibid.*)

Generally, "Questions of fact are reviewed by giving deference to the trial court's decision." (*Ghirardo, supra,* 8 Cal.4th at p. 800.) Where there is conflicting evidence, the trial court, who has a first-hand view of testimony, is in the best position to resolve the conflicts. (See, e.g. *People v. Lavender* (2014) 60 Cal.4th 679, 693 ["the power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court"]; *In re Carpenter* (1995) 9 Cal.4th 634, 646 [same].)

An exception arises where the facts are undisputed, meaning there is no conflict to be resolved. (See *Ghirardo, supra,* 8 Cal.4th at p. 801.) Essentially, the undisputed facts are what they are and there is no need for a credibility determination by the trial court or the appellate court.

Sometimes the facts presented (either in the form of disputed facts selected by the trial court or undisputed facts) will provide the entire answer to "what happened." However, in many situations, the ultimate facts necessary to make a decision must be inferred from other facts. A secondary set of rules applies to review of these inferred facts.

As an initial matter, the inference must be one that is reasonable to draw from the facts - whether those facts be disputed or undisputed. (See *Shandralina G. v. Homonchuk* (2007) 147 Cal.App.4th 395, 416-417 (*Shandralina G.*) [an inference may only serve as substantial evidence to support a trial court's factual finding when it is reasonable].)

In order to be reasonable, an inference "cannot be based upon suspicion, imagination, speculation, surmise, conjecture or guesswork." (*Shandralina G., supra,* 147 Cal.App.4th at p. 417.) It also cannot be contradicted by undisputed evidence in the record. (*Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 49; *Shandralina G., supra,* 147 Cal.App.4th at p. 417; *Conservatorship of Geiger* (1992) 3

Cal.App.4th 127, 132; *Fullerton Union High School Dist. v. Riles* (1983) 139 Cal.App.3d 369, 383.)

Where there are two or more reasonable inferences that may be drawn from the facts, the reviewing court defers to the inference selected by the trial court. (*Blix Street Records, Inc. v. Cassidy, supra,* 191 Cal.App.4th at p. 49; *Fullerton Union High Sch. Dist. v. Riles, supra,* 139 Cal.App.3d at p. 383.)

2. Step Two: Determining the Controlling Law.

After the historical facts have been established for purposes of review, the reviewing court independently determines the controlling law. (*Ghirardo, supra,* 8 Cal.4th at p. 800.) The meaning of statutory language falls within this step. This is true even in cases involving section 654. (See *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1414; see also *People v. Valli* (2010) 187 Cal.App.4th 786, 794; *People v. Tarris* (2009) 180 Cal.App.4th 612, 628.)

3. Step Three: Application of Controlling Law to the Applicable Facts.

The standard of review that applies to the third step of analysis in a mixed question of law and fact is not as clearly defined as the first

two. "As to the third step, the application of law to fact, difficulty is encountered and views as to the correct approach are mixed." (*Ghirardo, supra,* 8 Cal.4th at p. 800.)

Ultimately, the reviewing court must decide whether the issue presented is predominantly factual, or instead "requires us to consider legal concepts in the mix of fact and law to exercise judgment about the values that animate legal principles" in which case the question should be classified as one of law and reviewed de novo. (*Ghirardo, supra,* 8 Cal.4th at p. 800.) Where the question "can have practical significance far beyond the confines of the case then before the court," it typically involves a legal concept that should not be effectively removed from the consideration of the appellate courts by deferring to the trial court's conclusions. (*Id.* at p. 801.)

Another factor which indicates the central issue is a question of legal application to fact is where the question arises from undisputed facts. "When the facts are not disputed, the effect or legal significance of those facts is a question of law, and the appellate court is free to draw its own conclusions, independent of the ruling by the trial

court." (*Aghaian v. Minassian* (2015) 234 Cal.App.4th 427, 434; see also, *People v. Peoples* (2016) 62 Cal.4th 718, 740; *In re Fernando M.* (2006) 138 Cal.App.4th 529, 535-536; *Fullerton Union High School Dist. v. Riles, supra,* 139 Cal.App.3d at p. 383 [also noting the distinction between an inference drawn from facts due deference and a question of law applied to undisputed facts which is not].)

B. The Questions Raised in this Appeal Are Predominantly Legal and Should Therefore Be Reviewed De Novo.

The questions raised in this appeal all involve questions of general legal principles and are not about disputes over the particular facts presented to the trial court.

Here, there is no factual dispute in the record that co-defendant Danny Molestina took the coins by taking the van that contained them. At its heart, this appeal presents a question about a general principle of law – what are the legal distinctions between a single act, an indivisible course of conduct, and a divisible course of conduct under section 654? Once these legal distinctions are resolved, they can be applied to the facts of Corpening's case. Here, even the application of law to fact is predominantly an issue of law - can the

taking of a vehicle and its contents ever be considered a divisible course of conduct or is it a single act as defined by section 654? The answer to this question is not dependent on the particular facts of Corpening's case, but rather applies broadly in every situation where a defendant takes a vehicle and its contents.

A similar procedural situation was presented in *People v. Jones* (2012) 54 Cal.4th 350 (*Jones*). This court first established the historical facts based on the defendant's apparently undisputed statement to the officers surrounding his possession and intent of a firearm. (*Id.* at p. 352.) This court then addressed the legal question applying de novo review: "We must decide how [section 654] applies to defendant's three convictions." (*Id.* at p. 353.) This court did so without deference, treating the issue as a question of law as to the meaning and purpose of section 654. Finally, the court applied this law to the facts and reversed. (*Id.* at p. 359-360.)

Additionally, a secondary issue addressed in Argument II -- whether the trial court could properly find separate and distinct intents underlying the carjacking and the robbery -- is primarily a

question of law. Again, the basic facts in the probation report are undisputed. The trial court's inference about intent drawn from those facts must be reasonable and cannot be contradictory. The propriety of the inference is a question of law reviewed de novo. Corpening argues an inference of separate intents is not reasonable.

In arguing for deferential review, respondent does not address the legal dimension of the issues presented in this appeal. Instead respondent points to generalized statements that "the trial courts are granted broad latitude in their section 654 determination," citing *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564 (*Garcia*), and *People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312 (*Hutchins*). However, these authorities are cited out of context and, therefore, do not accurately reflect the three step review process actually applied in section 654 decisions.

For instance, the cited statement in *Hutchins* refers only to the factual component of a section 654 decision: "The question whether section 654 *is factually applicable* to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making

this determination." (*People v. Hutchins, supra,* 90 Cal.App.4th at p. 1312, emphasis added.) Indeed, the *Hutchins* pronouncement regarding factual deference was made in dicta before the Court of Appeal proceeded to address a question of law. The *Hutchins* court did not discuss the historical facts of the case or rely on how they had been resolved below. Instead, the *Hutchins* court immediately turned to a question of law – interpreting statutory language to decide whether section 654 prevented application of the section 12022.53 firearm enhancement to a murder conviction. (*Hutchins, supra,* 90 Cal.App.4th at p. 1313.) The decision was not based on the particular facts of *that case*; rather it was based on the plain language of the statute, ultimately finding section 654 inapplicable in *every* murder case involving a firearm. In other words, despite its broad statement, *Hutchins* did not actually involve a case where the reviewing court gave deference to the trial court's finding.

Garcia, the other case cited by respondent, did involve a factual determination. (*Garcia, supra,* 167 Cal.App.4th 1550, 1564.) *Garcia* addressed whether a sentence for possession of a firearm had to be

stayed in light of the sentence for a robbery using that firearm. (*Id.* at p. 1563.) The Court of Appeal deferred to the trial court's implicit finding that the defendant had separate intents when he committed a robbery with a firearm and when he continued to possess that firearm after the robbery until the time of his arrest, i.e. Step One in the analysis. (*Id.* at p. 1564.) But contrary to respondent's contention, this did not mean the Court of Appeal somehow deferred to the trial court on the application of law to those facts. Rather, the Court of Appeal applied de novo review in Step Two of the analysis, deciding section 654 only requires a stay of a possession conviction when "fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense." (*Id.* at p. 1565.) With this question of law resolved, the Court of Appeal applied the law to the facts as found by the trial court in Step Three of the analysis, and concluded no stay was required. (*Id.* at p. 1566.)

Thus, appellate review of a section 654 decision, like any other mixed question of law and fact, involves the standard three-step analysis. In the instant case, which involves *undisputed* facts and

centers primarily on a question of law, *each* of the steps requires *de novo* review.

ARGUMENT

I.

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

A. Whether a Set of Undisputed Facts Shows a Single Act or Course of Conduct With Respect to Two Statutes Is Solely a Question of Law.

In this case, the historical facts of the assault on the victim, Walter Schmidt Sr., are set forth in the probation report and are undisputed. As discussed above, the remaining question - whether the carjacking and robbery constitute a single act or a course of conduct – is a legal question arising from those undisputed facts.

Respondent contends otherwise, characterizing the resolution of whether there is a single act or a course of conduct as a "factual inquiry," citing *People v. Capistrano* (2014) 59 Cal.4th at 830, 886 (*Capistrano*). (ABM 19.) But *Capistrano* does not support respondent's conclusion. That case did not discuss the distinction between true single-act cases and course of conduct cases; it discussed when a

course of conduct factually involves a single objective and therefore qualifies as a single-act under section 654. (*Capistrano, supra,* 59 Cal.4th at p. 885.) In other words, it did nothing more than apply the *Neal* test. Moreover, in deciding that case, the court applied the standard three-step analysis. However, because the legal parameters of the *Neal* test were not in dispute, it did so with a primary focus on steps one and three.[4]

Here, of course, the review is entirely different. The facts surrounding Molestina's actions are established. Because intent is irrelevant in determining whether those actions constituted a single act per *Jones* or are instead a course of conduct, there are no inferences that must be addressed. Thus, Step One is complete. The central issue arises in Step Two – what constitutes a single criminal act versus a

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[4] Step One: The court engaged in deferential review to establish the historical facts and found there was substantial evidence of two distinct acts of violence - the first committed to remove the victims from their car and the second committed inside the victims' homes to obtain other property and commit other sexual offenses. (*Capistrano, supra,* 59 Cal.4th at p. 887.) Step Two: The court identified the rules set forth in the *Neal* test. (*Id.* at p. 885.) Step Three: With the historical facts established, the court applied the law and held these separate acts of violence could legally support separate sentences because there were separate objectives. (*Id.* at p. 887.)

course of conduct. The answer to this question affects all section 654 cases and is not tied to the facts of this case. It is a legal question. Finally, once that legal question is resolved, the law must be applied to the facts of this case. Because the facts are undisputed and the matter is primarily legal, Step Three favors de novo review.

Respondent attempts to characterize it as a factual question, such that the trial court's implied finding will be automatically upheld, arguing "neither the trial court's nor Corpening's view of the evidence was particularly unreasonable," and "what constitutes 'the act' here is reasonably debatable." (ABM 34.) Notably, the factors respondent acknowledges as "debatable" are not the historical facts – for instance, how many times Molestina pointed the gun at Schmidt Sr., or when asportation of the van versus the coins occurred. Rather, it is the interpretation flowing from the undisputed facts – whether these undisputed facts show a single act or a course of conduct. Respondent fails to distinguish a factual inference from a question of law. (*Fullerton Union High School Dist. v. Riles, supra,* 139 Cal.App.3d at p. 383.)

B. The "Act" for purposes of Section 654 is the Actus Reus of the Different Provisions of Law Being Compared.

Section 654 proscribes double punishment for "an act or omission that is punishable in different ways by different provisions of law." As discussed in the opening brief, an "act or omission that is punishable" means the actus reus of a statutory offense. (AOBM 19-20, citing § 15 and *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 349.)

All statutory crimes are broken down into at least two elements: (a) the actus reus (a defendant must actually do something) and (b) the criminal mens rea (the wrongful intent). Many statutes also include additional conditions that must be present to violate the statute.[5] All three categories matter for determining whether multiple

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[5] For instance, simple battery punishes a touching (the actus reus) done willfully (the mens rea) that is harmful or offensive (the condition). (§ 242; *People v. Shockley* (2013) 58 Cal.4th 400, 404. Other statutes impose greater punishment for a simple battery when additional elements are also present – usually in the form of additional conditions (see, e.g., §§ 243.1 [condition that battery be against a particular person] 243.35 [battery committed in a particular location]) or with a specific mens rea (see, e.g., § 243.4 [battery done with specific intent to achieve sexual gratification].)

convictions are proper.[6] (See *People v. Correa* (2012) 54 Cal.4th 331, 336-337 (*Correa*) [discussing the related but distinct concepts of units of prosecution, conviction, and punishment].) But the actus reus is the key element in determining whether multiple punishments are proper. Other categories of elements, the mens rea, or any additional conditions, are not relevant to this analysis. (See *Jones, supra,* 54 Cal.4th at pp. 355-357.)

Jones expressly overruled *In re Hayes* (1969) 70 Cal.2d 604 (*Hayes*), because *Hayes* incorrectly parsed the single actus reus of driving which was common to two statutes into separate "acts" based on the dissimilar conditional elements that made the act of driving unlawful under each statute – i.e., driving while under the influence and driving on a suspended license. (*Jones, supra,* 54 Cal.4th at p. 357.) Per *Jones,* the appropriate focus for section 654 is what act (or acts) the defendant committed rather than the conditions that make the act (or acts) unlawful under the statute.

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[6] Where all of the elements of one crime are statutorily present in another, it is a lesser included offense prohibiting a conviction of both. (See *People v. Robinson* (2016) 63 Cal.4th 200, 207.)

As a first step, the court must compare the two convictions and determine if both were based on the same actus reus. If so, a stay is automatically required. Only when there are two distinct actus rei underlying the convictions does the court need to determine whether they form one indivisible transaction, thus also requiring a stay, by looking to the intent and objective with which they were committed. (*Jones, supra,* 54 Cal.4th at p. 360; *Neal, supra,* 55 Cal.2d at p. 19.) The actus rei continue to be the central elements under consideration, but the intent and objective with which they were committed becomes relevant.[7] (See Argument II, *post*.)

C. The Actus Reus for Robbery and Carjacking Is the Taking by Force.

The actus reus in carjacking and robbery is the taking. (§§ 211, 215.) The offenses also share a condition that the taking must be committed by force or threat of force. (*Ibid.*) Robbery has an additional mens rea requirement in that the defendant must intend to

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[7] "Intent and objective," in this context, does not refer to the mens rea element of the offenses (though often referred to as the criminal intent), but rather to the common meaning of the purpose for committing an act.

permanently dispossess the items taken. (*Ibid.*) Carjacking has an additional condition in that the item taken must be a vehicle. (*Ibid.*) As a result, neither is a lesser included offense of the other and multiple convictions are proper. However, where the same act of taking underlies both the carjacking and the robbery, a stay is required. (*People v. Ortega* (1998) 19 Cal.4th 686, 699; *People v. Dominguez* (1995) 38 Cal.App.4th 410, 420.)

1. A Felonious Taking on One Occasion Constitutes a Single Actus Reus Even Where Multiple Items Are Taken.

Robbery and carjacking both punish the act of taking property from another by force. The taking is unitary act, even where multiple items are taken, even where those items belong to different individuals. (See *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1308.) Therefore, the fact that the singular act of taking another's property may violate different statutes because of other disparate conditions[8] has no bearing on the unitary nature of the actus reus.

[8] E.g., a specific type of property or a specific mens rea.

This distinguishes robbery crimes from the possession crimes discussed in *Jones.* The act of possessing is necessarily defined by the contraband possessed as one cannot possess in the abstract. (*Jones, supra,* 54 Cal.4th at p. 358.) The act of possessing methamphetamine (Health & Safe. Code, § 11377, subd. (a)) is as distinct from the act of possessing cocaine (Health & Safe. Code, § 11350) as it is from possessing a firearm (§ 29800, subd. (a)(1).) (See *Hayes, supra,* 70 Cal.2d at pp. 612-613, disn. opn. Traynor, C.J., cited with approval in *Jones, supra,* 54 Cal.4th at p. 356 [distinguishing narcotics possessions from the single physical act of driving while under the influence and while also on a suspended license].)

2. The Actus Reus of a Forceful Taking Cannot Be Parsed Into a Course of Conduct for Purposes of Section 654.

Respondent states in a conclusory manner, "The acts leading to the robbery and acts amounting to the carjacking could be construed as simultaneous acts animated by separate intents." (ABM 30.)[9]

[9] Respondent cites to *People v. Latimer* (1993) 5 Cal.4th 1203, 1211-1212. (RB 30.) However, in *Latimer,* this court did not address what constitutes simultaneous but distinct acts. Rather, it questioned whether the *Neal* test's expansion of section 654 to cover crimes involving two distinct actus rei (in that case a kidnapping and rape),

Respondent does not appear to seriously contend that there were two separate but simultaneous takings in this case. Rather, respondent argues that the actus reus of forceful taking is not actually an act at all; rather it is a course of conduct. (ABM 29-30.) Per respondent, because Molestina displayed force several times before he managed to complete the taking, this is a course of conduct case, not a single act case. This argument is unpersuasive because it does not line up with this Court's precedent holding cases to involve a single act even where the actus reus could arguably be parsed under respondent's reasoning.

For instance, *Correa* recently cited with approval *People v. Brown* (1958) 49 Cal.2d 577 as an example of a single act case requiring a stay (murder and illegal abortion), because there was "only one criminal act, that is, the insertion of a blunt instrument in combination with the injection of a solution." (*Correa, supra,* 49 Cal.2d at p. 340.) That *single*

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should be rejected in favor of limiting section 654 to single act crimes. (*Latimer, supra,* 5 Cal.4th at p. 1212.) Though the *Latimer* court noted precedent in which the *Neal* test had been limited, e.g., length of time or separate objectives (*Id.* at pp. 1211-1212), in the end the court did apply section 654. (*Id.* at pp. 1216-1217.) *Latimer* therefore does not appear to be relevant to respondent's argument.

criminal act consisted of two physical actions – inserting a blunt instrument and injecting a solution – yet the crime, for purposes of section 654, was not parsed into separate acts.

In the same vein *Jones* expressly overruled *People v. Harrison* (1969) 1 Cal.App.3d 115 for incorrectly treating a single act case as a multiple act case subject to the *Neal* test. (*Jones, supra,* 54 Cal.4th at p. 359.) *Harrison* artificially parsed the singular act of possessing one revolver on one occasion into separate physical actions of possessing that firearm and also carrying it in a car. (*People v. Harrison, supra,* 1 Cal.App.3d 122.) While "possessing" and "carrying" are not perfectly synonymous verbs,[10] this court, in *Jones,* noted the distinction made no difference; the defendant committed a single act of having the gun in his car on a specific occasion thereby both possessing and carrying it. (*Jones, supra,* 54 Cal.4th at p. 359.)

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[10] Possessing means having control over an item while carrying means holding or transporting an item. (See *People v. Overturf* (1976) 64 Cal.App.3d Supp.1, 6.)

3. That the Actus Reus for Robbery and Carjacking May Be Also Be the Actus Reus of Other Crimes Has No Bearing on Whether the Forceful Taking Is a Single Act.

Respondent argues that because the physical actions making up the common actus reus for robbery and carjacking also fell within other potential crimes, this somehow means the actus reus itself could be parsed into a course of conduct. (ABM 30.) Respondent notes Molestina committed multiple assaults, attempted robbery, attempted carjacking and a conspiracy to steal the coins. (ABM 30.) Respondent argues "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." (ABM 30.)

First, the premise that these were all punishable criminal acts is incorrect. While the physical actions could also constitute the actus reus of other crimes for which Corpening could have be convicted, it does not mean he committed multiple separately punishable acts. The entire purpose of section 654 is to prohibit multiple punishment. When section 654 applies, the crimes, as a matter of law, do not constitute separately punishable acts. (See, e.g., *People v. Nunez* (2012)

210 Cal.App.4th 625, 629.) As case in point, Corpening *was* convicted of assault based on the several attacks by Molestina in the attempt to take the van and coins. (4 RT 839; CT 163.) This conviction was properly stayed because it was not a separately punishable act. (See, e.g., *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171.)

Additionally, it is not clear why respondent believes a physical action cannot be considered an indivisible component of the actus reus in one statute just because it constitutes the entire actus reus in another statute. Again, Supreme Court precedent does not support this view. In *Mesa*, the defendant was convicted of assault, possessing a weapon as a felon, and of street terrorism pursuant to section 186.22, subdivision (a) for each of two different transactions where he shot at different victims on different occasions.[11] (*People v. Mesa* (2012) 54 Cal.4th 191, 194-195.) The court held the street terrorism conviction

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[11] Arguably, at least one of the section 186.22, subdivision (a) convictions was not appropriate because the defendant acted alone. (*People v. Rodriguez* (2012) 55 Cal.4th 1125.) However, *Mesa* was decided before *Rodriguez* held section 186.22, subdivision (a) does not apply to conduct by a lone gang member. That possible flaw in Mesa's conviction was not at issue in the *Mesa* opinion and has no bearing on its discussion of section 654.

must be stayed because the actus reus in that case was committed by the single act of shooting the victim. This single act also encompassed the two separate criminal acts underlying the other convictions, specifically possessing a weapon and assaulting the victim with a firearm. The fact that the actus reus of shooting the victim could be parsed into an act of possessing a firearm (having it within his control) and an act of assault (pointing it at another) did not change its character from a single act case for purposes of section 654.

D. The Same Conduct Constituted the Actus Reus of Both the Carjacking and Robbery Convictions in this Case, Therefore Requiring a Stay as a Matter of Law.

The actus reus for the carjacking and robbery convictions in this case were both satisfied by the same conduct. Molestina assaulted Schmidt Sr. until he was able to take possession and simultaneously asport the van and the coin collection it contained. As such, this was a single act case, and the robbery conviction should have been stayed as a matter of law.

II.

IF THE *NEAL* TEST APPLIES TO THE CRIMES IN THIS CASE, A STAY IS STILL REQUIRED AS A MATTER OF LAW.

According to respondent, the trial court could reasonably infer the defendants initially intended to take the coins without committing a carjacking and only decided to commit the carjacking when Schmidt, Sr. resisted. (ABM 42-43.) Per respondent, this change in intent warrants separate punishment. The Court of Appeal opinion suggests a similar change in intent. (Opn. 10.) Additionally, the Court of Appeal opinion suggests the intent to take the coins was separate and distinct from an intent to take the van in order to "escape." (Opn. 10.)

As a preliminary matter, both of these conclusions rely on a faulty premise that the record supports an inference that the intent to take the van was not part of the original intent to take the coins. Even setting that problem aside, the articulated possible "intents" of overcoming resistance or escaping with the coins are not the type of separate "intent or objective" that demonstrates a divisible course of conduct under the *Neal* test.

A. The Undisputed Facts Do Not Support an Inference that the Defendants' Intent Changed During the Course of the Robbery From Only Taking the Coins to Taking the Coins and Committing a Carjacking.

Because this case did not involve a jury trial, the facts of the incident came primarily in the form of the probation report. The report contained the statement of the victim and statements by the various co-defendants. Subject only to one minor exception not relevant to the issue in this appeal,[12] none of the statements contradicted each other with respect to the details of the crime. No party disputed the accuracy of the probation report at sentencing. Thus, the trial court did not engage in fact finding -- i.e. ascertaining the "what happened"; rather it engage in legal interpretation of these undisputed facts. (*Aghaian v. Minassian, supra,* 234 Cal.App.4th at p. 434; *In re Fernando M., supra,* 138 Cal.App.4th at pp. 535-536.)

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[12] Guerra said Corpening was the leader. (CT 52.) Corpening denied being the group leader, instead arguing Molestina came up with the idea and orchestrated the crime. (CT 54.) Based on several factors, including Corpening's behavior in court, the trial court rejected his version. (5 RT 832.) While this finding is likely entitled to deference, Corpening's leadership role has no relevance to the question on appeal.

Respondent argues that the court implicitly inferred Molestina's intent from the undisputed facts and that this is a form of fact finding subject to deference. (ABM 21.) However, before an inference is subject to deference, it must be reasonable in light of the undisputed facts. (See *Shandralina G., supra,* 147 Cal.App.4th at pp. 416-417.) An inference that is inconsistent with clear, positive and uncontradicted evidence is unreasonable. (*Blix Street Records, Inc. v. Cassidy, supra,* 191 Cal.App.4th at p. 49; *Shandralina G., supra,* 147 Cal.App.4th at p. 417; *Fullerton Union High School Dist. v. Riles, supra,* 139 Cal.App.3d at p. 383.)

Here, it could not reasonably be inferred the defendants' intent changed during the course of the robbery, because the plain, undisputed evidence indicated the thieves always intended to take the coins by taking the van.

According to the interview with co-defendant Arturo Guerra contained in the probation report, the defendants met the night before to plan the "job":

> The group of suspects met in the garage of Corpening's residence the night before the crime occurred and

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

(CT 52, emphasis added.)

Guerra also told the probation officer "Upon Corpening's command, *Molestina executed the carjacking.* After Molestina carjacked Mr. Schmidt Sr.'s vehicle, Corpening jumped in the passenger seat of the stolen van and they drove off." (CT 52.) The van and Pontiac met at Quebec Court where they proceeded to unload the van. (CT 52.)

While Corpening disputed being the leader and communication point man,[13] he did not contradict Guerra's description of a planned carjacking. (CT 54.) According to Corpening, Molestina volunteered to "jack the guy." (CT 54.)

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[13] A disputed fact the court resolved against Corpening. (5 RT 832.)

Schmidt Sr.'s description did not contradict Guerra and Corpening's description that a carjacking had been intended all along. When Molestina first pointed the gun at Schmidt Sr., Schmidt Sr. did not initially resist. (CT 51.) He "got out of the driver's seat *and relinquished his vehicle* to Molestina." (CT 51, emphasis added.) Molestina immediately attempted to enter the van. (CT 51.)

Further, the additional circumstantial evidence does not contradict the clear undisputed evidence that the carjacking had always been the intended means of committing the robbery. First, Molestina never made any attempt to restrain Schmidt Sr., as would presumably be necessary to transfer the coins in the driveway; he evicted Schmidt Sr. from the van and attempted to climb into the driver's seat. Second, the record contains no evidence that the defendants planned to load the coins into another vehicle while still at Schmidt's home.

There was not a specific count of the boxes, but it was assuredly a large number. The coins were valued at $70,000. (CT 65.) Residents at the apartment complex where the coins were transferred referred

to "individuals that were loading boxes from Mr. Schmidt Sr.'s van into the Aguila's Pontiac." (CT 51.) Upon his arrest, Molestina claimed "he had just been walking around the area and 'those guys' offered to pay him $1,000 if he helped unload boxes from the van into the Pontiac." (CT 52.) Had the defendants planned to move a large number of coins into another vehicle at Schmidt's house, they would have needed to bring at least one of the accomplice vehicles to the driveway in order to transfer the coins.

But the other vehicles *never* approached into the driveway. Corpening and Molestina initially parked around the corner and Molestina approached Schmidt Sr. on foot. (CT 52.) Schmidt Sr. saw Molestina drive approximately 50 yards away from the residence, stop and pick up Guerra, and then drive off. (CT 51.) The second vehicle then followed Molestina as he left the area. (CT 51.)

The only reasonable inference that can be drawn from the undisputed evidence is that defendants always planned to commit a carjacking in order to take the coins. The supposed implied inference urged by respondent and present in the Court of Appeal opinion

contradicts clear, undisputed evidence and, therefore, is not a reasonable inference and is not subject to deference.

B. Even If the Intent to Commit the Carjacking Arose During the Course of the Robbery, It Would Not Support Two Punishments.

Assuming, arguendo, that the court could reasonably infer Molestina decided to commit a carjacking only when Schmidt Sr. resisted his initial attempt at robbery, (therefore conceding this purported fact with respect to this Section B of the argument), it still would not be proper to hold there was an indivisible course of conduct under the *Neal* test.

Whether the facts as purportedly inferred by the trial court would support separate punishment is an application of law (in this case, the *Neal* test) to facts and is therefore subject to de novo review. (*Fullerton Union High School Dist. v. Riles, supra,* 139 Cal.App.3d at p. 383.) *Neal* itself recognized the application of section 654 to conceded facts to be a legal question subject to de novo review. (*Neal, supra,* 55 Cal.2d at p. 17.)

Under *Neal* and its progeny, a stay is required where one crime is committed in order to accomplish another crime. (*Neal, supra,* 55

Cal.2d 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.) The heart of the *Neal* test looks to whether two acts are so causally connected they essentially form one criminal act. This occurs when one criminal act is the means of accomplishing another crime, or in other words is facilitative of the other. (*Neal, supra,* 55 Cal.2d at p. 19-20.) This also occurs where one criminal act is merely an incidental[14] result of committing another crime. (*Ibid.*)

This basic premise of *Neal* is not logically affected by when a defendant decides to commit one crime in order to accomplish the other. None of the cases cited by respondent or the Court of Appeal suggest this basic premise would be affected by when the intent to commit the crime to accomplish the other would alter the application of the *Neal* test.

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[14] In the context of *Neal,* "incidental" means "being likely to ensue as a chance or minor consequence – usually used with *to.* (Webster's Third New International Dictionary, Unabridged accessed July 04, 2016, http://unabridged.merriam-webster.com.)

The cases cited by respondent involve additional crimes committed *after* completing another crime, thus, were not facilitative and, therefore, have no bearing on this issue. (See *People v. Harrison* (1989) 48 Cal.3d 321, 338 (*Harrison*) [multiple acts of rape in close succession]; *People v. Massie* (1967) 66 Cal.2d 899, 908 (*Massie*) [defendant shot the victim after robbing him]; *People v. Trotter* (1992) 7 Cal.App.4th 363, 367-368 (*Trotter*) [multiple separate assaults committed in close succession]; *People v. Nguyen* (1988) 204 Cal.App.3d 181, 190-193 (*Nguyen*) [defendant shot the victim *after* subduing and robbing him].)

The opening brief explains why the rationale in *Nguyen* is not applicable here. It involved a gratuitous act of violence after the robbery had been completed and therefore it was not an act designed to facilitate the robbery. (*Nguyen, supra,* 204 Cal.App.3d at pp. 185, 190.) *Massie* involves the same fact pattern and rationale. Massie demanded the victim's wallet. (*Massie, supra,* 66 Cal.2d at p. 908.) After the victim handed over the wallet, Massie said "Don't look at me, queer" and shot the victim, fortunately only grazing his temple.

(*Ibid.*) Because this second assault -- shooting the victim – was not the "'means' by which Massie sought to commit the robbery," but instead a "separate and distinct act after the completion of the robbery," multiple punishment was permissible. (*Ibid.*)

Harrison and *Trotter* both involved completing the same offense multiple times in succession. *Harrison* approved multiple punishment for three separate acts of digital penetration, thereby completing the crime proscribed by section 289 three times, albeit in rapid succession. (*Harrison, supra,* 48 Cal.3d at p. 329.) The defendant argued there was an overarching objective of obtaining sexual satisfaction and, therefore, section 654 required a stay. (*Id.* at p. 335.) This court held the purported single objective of "sexual gratification" relied on an overly broad interpretation of *Neal*. (*Id.* at p. 336.) *Neal* applies to crimes that are facilitative of or an incidental result of other crimes. (*Ibid.*) None of the acts of penetration facilitated any other acts of penetration in *Harrison* and declined to extend *Neal* beyond those sex crimes that are committed incidentally or committed to facilitate another crime. (*Id.* at pp. 336, 338.)

Trotter used the reasoning in *Harrison* and applied it to three convictions for assault where the defendant shot at pursuing police officers three separate times. (*Trotter, supra,* 7 Cal.App.4th at pp. 367-368.) The *Trotter* court held there were separate intents and objectives for each shot fired, because "each shot evinced a separate intent to do violence just as each new and separate penetration in *Harrison* evinced a new and separate intent and objective." (*Id.* at p. 368.)

As a preliminary matter, *Trotter's* reliance on *Harrison* outside the context of sex offenses is somewhat inappropriate. *Harrison* specifically distinguished sex offenses from crimes of violence like robbery, acknowledging *People v. Bauer* (1969) 1 Cal.3d 368, 377, which applied section 654 to a continuous transaction of robbery, car theft, and possession of contraband. (*Harrison, supra,* 48 Cal.3d at p. 336.) Additionally, in *People v. Hicks* (1993) 6 Cal.4th 784, 791-797, which cited *Harrison,* explained that unlike other crimes, separate sex

offenses enumerated in section 667.7, subdivision (e) are expressly not subject to the *Neal* test per section 667.7, subdivision (c).[15]

Regardless, *Trotter* does not stand for the proposition that one crime which facilitates another somehow falls outside of *Neal* solely because the facilitative crime is violent. None of the shots fire in *Trotter* facilitated any of the other shots. Respondent's expansive interpretation of *Trotter* would require a radical divergence from the basic premise of *Neal*; that crimes committed to facilitate other crimes are part of an indivisible transaction.

Respondent argues that there is reason to depart from this basic principle; according to respondent, doing so would further the goal of section 654 to "ensure[] 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." (ABM 43.) This argument relies on a flawed comparison.

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[15] They are, however, still subject to section 654 to the extent the offenses arise from a single act. (*People v. Hicks, supra,* 6 Cal.4th at p. 790-791; *People v. Siko* (1988) 45 Cal.3d 820, 825.)

Respondent compares the culpability of a defendant who attempts to commit a robbery, fails, and gives up with one who attempts to commit a robbery, fails, and then commits a carjacking to achieve the robbery. (ABM 43.) Respondent concludes that a stay would therefore thwart the law's goal of making punishment commensurate with culpability. (ABM 43.) This conclusion has a hidden incorrect assumption in it, that with a stay applied, someone who attempts a robbery and gives up is punished the same as someone who attempts a robbery and escalates his conduct when met with resistance. As described below, this is simply not true. It also focuses on the wrong comparison – (1) contrasting the defendant who is willing to resort to a carjacking with a defendant who gives up when facing resistance rather than (2) comparing it to a defendant who planned to commit a carjacking all along. As explained below, imposing a stay where the defendant commits a carjacking to accomplish a robbery when met with resistance does ensure commensurate punishment.

There is a spectrum of culpability in the hypothetical conduct involving robbery of items in a vehicle, from one who attempts a robbery and gives up when met with resistance all the way to one who accomplishes a robbery and then commits an additional crime. The application of the *Neal* test under section 654 ensures commensurate punishment for each step of this spectrum:

- Scenario A: Least culpable behavior: defendant intends to commit a robbery by assault to obtain coins but gives up when faced with resistance. Punishment: attempted robbery. (§§ 213, subd. (b).)
- Scenario B: More culpable behavior: defendant intends to commit a robbery by assault to obtain coins and succeeds without or despite resistance. Greater punishment: robbery. (§ 213, subd. (a)(2).)
- Scenario C: More culpable behavior: defendant intends to commit a robbery by assault, but when met with resistance, commits a carjacking to obtain the coins. Greater

punishment: carjacking (§ 215) with robbery conviction stayed (§ 654.)

- Scenario D: Equal or slightly more culpable[16] behavior: defendant intends to commit a robbery by carjacking to obtain the coins. Equal punishment: carjacking (§ 215) with robbery conviction stayed (§ 654). To the extent this situation is morally more culpable, the court can impose an upper term on the carjacking. (Cal. Rules of Court, rules 4.420, 4.421(a) and (b).)
- Scenario E: Most culpable behavior: defendant intends to commit a robbery to obtain the coins, accomplishes this objective and then decides afterwards to commit a carjacking in order to also take the vehicle. Greatest

[16] It seems that one who plans to commit the carjacking all along would be slightly more culpable than one who is also willing to commit a carjacking to accomplish a robbery, but attempts to achieve the robbery without a carjacking first. However, both situations involve someone morally willing to commit a carjacking to achieve the robbery.

Punishment: separate sentences for carjacking and robbery allowed.[17] (*Nguyen, supra,* 204 Cal.App.3d at pp. 190-193.)

If respondent's proposed version of the *Neal* test were embraced, it would actually thwart the goal of keeping punishment commensurate with culpability. The defendant who hoped to accomplish a robbery without committing a carjacking (Scenario C) would be punished more harshly than the defendant who always intended to accomplish a robbery by committing carjacking (Scenario D), even though he committed *the same crime* with arguably less moral culpability. There is no reason grounded in logic or policy to modify the *Neal* test to obtain such an outcome.

C. The Court of Appeal Erred in Finding a Separate Intent to "Escape" for the Carjacking Conviction.

The Court of Appeal relied on a slightly different implicitly inferred intent than that espoused by respondent. Rather than focus on the change in intent to accomplish the robbery, the opinion

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[17] A trial court, of course, might still properly decide that the subsequent decision to commit a carjacking does not show significantly greater culpability under the facts of a given case and could choose to impose a concurrent sentence in its discretion.

primarily focused on an intent to commit the carjacking to escape from the scene of the robbery. (Opn. 10.) Corpening has already addressed the fallacy of a legal conclusion drawn from the undisputed facts that this intent to "escape" was anything other than an intent to asport the coins and therefore an indivisible part of accomplishing the robbery. (AOBM Argument II.)

Respondent does not seriously rely on the Court of Appeal's reasoning that Molestina intended to "escape" with the van, but does misconstrue Corpening's argument as "extend[ing] the escape rule, which is used in felony-murder situations to show the duration of a robbery, to apply in section 654 analyses. ([AOBM] 41-45.)" (ABM 40, fn. 7.) This is not a correct characterization of Corpening's argument. The escape rule applies to a completed but continuing robbery. (*People v. Rodriguez, supra,* 235 Cal.App.4th at p. 1007.) Corpening *does not* contend the carjacking should be stayed because van was taken after completing the robbery in order to reach a place of temporary safety. Rather, Corpening explains that the robbery was not completed until Molestina obtained possession of the coins and

asported those coins some distance. (AOBM 21-22; See *People v. Gomez* (2008) 43 Cal.4th 249, 255.) This asportation, a necessary element of robbery, was accomplished by moving the van containing the coins. The concept of asportation is separate and distinct from the doctrine of a continuing robbery for purposes felony-murder. (*Ibid.*)

D. That a Criminal Act Which Facilitates Another Crime May Also Be Motivated by Reasons Unrelated to the Other Crime Does Not Make the *Neal* Test Inapplicable.

Implicit in the Court of Appeal's holding is a concept that even where two crimes are facilitative or incidental, if the defendant had even one additional possible reason to commit one of the crimes independent of the other crime, then a court can properly infer separate intents and does not have to apply section 654. This construction is not true to the rationale of *Neal.*

As this court noted in *Jones,* a broad concept of intent that simply requires identifying a possible reason for committing an act is too subjective to be helpful. (*Jones, supra,* 54 Cal.4th at p. 360.) Many acts can be described as having multiple intents associated with them. In *Jones,* this court recognized that a person who carries a weapon may have it "to intimidate rival gang members, or go hunting, or

harbor[ ] any other of the myriad possible objectives for illegally possessing a firearm." (*Ibid.*) Indeed, in addition to being difficult to deduce (the primary concern voiced in *Jones*) these objectives are also not mutually exclusive. A defendant could possess a gun to intimidate rival gang members and also to go hunting. Can a court therefore subjectively assign one intent to possession of the firearm generally while assigning another to concealing that firearm within a car?

Fortunately, the *Neal* test does not require this subjective and fuzzy examination of a defendant's "intent." *Neal* did not base the need to stay crimes on whether more than one motive could be articulated for a particular act. Rather, it looked at whether the reason for committing the several acts under comparison were causally linked to each other. While characterized as looking to a defendant's "intent and objective," the *Neal* court's primary focus was whether multiple offenses were so causally linked they were part and parcel of one crime. (*Neal, supra,* 55 Cal.2d at p. 20.) Nothing in *Neal* suggests

that the possible existence of *additional* reasons for committing one of the acts somehow breaks the causal connection between the acts.

The *Neal* court's focus on the causal connection between acts also ties the *Neal* test to the plain language of section 654. Where one actus reus is committed to achieve the objective of another crime, or where one actus reus is merely an incidental result of committing another crime, then there is an indivisible course of conduct which is essentially a single criminal act for which the defendant should be punished only once. Like the pure single-act crimes discussed in *Jones*, this is true even where other independent motivations for the offenses may exist. On the other hand, if the actus rei are neither facilitative nor incidental, even where occurring closely in place and time, they are not truly indivisible and section 654 does not apply.

Neal is not a judicially-created exception to section 654. It is an interpretation of what is meant by "same act." Indivisible "acts" that are facilitative or incidental constitute but one punishable act. Divisible acts that are not facilitative or incidental, no matter how closely in time or place they are committed, are still separate and

distinct criminal acts. Courts consider "intent and objective" as a factor to help determine whether the acts are divisible (independent) or indivisible (facilitative or incidental).

The Court of Appeal opinion comes at the *Neal* test from the wrong direction. Rather than asking whether there is a mutual intent or objective showing a causal connection between the actus rei which creates an indivisible course of conduct, the Court of Appeal asks whether there is any conceivable intent that applies to only one of the crimes, even if that independent intent does not break the causal connection. By doing so, the Court of Appeal creates an odd and unnecessary conflict between *Neal* and *Jones*. Under the Court of Appeal's interpretation, the existence of multiple motivations applying to an actus reus defeats section 654 in course of conduct cases but not in single-act cases. A better rule would be to hold the existence of multiple motivations make no difference in either situation; instead the central requirement for imposing a stay should be the existence of a single act covered by both provisions of law, or

the existence of multiple acts representing an indivisible course of conduct because they are causally connected.

Under the facts in this case, even if construed as a course of conduct, the act of carjacking was causally and, therefore, indivisibly connected to the act of robbery; the carjacking was the means of possessing and asporting the coins held in the van. The existence of possible additional intents for the act of carjacking (e.g., to more easily escape with the coins, or to avoid capture) does not break the causal connection. Pursuant to the rationale set forth in both *Jones* and *Neal*, this causality requires a stay.

III.

CONCLUSION

Because the single act of forceful taking formed the actus reus of Corpening's carjacking and robbery conviction, the robbery conviction must be stayed pursuant to *People v. Jones.* Furthermore, because the carjacking was committed to accomplish the robbery, it must be stayed under the reasoning of *Neal v. California.*

Dated: July 4, 2016

Respectfully Submitted,

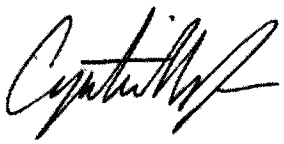
Cynthia M. Jones
Attorney for Tory Corpening
Defendant and Appellant

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 9,042 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: July 4, 2016



Cynthia M. Jones

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(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):

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APPELLATE DEFENDERS, INC.

ATTORNEY GENERAL'S OFFICE

SAN DIEGO DISTRICT ATTORNEY'S OFFICE

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

Executed on July 5, 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 July 4, 2016, I served a copy of the attached Reply Brief on the Merits (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 4th day of July, 2016.

Teresa C. Martinez

Teresa C. Martinez
(Name of Declarant)

(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 July 4, 2016 a PDF version of the Reply Brief on the Merits (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 4th day of July, 2016 at 19:33 Pacific Time hour.

Teresa C. Martinez
(Name of Declarant)

(Signature of Declarant)