S206084

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	
Plaintiff and Appellant,	Court of Appeal No G046177
v.	
DANIEL INFANTE,	Superior Court No. 10NF1137
Defendant and Petitioner.	

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Richard W. Stanford, Judge

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

PETITION FOR REVIEW

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Attorney for Appellant.

By appointment of the Court
Of Appeal under the Appellate
Defenders Inc. independent case system

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TABLE OF AUTHORITIES

Cases

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TO THE HONORABLE CHIEF JUSTICE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Defendant and petitioner Daniel Infante respectfully petitions this court for review of the published opinion by the Fourth District, Division Three, which reverses the judgment, filed October 2, 2012. A copy of the opinion of the Court of Appeal is attached to this petition as Appendix A. (Cal. Rules of Court, rule 8.504(b)(4).)

QUESTIONS PRESENTED.

1. Was this appeal moot?

2. Did petitioner commit "independent felonious conduct" such that would elevate his misdemeanor gun possession charges to felonies?

NECESSITY FOR REVIEW.

Review is necessary as the questions are ones of statewide and constitutional importance. The issue raised in question one presents a unique twist in that the district attorney is appealing from the dismissal of two counts that the court dismissed at the request of the district attorney. As to the second issue, the decision of the Court of Appeal is in direct conflict with a published opinion from the Fifth District Court of Appeal.

PETITION FOR REHEARING.

Although a Petition for Rehearing could have been filed in the Court of Appeal, neither party filed such a petition. (Cal. Rules of Court, rule 8.504(b)(3).)

STATEMENT OF THE CASE.

An information filed on June 3, 2010, charged petitioner Daniel Infante in count one with an active participant in a criminal street gang having a concealed firearm in a vehicle (Pen. Code[1] § 12025, subd. (a)(1)(b)(3)); in count two with an active participant in a criminal street gang carrying a loaded firearm in public (§ 12031, subd. (a)(1)(a)(2)(C)); in count three with possession of a firearm by a felon (§ 12021, subd, (a)(1)); and in count four with street terrorism. (§ 186.22, subd. (a).) Petitioner was further charged with three prison priors. (§ 667.5, subd. (b).) (1CT pp. 173-175.)

[1] All further references are to the Penal Code, unless noted.

On October 25, 2011, petitioner filed a motion to dismiss counts one, two, and four, pursuant to section 995. (1CT p. 219.) On November 4, 2011, the court denied the motion with respect to count four, and reduced counts one and two to misdemeanors, relying on the holding in *In re Jorge P.* (2011) 197 Cal.App.4th 628. The district attorney then requested that the court dismiss counts one and two and the court, at the request of the district attorney, dismissed counts one and two. (1CT pp. 252-254, 1RT pp. 11, 14-15.)

The People filed a notice of appeal from the dismissal of counts one and two on December 5, 2011. (1CT p. 232.) On January 27, 2012, the People and petitioner entered into a plea agreement where petitioner pled guilty to counts three and four, and admitted all priors, in exchange for a stipulated prison sentence of two years. (Supp 1CT pp. 3, 7-8, Supp 1RT p. 3.)

STATEMENT OF FACTS.[2]

On April 1, 2010, a La Habra police officer stopped a motor vehicle driven by defendant because defendant did not stop at a stop sign. The officer found a loaded revolver and a loaded semiautomatic nine-millimeter pistol in the center console. Defendant was previously convicted of a felony. A gang expert testified the Headhunters gang is a criminal street gang and defendant is an active participant in the gang.

[2] Taken from the opinion of the Court of Appeal.

ARGUMENT

I.

THIS APPEAL IS MOOT.

The court of appeal stated, in its opinion, "The court granted defendant's motion to set aside the charges of possession of a concealed firearm by an active gang participant (count one) and possession of a concealed firearm in a motor vehicle by an active gang participant (count two), and denied defendant's motion as to the charge of active participation in a criminal street gang." (Court of Appeal opinion at p. 5.) What the opinion does not state is that the charges were reduced from felonies to misdemeanors by the court; the charges were then dismissed at the request of the district attorney. (1CT pp. 252-254, 1RT pp. 11, 14-15.)

The California Constitution leaves the decision whether to pursue criminal charges against a person to the discretion of prosecutors subject only to the supervision of the Attorney General. Article V, section 13, of the Constitution states the investigation and prosecution of crimes is an executive branch function, supervised by the state Attorney General and executed by the state's district attorneys. Thus, " the charging function of a criminal case is within the sole province of the executive branch, which includes the Attorney General and the various district attorneys [citation]... " (*People v. Mikhail* (1993) 13 Cal.App.4th 846, 854.)

"Subject to supervision by the Attorney General (Cal. Const., art. V, § 13;Gov.Code, § 12550) ... the district attorney of each county independently exercises all the executive branch's discretionary powers in the initiation and conduct of criminal proceedings. [Citations.] The district attorney's discretionary functions extend from the investigation of and gathering of evidence relating to criminal offenses [citation], through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding 'whether to seek, oppose, accept, or challenge judicial actions and rulings.' " (*People v. Eubanks* (1996) 14 Cal.4th 580, 589.) Therefore the district attorney has complete discretion as to whether or not to file criminal charges in a case. (*People v. Parmar* (2001) 86 Cal.App.4th 781, 807.) In this case, where the district attorney asked that the two charges be dismissed, the district attorney cannot then appeal the "decision" of the trial court to comply with their request.

Further, this appeal is moot because the district attorney and appellant entered into a plea bargain that fully resolved all charges against him. This plea involved appellant pleading guilty to the only two charges he was facing, as the other two charges had been dismissed at the request of the district attorney. The court of appeal stated "but as the district attorney points out, the prosecution is entitled to appeal the dismissal of part of an action pursuant to section 995 while the remaining portion proceeds to

resolution by way of trial or a guilty plea. (*People v. Alice* (2007) 41 Cal.4th 668, 683-684 [count dismissed by section 995 motion may be appealed although defendant pled guilty to remaining counts]; *People v. Franc* (1990) 218 Cal.App.3d 588, 591-592 [trial on charges without the special circumstance allegation set aside pursuant to section 995 does not render People's appeal moot].) (Court of Appeal opinion at pp. 6-7.) However in both of the cited cases the prosecution was appealing from a decision of the trial court to dismiss either a charge or allegation. Here the trial court did not dismiss the two charges, but instead reduced them to misdemeanors. It was only at the request of the district attorney that the two charges were dismissed. The district attorney could have appealed the decision of the trial court to reduce the two felony charges to misdemeanors, or asked the court of appeal for a writ of mandate to restore the two misdemeanor charges to felonies. Had it done so then appellant would have to address those charges, as well as the other charges, in resolving his case. But in a case such as this where the district attorney has dismissed two charges it would be patently unfair to appellant to fully resolve his case only to later face additional charges.

A " 'case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief. [Citation.]' [Citation.]" (*People v. Rish* (2008) 163 Cal.App.4th 1370, 1380-1382.)

That is precisely the circumstances presented here. Appellant therefore respectfully requests this court grant review on this issue.

II.

PETITIONER DID NOT COMMIT "INDEPENDENT FELONIOUS CONDUCT" SUCH THAT WOULD ELEVATE HIS MISDEMEANOR GUN POSSESSION CHARGES TO FELONIES.

Both the offense in count one, having a concealed firearm in a vehicle (§ 12025, subd. (a)(1), and the offense in count two, carrying a loaded firearm in public (§ 12031, subd. (a)(1) are nominally misdemeanor offenses. Both offenses are elevated to felonies when the defendant is an active participant in a criminal street gang. (§ 12025, subd. (b)(3), § 12031, subd. (a)(2)(C).) This requires proof that " *all* of section 186.22(a)'s elements must be satisfied, including that defendant willfully promoted, furthered, or assisted felonious conduct by his fellow gang members *before* section 12031(a)(2)(C) applies to elevate defendant's section 12031, subdivision (a)(1) misdemeanor offense to a felony. Stated conversely, section 12031(a)(2)(C) applies only *after* section 186.22(a) has been *completely* satisfied by conduct *distinct from* the otherwise misdemeanor conduct of carrying a loaded weapon in violation of section 12031, subdivision (a)(1)." (*People v. Lamas* (2007) 42 Cal.4th 516, 524, italics original.) The court concluded, "defendant's misdemeanor conduct—being a gang member who carries a loaded firearm in public—cannot satisfy

section 186.22(a)'s third element, felonious conduct, and then be used to elevate the otherwise misdemeanor offense to a felony." (*Ibid.*)

Left unanswered was the following: "[w]e do not address the issue raised in briefing regarding whether the felonious conduct requirement in section 186.22(a) can be satisfied with conduct that occurs contemporaneously with otherwise misdemeanor gun offenses because the record does not contain evidence that defendant [Lamas] engaged in *any* felonious conduct, either concurrently with, or prior to, his misdemeanor gun offenses." (*People v. Lamas, supra,* 42 Cal.4th at p. 526, fn. 9.)

This was the issue addressed in *Jorge P.,* whether a felony offense, based on the same conduct as the misdemeanor offense, can support the section 186.22, subdivision (a) violation and by extension elevate the misdemeanor to a felony. (*In re Jorge P., supra,* 197 Cal.App.4th 628, 635.) The court in *Jorge P.* held: "We conclude the prosecution must prove felonious conduct distinct from the conduct that underlies the 12031(a)(1) offense, notwithstanding the possibility that a separate felony offense may be charged based on the same underlying conduct. Misdemeanor conduct that would be impermissibly used to support the gang allegation in count 1 under *Lamas* cannot be transformed into viable felonious conduct simply by charging a different offense." (*In re Jorge P., supra,* 197 Cal.App.4th 628, 637.)

The court of appeal in the instant case held "Thus, the issue became whether the conduct underlying a felony offense of minor in possession of a firearm (based on possession of the same firearm) could support a finding the minor violated section 186.22(a), thus elevating the misdemeanor offense of possession of a loaded firearm in public to a felony. [Citation.]

To resolve the issue, the court in *Jorge P.* noted *Lamas* "alluded to" a distinction between conduct and offenses. (*In re Jorge P.*, *supra*, 197 Cal.App.4th at p. 636.)[3] The *Jorge P.* court then concluded "conduct" and "offense" are not synonymous. (*Ibid.*) As a result, the court found the minor's arguably felonious conduct of possessing a firearm in violation of section 12101, subdivision (a)(1), was not *distinct from* his misdemeanor conduct of possessing the same weapon in violation of section 12031, subdivision (a)(1), and could not therefore be used as the felonious criminal conduct necessary to prove a violation of section 186.22(a), a prerequisite to elevating the misdemeanor violation of section 12031, subdivision (a)(1) to a felony. (*In re Jorge P.*, *supra*, 197 Cal.App.4th at p. 638.)

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[3] The following is the allusion referred to by *In re Jorge P.* court: "The People acknowledge that a prior *misdemeanor conviction* under section 186.22(a) cannot satisfy the elements of section 186.22 or the elements of section 12031(a)(2)(C). They concede that 'misdemeanor convictions do not constitute "felonious criminal conduct[,]" [s]o a person with a prior misdemeanor conviction for section 186.22, subdivision (a) is not in violation of section 12031, subdivision (a)(2)(C), unless the current charged firearm possession itself constitutes "felonious criminal conduct" . . . .' It logically follows that *misdemeanor conduct* similarly cannot constitute 'felonious criminal conduct' within the meaning of section 186.22." (*People v. Lamas*, *supra*, 42 Cal.4th at p. 524.)

We respectfully disagree. If a defendant engages in felony conduct that would otherwise subject him to prosecution for a violation of section 186.22(a), we see nothing in *People v. Lamas*, *supra*, 42 Cal.4th 516, to prevent prosecution simply because that same felonious criminal conduct could, under a different penal statute, be charged as a misdemeanor. We do not think the allusion in *Lamas* to a distinction between a criminal offense and felonious criminal conduct compels the result in *Jorge P.*" (Court of Appeal opinion at pp. 10-11.)

The court of appeal went on to state "The fact that possession of a loaded or concealed firearm in public would ordinarily be considered a misdemeanor should not be determinative of whether an inarguable felony possession of a firearm may serve as the felonious criminal conduct necessary to support a charge of violating section 186.22(a). This is especially apt given the Legislature expressly provided that a "pattern of criminal gang activity," a prerequisite for finding a group is a criminal street gang (§ 186.22(a)), may be shown by evidence members of the gang violated section 12021. (§ 186.22, subd. (e)(31).) It would seem then that a violation of section 12021 may serve as the felonious criminal conduct necessary to support a charge of violating section 186.22(a). It would thus defy reason to declare a group is a criminal street gang if its members violate section 12021, but hold a violation of section 12021 by a gang member does not qualify as felonious criminal conduct for purposes of

finding the gang member is an active participant of the gang. Neither would reason dictate a violation of section 12021 cannot serve as the felonious criminal conduct necessary to find a violation of section 186.22(a) merely because under some other statute the possession of the firearm may be punished as a misdemeanor, rather than a felony."[4] (Court of Appeal opinion at p. 13.)

The court in *Jorge P.* based its decision on the distinction between felony conduct, and a felony offense. The fact that the same conduct may be parsed into multiple criminal offenses under section 954 does not mean that the legislature intended the same conduct to be used to elevate an otherwise misdemeanor offense into a felony.

Section 186.22, subdivision (a) states, in relevant part: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal *conduct* by members of that gang...(italics added.) *Jorge P.* stated: "If the Legislature desired to specify felonious criminal *offenses,* or expand the scope of the conduct required, it had ample opportunity and ability to do so. (Compare § 186.22, subd. (b)(1) ['any person who is

[4] This conclusion appears to be consistent with the Legislature's intent, as sections 12025 and 12031 each contain a provision elevating a violation to a felony where the defendant has previously been convicted of a felony. (§§ 12025, subd. (b)(1), 12031, subd. (a)(2)(D).)

convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in *any criminal conduct* by gang members ...' (italics added)] with § 1192.7, subd. (c)(28) [making 'any felony *offense,* which would constitute a felony *violation* of Section 186.22' a serious felony (italics added)]; *People v. Briceno* (2004) 34 Cal.4th 451, 458–459.) Thus, 'conduct' and 'offense' are not synonymous for purposes of a section 186.22(a) analysis." (*In re Jorge P., supra,* 197 Cal.App.4th 628, 636.) The court concluded "We conclude the prosecution must prove felonious conduct distinct from the conduct that underlies the 12031(a)(1) offense, notwithstanding the possibility that a separate felony offense may be charged based on the same underlying conduct." (*Id.* at p. 637.)

The rationale behind *Jorge P.* is the better reasoned. The legislature in specifically referring to criminal *conduct* in section 186.22 as opposed to criminal *offenses*, is requiring distinct criminal conduct on the part of an individual to elevate what would otherwise be a misdemeanor to a felony. The legislature is well aware that one act of criminal conduct may be charged as different offenses under section 954, and by specifying conduct in section 186.22 is impliedly rejecting the use of a single criminal act to bootstrap a misdemeanor into a felony. Petitioner therefore respectfully requests this court grant review on this issue.

CONCLUSION

For the reasons set forth above, this court should exercise its discretion and grant review.

Dated: October 10, 2012

Respectfully submitted,

Stephen M. Hinkle
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

WITH CALIFORNIA RULES OF COURT, RULE 8.360.

Case Name: People v. DANIEL INFANTE

Court of Appeal No. G046177

I, Stephen M. Hinkle, certify under penalty of perjury under the laws of the State of California that the attached PETITION FOR REVIEW contains 3076 words as calculated by Microsoft Word 2003.

Dated: October 10, 2012

Stephen M. Hinkle

Stephen M. Hinkle
Attorney at Law
11260 Donner Pass Rd., C1 PMB 138
Truckee, CA 96161

COURT OF APPEAL CASE NO. G046177
SUPERIOR COURT CASE NO. 10NF1137

People v. DANIEL INFANTE

DECLARATION OF SERVICE

I, the undersigned, say: I am over 18 years of age, employed in the County of Nevada, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is 11260 Donner Pass Rd., C1 PMB 138, Truckee, CA. I served the following document:

PETITION FOR REVIEW

of which a true copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee names hereafter, addressed to each addressee respectively as follows:

Attorney General Served electronically at ADIEService@doj.ca.gov and a hard copy at: P.O. Box 85266 San Diego, CA 92186-5266	Appellate Defenders, Inc. Attn: Anita Jog Served electronically at eservice-criminal@adi-sandiego.com
Office of the District Attorney Attn: Brian Fitzpatrick P.O. Box 808 Santa Ana, CA 92702	Fourth District Court of Appeal Division Three 601 W. Santa Ana Blvd. Santa Ana, CA 92701
Clerk of the Court Superior Court of Orange County 1275 N. Berkeley Ave. Fullerton, CA 92832-1206 Attn: Hon. Richard W. Stanford, Judge	Daniel Infante #AL-5636 P.O. Box 3130 Delano, CA 93216-6000

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Truckee, California, on October 17, 2012. I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 17, 2012, at Truckee, California.

_____
Stephen Hinkle

EXHIBIT A

Filed 10/2/12

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Appellant, v. DANIEL INFANTE, Defendant and Respondent.	G046177 (Super. Ct. No. 10NF1137) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard W. Standford, Jr., Judge. Reversed.

Tony Rackauckas, District Attorney and Brian F. Fitzpatrick, Deputy District Attorney for Plaintiff and Appellant.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Respondent.

* * *

Defendant Daniel Infante was charged in an information with possession of a concealed firearm in a motor vehicle by an active gang participant (Pen. Code,[1] former § 12025, subds. (a)(1), (b)(3), repealed by Stats. 2010, ch. 711, § 4), possession of a loaded firearm in public by an active gang member (former § 12031, subds. (a)(1), (2)(C), repealed Stats. 2010, ch. 711, § 4), possession of a firearm by a felon (former § 12021, subd., (a)(1), repealed by Stats. 2010, ch. 711, § 4),[2] and active participation in a criminal street gang (§ 186.22, subd. (a); hereafter 186.22(a)).

This appeal from the partial granting of defendant's section 995 motion presents a recurring issue involving the interplay between sections 12025, 12031, and section 186.22(a). Violations of sections 12025 and 12031 are normally deemed misdemeanors. (§§ 12025, subd. (b)(7), 12031, subd. (a)(2)(G).) However, each section contains a provision elevating the offense to a felony when the defendant is proved to be "an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act . . . ." (§§ 12025, subd. (b)(3), 12031, subd. (a)(2)(C).)

In *People v. Robles* (2000) 23 Cal.4th 1106, our Supreme Court held proof the defendant violated section 186.22(a) is required to elevate a violation of section 12031, subdivision (a)(1) from a misdemeanor to a felony. In *People v. Lamas* (2007) 42 Cal.4th 516, the court held a violation of section 12031, subdivision (a)(1) cannot serve as the felonious criminal conduct necessary to prove a violation of section 186.22(a).

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[1] All statutory references are to the Penal Code unless otherwise stated.

[2] Former Sections 12021, 12025, and 12031 were carried over without substantive change in sections, 29800, 25400, and 25850 respectively. (Nonsubstantive Reorganization of Deadly Weapon Statutes (June 2009) 38 Cal. Law Revision Com. Rep. (2008) pp. 514 [§ 12025], 538-539 [§12031], 758 [§ 12021].) All references to sections 12021, 12025, and 12031 are to their former designations.

(*Id.* at p. 519.) The condemned practice was nothing short of bootstrapping:[3] The possession of a firearm, a misdemeanor *until* a violation of section 186.22(a) has been proved (*People v. Robles*, *supra*, 23 Cal.4th at p. 1115), was used as the felonious criminal conduct necessary to establish a violation of section 186.22(a). (*People v. Lamas*, *supra*, 42 Cal.4th at p. 521.) Then, once a violation of section 186.22(a) was established, the misdemeanor firearm charge was elevated to a felony. It could also be said in such situations, the prosecution placed the cart before the horse: the possession of a loaded firearm becomes a felony only *after* the defendant is proven to have violated section 186.22(a).

In *In re Jorge P.* (2011) 197 Cal.App.4th 628, the appellate court held the minor's otherwise misdemeanor possession of a loaded firearm in a motor vehicle could not be used as the felonious conduct necessary to prove a violation of section 186.22(a). (*Id.* at p. 630.) But the court went one step further and interpreted language in *Lamas* — that the felonious criminal conduct required by section 186.22(a) must be "*distinct from*" the otherwise misdemeanor conduct of possessing a loaded or concealed firearm (*People v. Lamas*, *supra*, 42 Cal.4th at pp. 519-520) — to mean that even if possession of the firearm is punishable as a felony under some other statute, that felonious criminal conduct is not distinct from the conduct involved in the otherwise misdemeanor possession of the same firearm under sections 12025 and 12031, and under that circumstance the section 12025 and 12031 offenses are not be elevated to felonies. (*In re Jorge P.*, *supra*, 197 Cal.App.4th at pp. 632, 638.)

We respectfully disagree with our colleagues in the Fifth Appellate District. It appears to us the rationale implicit in both *Robles* and *Lamas* was to preclude the prosecution from bootstrapping what would otherwise be misdemeanor conduct into the

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[3] "To pull oneself up by one's own bootstraps" generally refers to an impossible act, such as pulling one's self out of a swamp by one's hair. (See The Adventures of Baron Munchausen (Columbia Pictures 1989).)

"felonious criminal conduct" required to find a violation of section 186.22(a), and then having purportedly established a violation of that section, using that violation to elevate misdemeanor firearm possession into a felony in a nunc pro tunc-like fashion.

Bootstrapping is not present when, as in the present case, possession of the firearm is *independently* punishable as a felony under another penal statute. In such a case, a violation of section 186.22(a) rests on the felonious criminal conduct of the defendant, not conduct punishable only as a misdemeanor *until* a violation of section 186.22(a) has been established. When possession of the firearm is independently punishable as a felony under some other statutory provision, such as it is in this case under section 12021, subdivision (a)(1) (convicted felon in possession of a firearm), that possession may be used as the felonious criminal conduct necessary to establish a violation of section 186.22(a). Having established probable cause to believe defendant violated section 186.22(a), the otherwise misdemeanor offenses of carrying a concealed firearm in public (§ 12025, subd. (a)(1)) and possessing a loaded firearm in public (§ 12031, subd. (a)(1)) may be charged as felonies.

I

BACKGROUND AND FACTS

The felony complaint charged defendant with possession of a concealed firearm in a motor vehicle by an active gang participant (§ 12025, subds. (a)(1), (b)(3); count one), possession of a loaded firearm in public by an active gang participant (§ 12031, subds. (a)(1), (2)(C); count two), possession of a firearm by a felon (§ 12021, subd. (a)(1); count three), and active participation in a criminal street gang (§ 186.22(a); count four). All offenses were alleged to have occurred on April 1, 2010. The complaint further alleged defendant served two prior terms in state prison (§ 667.5, subd. (b)) and that the firearm charges were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)). The magistrate held defendant to answer on all charges at the

conclusion of the preliminary examination, but discharged defendant on the gang enhancement allegation.

The information realleged the substantive offenses and alleged defendant served three prior terms in prison. Defendant filed a section 995 motion to set aside all the charges with the exception of the charge of possession of a firearm by a convicted felon. (§ 995, subd. (a)(2)(B) [defendant committed without reasonable or probable cause].) The court denied defendant's motion. On September 9, 2011, defendant pled guilty to possession of a firearm by a felon (count three) and active participation in a criminal street gang (count four). Counts one (possession of a concealed firearm by an active gang participant) and two (possession of a loaded firearm in public by an active gang participant) were dismissed on the People's motion. Sentencing was continued to September 30, 2011. At his sentencing hearing, defendant's motion to withdraw his guilty pleas was granted and the dismissal of counts one and two was vacated.

Defendant then renewed his section 995 motion, alleging a change in the law brought about by the Fifth District Court of Appeal's decision in *In re Jorge P.*, *supra*, 197 Cal.App.4th 628. The court granted defendant's motion to set aside the charges of possession of a concealed firearm by an active gang participant (count one) and possession of a concealed firearm in a motor vehicle by an active gang participant (count two), and denied defendant's motion as to the charge of active participation in a criminal street gang. The People filed a timely notice of appeal. Defendant did not seek review of the lower court's ruling in connection with the gang charge.

On January 27, 2012, defendant entered into a plea bargain with the district attorney whereby he pled guilty to counts three and four, and admitted he served three prior terms in state prison, in exchange for a promise of a two-year prison commitment. His sentencing date was continued and he was ordered to return. As of the last minute order contained in the record on appeal, defendant had yet to be sentenced.

The parties do not dispute the facts and present the issue on appeal as a question of law. Defendant does not argue on appeal the evidence was insufficient to charge him with violating section 186.22(a). We therefore present the facts from the preliminary examination in a truncated fashion. On April 1, 2010, a La Habra police officer stopped a motor vehicle driven by defendant because defendant did not stop at a stop sign. The officer found a loaded revolver and a loaded semiautomatic nine-millimeter pistol in the center console. Defendant was previously convicted of a felony. A gang expert testified the Headhunters gang is a criminal street gang and defendant is an active participant in the gang.

II

DISCUSSION

A. *Mootness*

We first resolve an issue raised by defendant. He contends his guilty plea in a plea bargain entered into with the prosecution renders the prosecution's appeal moot. We note, however, the record on appeal does not reflect defendant has been sentenced by the superior court.

An appeal is moot "'"when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."' [Citations.]" (*Murphy v. Hunt* (1982) 455 U.S. 478, 481.) Stated another way, a "'case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief. [Citation.]' [Citation.]" (*People v. Rish* (2008) 163 Cal.App.4th 1370, 1380.) Defendant argues this appeal is moot because his guilty plea fully resolved this case. But as the district attorney points out, the prosecution is entitled to appeal the dismissal of part of an action pursuant to section 995 while the remaining portion proceeds to resolution by way of trial or a guilty plea. (*People v. Alice* (2007) 41 Cal.4th 668, 683-684 [count dismissed by section 995 motion may be appealed although defendant pled guilty to remaining counts]; *People v. Franc* (1990) 218 Cal.App.3d 588, 591-592 [trial on charges without

the special circumstance allegation set aside pursuant to section 995 does not render People's appeal moot].) Accordingly, we find the appeal is not moot.

B. *The Trial Court Erred in Granting Defendant's Motion.*

Section 995 authorizes the superior court to set aside an information when "the defendant had been committed without reasonable or probable cause. (§ 995, subd. (a)(2)(B).) A section 995 motion may also be used to set aside individual charges (*People v. Hudson* (1917) 35 Cal.App. 234, 237) or enhancements (*People v. Superior Court* (*Mendella*) (1983) 33 Cal.3d 754). In reviewing a ruling on a section 995 motion, "We conduct an independent review of the evidence . . . . [Citation.] We will not set aside an information 'if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.' [Citation.]" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 654.)

As stated above, violations of section 12025, subdivision (a)(1) and section 12031, subdivision (a)(1) are normally misdemeanors, but a violation of each section may be elevated to a felony if evidence shows the defendant to be "an active participant in a criminal street gang, as defined in subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act . . . ." (§§ 12025, subd. (b)(3), 12031, subd. (a)(2)(C).) Pertinent to the issue raised on appeal, defendant's section 995 motion urged the court to set aside counts one and two, contending the conduct underlying the normally misdemeanor firearm offenses (§§ 12025, subds. (a)(1), (b)(7), 12031, subds. (a)(1), (2)(G)), cannot serve as the "felonious criminal conduct" required to prove a violation of section 186.22(a),[4] which is itself a prerequisite to elevating the misdemeanor firearm

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[4] "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any *felonious criminal conduct* by members of that gang" (§ 186.22(a), italics added) commits the crime of active participation in a criminal street gang.

offenses to felonies. (*People v. Robles*, *supra*, 23 Cal.4th at p. 1115; §§ 12025, subd. (b)(3), 12031, subd. (a)(2)(C).) He further argued the felonious criminal conduct necessary to prove a violation of section 186.22(a) must be distinct from the otherwise misdemeanor conduct involved with the misdemeanor firearm offenses. According to *In re Jorge P.*, *supra*, 197 Cal.App.4th at page 637, although defendant's possession of the firearm was punishable as a felony under section 12031, subdivision (a)(1) due to his prior felony conviction, that conduct was not *distinct from* the otherwise misdemeanor conduct involved in possessing a loaded or concealed firearm in public.

In *People v. Robles*, *supra*, 23 Cal.4th 1106, the defendant was charged with possession of a loaded firearm in public as a felony under subdivision (a)(2)(C) of section 12031. As the court noted, "That subdivision elevates from a misdemeanor to a felony the offense of carrying a loaded firearm in public when committed by 'an active participant in a criminal street gang, *as defined in* subdivision (a) of Section 186.22, under the Street Terrorism Enforcement and Prevention Act.' [Citation.]" (*Id.* at p. 1109.) The *Robles* court stated its task was "to ascertain what the Legislature meant by [an active participant in a criminal street gang, as defined in section 186.22(a)]." (*Ibid.*)

The court construed the language in section 12031, subdivision (a)(2) "as referring to the substantive gang offense defined in section 186.22(a)." (*People v. Robles*, *supra*, 23 Cal.4th at p. 1115.) As a result, the court concluded possession of a loaded firearm in public is punished as a felony under section 12031, subdivision (a)(2)(C) "when a defendant satisfies the elements of the offense described in section 186.22(a). Those elements are [1] 'actively participat[ing] in any criminal street gang [2] with knowledge that its members engage in or have engaged in a pattern of criminal gang activity' and [3] 'willfully promot[ing], further[ing], or assist[ing] in any felonious criminal conduct by members of that gang.' [Citation.]" (*People v. Robles*, 23 Cal.4th at p. 1115; see CALCRIM No. 1400.) In other words, a violation of section 186.22(a) is a

prerequisite to elevating a violation of section 12031 from a misdemeanor to a felony under subdivision (a)(2)(C) of the latter section.

In *People v. Lamas*, *supra*, 42 Cal.4th 516, the court again confronted the interplay between section 186.22(a) and section 12031, subdivision (a)(2)(C). This time the issue was whether possession of a loaded firearm in public — again, normally a misdemeanor — could serve as the felonious criminal conduct necessary to fulfill the third element of a section 186.22(a) violation. (*Id.* at pp. 519-520.) In connection with the gang charge, the jury in *Lamas* had been instructed, in pertinent part: "'[f]elonious criminal conduct includes carrying a loaded firearm in a public place by a gang member . . . or . . . carrying a concealed firearm by a gang member.'" (*Id.* at pp. 521-522, italics and fn. omitted.) The problem with this instruction was evident. It used a misdemeanor offense as the felonious criminal conduct necessary to prove the defendant violated the gang statute, a clear example of bootstrapping.

The Supreme Court corrected the situation by holding "*all* of section 186.22(a)'s elements must be satisfied, including that defendant willfully promoted, furthered, or assisted felonious conduct by his fellow gang members *before* section 12031(a)(2)(C) applies to elevate defendant's section 12031, subdivision (a)(1) misdemeanor offense to a felony." (*People v. Lamas*, *supra*, 42 Cal.4th at p. 524.) The court then restated the rule: "[S]ection 12031(a)(2)(C) applies only *after* section 186.22(a) has been *completely* satisfied by conduct *distinct from* the otherwise misdemeanor conduct of carrying a loaded weapon in violation of section 12031, subdivision (a)(1)." (*Ibid.*) Thus, a defendant's misdemeanor possession of a firearm "cannot satisfy section 186.22(a)'s third element, felonious conduct, and then be used to elevate the otherwise misdemeanor offense to a felony." (*Ibid.*) The court held the same logic applies when the underlying firearm offense is possession of a concealed firearm in public by an active participant in a criminal street gang in violation of section 12025, subdivisions (a)(2), (b)(3). (*Id.* at pp. 524-525.)

The interplay between section 186.22(a) and the felony elevating provision in section 12031 again arose in *In re Jorge P.*, *supra*, 197 Cal.App.4th 628. The charges filed in *Jorge P.* presented a new twist on the issues considered in *Robles* and *Lamas*. The minor in *Jorge P.* was charged with possession of a loaded firearm in public as a felony, based on his active participation in a criminal street gang (§ 12031, subds. (a)(1), (a)(2)(C)), like the defendants in *Robles* and *Lamas*. Unlike both those cases, the minor was also charged with a separate offense — minor in possession of a firearm (§ 12101, subd. (a)(1)) — which the prosecution argued could serve as the felonious criminal conduct necessary to establish a violation of section 186.22(a), and thus permit charging of the violation of section 12031, subdivision (a)(1) as a felony under subdivision (a)(2)(C) of that section. (*In re Jorge P.*, *supra*, 197 Cal.App.4th at pp. 630, 632.) The juvenile court found both gun charges true. (*Id.* at p. 632.)

The *Jorge P.* court noted the crime of minor in possession of a firearm is punishable as a misdemeanor or a felony, and remanded that count to the juvenile court to determine whether it found the charge to be a felony or a misdemeanor. (*In re Jorge P.*, *supra*, 197 Cal.App.4th at p. 632.) Notwithstanding the decision to remand that count to the trial court, the appellate court proceeded to determine whether the evidence supported a felony charge of possession of a loaded firearm in public by an active gang participant, in the event the trial court on remand finds the charge of minor in possession of a firearm was a felony. Thus, the issue became whether the conduct underlying a felony offense of minor in possession of a firearm (based on possession of the same firearm) could support a finding the minor violated section 186.22(a), thus elevating the misdemeanor offense of possession of a loaded firearm in public to a felony. (*Id.* at pp. 631-632.)

To resolve the issue, the court in *Jorge P.* noted *Lamas* "alluded to" a distinction between conduct and offenses. (*In re Jorge P.*, *supra*, 197 Cal.App.4th at p.

636.)[5] The *Jorge P.* court then concluded "conduct" and "offense" are not synonymous. (*Ibid.*) As a result, the court found the minor's arguably felonious conduct of possessing a firearm in violation of section 12101, subdivision (a)(1), was not *distinct from* his misdemeanor conduct of possessing the same weapon in violation of section 12031, subdivision (a)(1), and could not therefore be used as the felonious criminal conduct necessary to prove a violation of section 186.22(a), a prerequisite to elevating the misdemeanor violation of section 12031, subdivision (a)(1) to a felony. (*In re Jorge P.*, *supra*, 197 Cal.App.4th at p. 638.)

We respectfully disagree. If a defendant engages in felony conduct that would otherwise subject him to prosecution for a violation of section 186.22(a), we see nothing in *People v. Lamas*, *supra*, 42 Cal.4th 516, to prevent prosecution simply because that same felonious criminal conduct could, under a different penal statute, be charged as a misdemeanor. We do not think the allusion in *Lamas* to a distinction between a criminal offense and felonious criminal conduct compels the result in *Jorge P.* Two things are important to keep in mind about the decision in *Lamas*. First, the decision sought to prevent the prosecution from bootstrapping a misdemeanor into a felony. In applying *Lamas*, we are bound not only by its holding but also by its rationale. (See *Silveira v. Lockyer* (9th Cir. 2003) 328 F.3d 567, 569 (Kozinski, J. [dissenting from denial of rehearing en banc]).) The *Lamas* court was not presented with the present situation, where the defendant's possession of the firearm involved felonious criminal

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[5] The following is the allusion referred to by *In re Jorge P.* court: "The People acknowledge that a prior *misdemeanor conviction* under section 186.22(a) cannot satisfy the elements of section 186.22 or the elements of section 12031(a)(2)(C). They concede that 'misdemeanor convictions do not constitute "felonious criminal conduct[,]" [s]o a person with a prior misdemeanor conviction for section 186.22, subdivision (a) is not in violation of section 12031, subdivision (a)(2)(C), unless the current charged firearm possession itself constitutes "felonious criminal conduct" . . . .' It logically follows that *misdemeanor conduct* similarly cannot constitute 'felonious criminal conduct' within the meaning of section 186.22." (*People v. Lamas*, *supra*, 42 Cal.4th at p. 524.)

conduct *independent* of any violation of section 186.22(a). A misdemeanor firearm charge is not pulled up by its own bootstraps (or ponytail) into a felony when a violation of section 186.22(a) — a prerequisite to elevation of the offense to a felony — is supported by avowedly felonious criminal conduct (possession of a firearm by a convicted felon). This is true even where possession of the firearm could have been charged as a misdemeanor under a different statute.

Second, the *Lamas* court stated the prosecution's obligation to prove felonious criminal conduct distinct from a defendant's otherwise misdemeanor conduct of carrying a loaded or concealed weapon in public "*applies to the substantive charge that defendant is an active participant of a criminal street gang* (§ 186.22(a)) and to the gun offenses that elevate to felonies only upon proof that defendant satisfied *Robles*'s requirements under section 186.22(a)." (*People v. Lamas*, *supra*, 42 Cal.4th at p. 520, italics added.) Although *In re Jorge P.* did not involve a charge of 186.22(a) (*In re Jorge P. supra*, 179 Cal.App.4th at p. 630), the reasoning and conclusion reached therein would appear to prohibit a defendant from being convicted of violating section 186.22(a) where the underlying felonious criminal conduct involved a convicted felon's possession of a firearm (§ 12021, subds. (a)(1), (2)) if the firearm was possessed in public and was loaded or concealed on the defendant's person, even if the defendant was not charged with violating section 12025 or 12031. This would be true because (1) under *Jorge P.*, such felonious conduct would not be considered *distinct from* the otherwise misdemeanor conduct of possessing a loaded or concealed firearm in public (*In re Jorge P.*, *supra*, 197 Cal.App.4th at p. 638), and (2) under *Lamas*, the rule that the felonious criminal conduct necessary to find a violation under section 186.22(a) must be distinct from a defendant's otherwise misdemeanor conduct of possessing a loaded firearm in public applies to the *substantive gang charge*, as well as to misdemeanor firearm offenses elevated to felony status upon proof the defendant violated section 186.22(a) (*People v. Lamas*, *supra*, 42

Cal.4th at p. 524). We do not think the Legislature or our Supreme Court intended such a result.

The fact that possession of a loaded or concealed firearm in public would ordinarily be considered a misdemeanor should not be determinative of whether an inarguable felony possession of a firearm may serve as the felonious criminal conduct necessary to support a charge of violating section 186.22(a). This is especially apt given the Legislature expressly provided that a "pattern of criminal gang activity," a prerequisite for finding a group is a criminal street gang (§ 186.22(a)), may be shown by evidence members of the gang violated section 12021. (§ 186.22, subd. (e)(31).) It would seem then that a violation of section 12021 may serve as the felonious criminal conduct necessary to support a charge of violating section 186.22(a). It would thus defy reason to declare a group is a criminal street gang if its members violate section 12021, but hold a violation of section 12021 by a gang member does not qualify as felonious criminal conduct for purposes of finding the gang member is an active participant of the gang. Neither would reason dictate a violation of section 12021 cannot serve as the felonious criminal conduct necessary to find a violation of section 186.22(a) merely because under some other statute the possession of the firearm may be punished as a misdemeanor, rather than a felony.[6]

Accordingly, we conclude the *Lamas* court, in holding the felonious conduct necessary to demonstrate a violation of section 186.22(a) must be distinct from the otherwise misdemeanor conduct of possessing a loaded (or concealed) firearm, meant nothing more than the otherwise misdemeanor violation of section 12025 or section 12031 may not serve as the felonious criminal conduct necessary to prove a violation of

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[6] This conclusion appears to be consistent with the Legislature's intent, as sections 12025 and 12031 each contain a provision elevating a violation to a felony where the defendant has previously been convicted of a felony. (§§ 12025, subd. (b)(1), 12031, subd. (a)(2)(D).)

section 186.22(a). In other words, a misdemeanor cannot be considered felonious criminal conduct. The felonious criminal conduct required by section 186.22(a) must be conduct that does not depend upon the existence of a violation of that section to itself be elevated from misdemeanor to felony status. Because the prosecution in the present case introduced evidence of defendant's felonious criminal conduct (felon in possession of a firearm), there was sufficient evidence of a violation of section 186.22(a) and consequently, sufficient evidence to support felony charges of possessing a concealable firearm in a motor vehicle in public (count one) and possessing a loaded firearm in public (count two). The trial court therefore erred in granting defendant's section 995 motion as to those counts.

III

DISPOSITION

The superior court is ordered to vacate its November 4, 2011 order setting aside counts one and two pursuant to Penal Code section 995, and directed to enter a new order denying the motion.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.