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
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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),