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ORIGINAL

# In the Supreme Court of the State of California

| THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. VICTOR CORREA, Defendant and Appellant. | Case No. S163273 |
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SUPREME COURT
FILED
DEC 14 2010
Frederick K. Ohlrich Clerk
Deputy

Third Appellate District, Case No. C054365
Sacramento Superior Court, Case No. 06F01135
The Honorable Patricia C. Esgro, Judge

## RESPONDENT'S SUPPLEMENTAL LETTER REPLY BRIEF

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December 13, 2010

The Honorable Frederick Ohlrich, Clerk
California Supreme Court
350 McAllister, 1st Floor
Earl Warren Building
San Francisco, CA 94102

RE: *People v. Victor Correa*
California Supreme Court, case no. S163273

Dear Mr. Ohlrich:

On October 13, 2010, this Court ordered the parties to file supplemental briefing. The order directed the parties to *Neal v. California* (1960) 55 Cal.2d 11, 18, footnote 1 ("the footnote"), which states:

> Although section 654 does not expressly preclude double punishment when an act gives rise to *more than one violation of the same Penal Code section* or to multiple violations of the criminal provisions of other codes, it is settled that *the basic principle it enunciates precludes double punishment in such cases also.* (*People v. Brown*, 49 Cal.2d 577, 591; see *People v. Roberts*, 40 Cal.2d 483, 491; *People v. Clemett*, 208 Cal. 142, 144; *People v. Nor Woods*, 37 Cal.2d 584, 586. (Italics added.)

On November 12, 2010, respondent filed a supplemental letter brief. On November 29, 2010, appellant filed a supplemental letter brief. Consistent with the Court's order, respondent submits the following supplemental reply brief. As stated in respondent's supplemental letter brief, this Court should reconsider what it said in the footnote, and conclude that Penal Code section 654[1] does not govern multiple convictions of the same provision of law.

[1] All undesignated statutory references are to the Penal Code.

### A. The Authorities Cited in the Footnote Do Not Support the Italicized Language

The crux of the italicized language in the footnote is that section 654 precludes double punishment when an act gives rise to more than one violation of the same Penal Code section. But as set forth in detail in respondent's supplemental letter brief, the cited authorities do not support that conclusion. For example, *People v. Brown* (1958) 49 Cal.2d 577, did not involve applying section 654 to multiple violations of the same Penal Code section. Further, the issue in *People v. Roberts* (1953) 40 Cal.2d 483, was whether or not the defendant had actually committed a single offense or multiple offenses pursuant to the same Health and Safety Code section. Similarly, the courts in *People v. Clemett* (1929) 208 Cal. 142 and *People v. Nor Woods* (1951) 37 Cal.2d 584, addressed whether the defendant committed more than one offense. Those cases are distinguishable from circumstances such as appellant's, that is, when a person is properly convicted of multiple violations of the same provision of law. Here, there is no question that appellant violated section 12021 seven different times, and as a consequence incurred seven valid convictions.

In response to the Court's first question appellant states:

> The task before this Court is easily stated, what is meant by "act or omission" and "provisions" within the meaning of Section 654?

(Appellant's Supplemental Brief at p. 2.)

Appellant directs the Court to the Legislative amendments that section 654 has undergone, and cites some cases addressing section 654 to ultimately conclude:

> It can thus be seen, that even though this footnote was not determinative of the outcome in *Neal*, it did provide an accurate summary of the focus of reviewing courts since the inception of section 654: it is the "act or omission" and not on whether a defendant could suffer multiple punishments. In short, the authority cited in this footnote supports "the basic principle in such cases. [footnote omitted]."

(Appellant's Supplemental Brief at p. 6.)

But the Court's first question was, "Does the authority cited in this footnote support the italicized language?" For the reasons stated in respondent's supplemental letter brief, the authority cited in the footnote does not support the italicized language. (See Respondent's Supplemental Letter Brief at pp. 1-6.) As noted by appellant, the footnote was not determinative of the outcome in *Neal*, and therefore, does not represent the *Neal* rule decided by this Court in 1960. Further, as observed in the footnote itself, section 654 does not expressly preclude double punishment when an act gives rise to more than one violation of the same Penal Code section.

The Legislature has determined that possession of each individual firearm under section 12021 is a separate offense. As a consequence, by possessing seven different firearms, appellant committed a crime with each "act" of possession. A felon who chooses to possess multiple firearms has committed that "act" multiple times. Section 654 should not govern when a defendant's conduct results in multiple valid convictions of the same provision of law, and the cases cited in the footnote do not support the italicized language.

**B. Section 654 Should Not Govern Multiple Convictions of the Same Provision of Law**

Appellant responds to the Court's second and third question in the same argument. (Appellant's Supplemental Brief at p. 6.) Appellant's argument focuses on the "intent and objective" test of *Neal v. State of California* (1960) 55 Cal.2d 11, 19, and he subimts that section 654 should govern multiple convictions of the same provision of law.

As noted by the Court, the "intent and objective" test of *Neal* has been the subject of criticism.

> By its language, section 654 applies only to "[a]n act or omission...." Nothing in this language suggests the "intent or objective" test. As we have noted before, that test is a "judicial gloss" that was "engrafted onto section 654."

(*People v. Latimer* (1993) 5 Cal.4th 1203, 1211, quoting *People v. Siko* (1988) 45 Cal.3d 820, 822.)

Further, since the "judicial gloss" of *Neal* was "engrafted onto section 654" there have been instances in which the Court has recognized it defeats the purpose of section 654. (*People v. Latimer*, *supra*, 5 Cal.4th at p. 1211 ["In some situations, the gloss defeats its own purpose."].)

The Legislature defines what constitutes criminal conduct in California. By enacting section 654, the Legislature recognized that in its attempt to address the broad variety of potential criminal conduct, there could be instances where the same prohibited conduct violated more than one code section, and in those cases the individual should only be subject to one punishment, the longest. Section 654 therefore addressed a concern that an "act or omission" that gives rise to liability under different provisions of law would subject an individual to additional punishment for the same prohibited conduct. That same concern does not exist when a person is properly convicted of multiple violations of the same provision of law. As this Court has recognized, "A grand criminal enterprise is more deserving of censure than a less ambitious one, even if there is only one ultimate objective." (*People v. Latimer*, *supra*, 5 Cal.4th at p. 1211.) When a person repeatedly violates the same provision of law he/she has, by definition, committed separate acts. Consequently, section 654 should not apply to multiple valid convictions of the same provision of law.

Appellant was convicted of seven counts of being a felon in possession of a firearm (§ 12021, subd. (a)(1); I CT 203-209, 214), and was sentenced to consecutive terms for each of those convictions. (I CT 273-274; III RT 763.) Appellant's conduct became more egregious each time he possessed a firearm. The Legislature has concluded that each "act" of possessing a firearm made appellant more dangerous to public safety and therefore more culpable. Further, this is not a case where one volitional "act" gave rise to multiple offenses. Here, the Legislature has determined that each firearm a felon possesses is a separate violation of the Penal Code. Pursuant to section 12021, subdivision (a) therefore, the "act" that gave rise to each offense was the possession of each individual firearm. Appellant should not be rewarded where instead of stopping at the possession of a single firearm, he can with impunity repeat the conduct that has been prohibited by the Legislature. It goes without saying that a convicted felon in possession of multiple firearms is more dangerous and has engaged in more egregious conduct than a convicted felon in possession of a single firearm. This case exemplifies that in order to achieve the goal of section 654, and ensure that appellant's punishment will be commensurate with his culpability, section 654 should not govern multiple valid convictions of the same provision of law.

Further, a reconsideration of the language in the footnote, in the vast majority of cases, will have no impact on a court's discretion to impose concurrent or consecutive sentences. The criteria courts consider in making that determination includes whether or not the crimes and their objectives were predominantly independent of each other, whether the crimes involved separate acts of violence or threats of violence, or whether the crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior. (Cal. Rules of Court, rule 4.425.)

Appellant also argues that:

> Respondent has reached their position by ignoring the 138 year history of the application of section 654. Respondent has offered not a single reason why this course should now be changed. Respondent has not suggested why after 138 years of experience by this state's reviewing courts resolving whether *a course of criminal conduct* is divisible should now arbitrarily exclude from consideration those many cases where there are multiple violations of the same statutory provisions.

(Appellant's Supplemental Brief at p. 10.)

As noted by respondent in its supplemental letter brief, the issue currently before the Court does not present the question of overruling the *Neal* rule. (Respondent's Supplemental Brief at p. 10.) The language in the footnote does not represent the rule of *Neal*, and in fact is inconsistent with the language and purpose of section 654. In *People*

*v. Latimer*, *supra*, 5 Cal.4th at p. 1212, this Court considered whether or not is should overrule *Neal v. California*, *supra*, 55 Cal.2d 11, ultimately concluding it should not. (*Ibid.*) While the Court determined that it would not overrule *Neal*, it stated:

> We also stress that nothing we say in this opinion is intended to cast doubt on any later judicial limitations of the *Neal* rule. For example, we do not intend to question the validity of decisions finding consecutive, and therefore separate, intents, and those finding different, if simultaneous, intents. (See pt. II, A., *ante*, last three paragraphs.) Multiple punishment in those cases remains appropriate.

(*People v. Latimer*, *supra*, 5 Cal.4th at p. 1216.)

Respondent is asking this Court to conclude that section 654 does not govern multiple valid convictions of the same provision of law because that is consistent with the language and purpose of section 654. The purpose of section 654 is "to insure that a defendant's punishment will be commensurate with his culpability." (*Neal v. State of California, supra,* 55 Cal.2d at p. 20.) Section 654 is applicable when there is an "act" that is punishable in different ways by different provisions of law. But in instances where the Legislature has defined the "act" that gives rise to a conviction pursuant to a provision of law, it is not possible for the same specific "act" to expose the individual to liability again for the same provision. The same is not true when an "act," as defined by the Legislature, can expose a defendant to criminal liability pursuant to different provisions of law. Section 654 should not govern when conduct results in multiple valid convictions of the same provision of law.

**C. Appellant Is Deserving of Punishment Commensurate with His Culpability**

Appellant further argues that if he prevails and is remanded for resentencing his punishment will be commensurate with his culpability. (Appellant's Supplemental Brief at p. 11.) Respondent disagrees. Appellant was convicted of seven counts of section 12021, subdivision (a), being a felon in possession of a firearm, and one count of section 496d, subdivision (a) receiving stolen property. (I CT 203-209, 214.) In the information it had been alleged that appellant had suffered three prior strike convictions within the meaning of sections 667, subdivisions (b) through (i) and 1170.12. (I CT 122-123.) After trial, the People dismissed one of the prior strike allegations, and the court found the remaining two allegations true. (III RT 746-749.) The court sentenced appellant to seven consecutive terms of 25 years to life on each of the convictions for being a felon in possession of a firearm, and an additional consecutive term of 25 years to life for receiving stolen property. (I CT 273-274; III RT 763.)

The very purpose of section 12021 is to protect the public from individuals like appellant. (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037-1038.) The risk to the public, and appellant's culpability, increased with each additional weapon he possessed.

Appellant was arrested by SWAT officers while he was hiding inside a home under a stairwell. (I RT 262-265, 268-270.) The officers discovered numerous gun cases and two guns without cases. (I RT 265-266.)

Appellant's sentence is the result of his two prior strike convictions and his ambitious desire to possess multiple firearms. Appellant is deserving of a lengthy prison sentence consistent with the provisions of three strikes. Further, applying section 654 to cases such as appellant's may well convince individuals that have been convicted of felonies that if they are intent on possessing a single firearm they may as well possess an arsenal because the length of time they risk in prison will be the same. The sentence imposed by the superior court was commensurate with appellant's culpability.

### D. A Finding That Section 654 Does Not Govern Multiple Convictions of the Same Provision of Law Can Be Applied to Appellant

In his final argument, appellant contends that a conclusion that section 654 does not govern multiple convictions of the same provision of law cannot be applied to him because it would violate his federal and state constitutional rights of due process. (Appellant's Supplemental Brief at p. 11.) Respondent disagrees.

A statute "'which makes more burdensome the punishment for a crime, after its commission,'" violates article I, section 9, clause 3, of the United States Constitution and article I, section 9 of the California Constitution as an ex post facto determination of criminal liability. (*Collins v. Youngblood* (1990) 497 U.S. 37, 42, quoting *Beazell v. Ohio* (1925) 269 U.S. 167, 169-170; *Tapia v. Superior Court* (1991) 53 Cal.3d 282; *People v. Davis* (1994) 7 Cal.4th 797, 811-812.) As a consequence, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law. (*People v. Escobar* (1992) 3 Cal.4th 740, 752.) Thus, holding a defendant criminally responsible for conduct that he could not reasonably anticipate would be prohibited violates due process because the law must give sufficient warnings so that individuals may conduct themselves accordingly. (*Rose v. Locke* (1975) 423 U.S. 48, 50.)

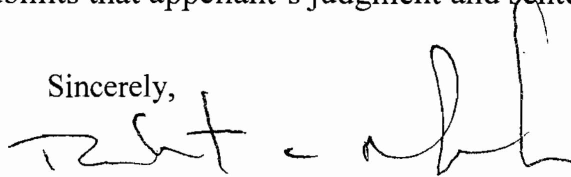
In *People v. King* (1993) 5 Cal.4th 59, this Court overruled its prior decision in *In re Culbreth* (1976) 17 Cal.3d 330, 333, which pertained to sentence enhancements pursuant to section 12022.5, subdivision (a). In *King* the Court noted that *Culbreth* had been applied consistently since it was decided so that retroactive application would make the punishment for the defendant's crimes more burdensome after he committed them. (*People v. King*, *supra*, 5 Cal.4th at p. 80.)

A determination by this Court that section 654 does not govern multiple valid convictions for the same provision of law would not make appellant's punishment more burdensome after he committed the crimes. First, appellant, a twice convicted felon, currently stands convicted of eight additional felonies, and therefore exposed himself to eight sentences of 25 years to life. Appellant risked that punishment each time he decided to possess a gun. A determination that section 654 does not govern appellant's

case would merely result in the sentence to which he exposed himself by his own conduct. Further, a determination that section 654 does not apply has nothing to do with appellant's conduct. Appellant's conduct was his decision to possess seven different firearms. Appellant cannot logically argue that he could not reasonably anticipate he would be held criminally responsible for his decision to possess the guns. A determination that section 654 does not govern multiple convictions of the same provision of law can therefore be applied to appellant.

The Legislature defines the "act" that is prohibited and criminals whose conduct constitutes multiple performances of that act have violated the Penal Code multiple times. Section 654 should not govern when conduct results in multiple convictions of the same provision of law. Thus, respondent submits that appellant's judgment and sentence should be affirmed.

Sincerely,



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For EDMUND G. BROWN JR.
Attorney General

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Correa** No.: **S163273**

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.

On December 13, 2010, I served the attached **RESPONDENT'S SUPPLEMENTAL LETTER REPLY BRIEF** 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 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

**Conrad Dean Petermann**
**Attorney at Law**
**323 East Matilija Street, Suite 110**
**PMB 142**
**Ojai, CA 93023-2769**
**(Representing appellant Correa – 2 copies)**

**Honorable Jan Scully**
**Sacramento County District Attorney**
**P.O. Box 749**
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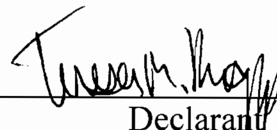
**Court of Appeal,**
**Third Appellate District**
**621 Capitol Mall, 10th Floor**
**Sacramento, CA 95814-4719**

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 December 13, 2010, at Sacramento, California.



Declarant

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