IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Ct.) No. S206084
Plaintiff and Respondent,	) Court of Appeal) No. G046177
v.	)
DANIEL INFANTE,	) Superior Court) No. 10NF1137
Defendant and Appellant.	)

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Richard W. Stanford, Judge

APPELLANT'S OPENING BRIEF

Stephen M. Hinkle, Attorney at Law
SBN 124407
11260 Donner Pass Road, C-1 PMB 138
Truckee, CA 96161
(530) 553- 4425
Attorney for Appellant

By appointment of the California
Supreme Court

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Ct.
	) No. S206084
	)
Plaintiff and Respondent,	) Court of Appeal
	) No. G046177
v.	)
	) Superior Court
DANIEL INFANTE,	) No. 10NF1137
	)
Defendant and Appellant.	)
	)

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Richard W. Stanford, Judge

APPELLANT'S OPENING BRIEF

Stephen M. Hinkle, Attorney at Law
SBN 124407
11260 Donner Pass Road, C-1 PMB 138
Truckee, CA 96161
(530) 553- 4425
Attorney for Appellant

By appointment of the California
Supreme Court

Table of Authorities i

ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

ARGUMENT 3

I. THE EVIDENCE DOES NOT SHOW THAT APPELLANT COMMITTED DISTINCT INDEPENDENT FELONIOUS CRIMINAL CONDUCT SEPARATE FROM HIS POSSESSION OF A GUN. 3

A. Introduction. 3

B. The Standard of Review. 5

C. The People Must Show Felonious Conduct Distinct From Appellant's Otherwise Misdemeanor Possession of a Gun. 5

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 21

DECLARATION OF SERVICE 22

Table of Authorities

Cases

In re Hayes (1969) 70 Cal.2d 604 17

In re Jorge P. (2011) 197 Cal.App.4th 628 ..... 8, 12, 13

Neal v. State of California (1960) 55 Cal.2d 11 18

People v. Briceno (2004) 34 Cal.4th 451 11

People v. Correa (2012) 54 Cal.4th 331 18

People v. Cromer (2001) 24 Cal.4th 889 5

People v. Deloza (1998) 18 Cal.4th 585 15

People v. Haendiges (1983) 142 Cal.App.3d Supp. 9 15

People v. Harrison (1969) 1 Cal.App.3d 115 ..... 17, 18

People v. Jones (2012) 54 Cal.4th 350 ..... 15, 16, 18, 19

People v. Lamas (2007) 42 Cal.4th 516 ..... 4, 6, 7, 8, 10, 11, 13, 19, 20

People v. Robles (2000) 23 Cal.4th 1106 ..... 5, 6, 16

Statutes

Penal Code section 186.22 ..... 4, 11, 12, 16

Penal Code section 186.22, subdivision (a) 1, 2, 4, 6, 9, 14, 16, 19

Penal Code section 186.22, subdivision (b)(1) 11

Penal Code section 654 ..... 16, 17, 18

Penal Code section 654, subdivision (a) 15

Penal Code section 667.5, subdivision (b) 2

Penal Code section 954 3

Penal Code section 995 2

Penal Code section 1192.7, subdivision (c)(28) 11, 16

Penal Code section 12021, subdivsion (2) 13

Penal Code section 12021, subdivision (a)(1) 2, 3, 4, 9, 13, 14, 19

Penal Code section 12025 13

Penal Code section 12025, subdivision (a)(1) 5, 14

Penal Code section 12025, subdivision (a)(1)(b)(3) 2, 3

Penal Code section 12025, subdivision (b)(3) 4, 5, 14, 16, 19

Penal Code section 12025, subdivision (b)(7) 4

Penal Code section 12031 13

Penal Code section 12031, subdivision (a)(1) 5, 7, 8, 10, 12, 14, 19, 20

Penal Code section 12031, subdivision (a)(1)(a)(2)(C)) 2, 3

Penal Code section 12031, subdivision (a)(2) 6

Penal Code section 12031, subdivision (a)(2)(C) . 4, 5, 6, 7, 9, 14, 15, 16, 19

Penal Code section 12031, subdivision (a)(2)(G) 4

Other Authorities

CALCRIM No. 1400 6

California Rules of Court, rule 8.516 (a)(1) 1

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	) Supreme Ct.) No. S206084)
Plaintiff and Respondent,	) Court of Appeal) No. G046177)
v.	) Superior Court
DANIEL INFANTE,	) No. 10NF1137)
Defendant and Appellant.	))

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY

Honorable Richard W. Stanford, Judge

APPELLANT'S OPENING BRIEF

ISSUE PRESENTED

(California Rules of Court, rule 8.516 (a)(1)

Did the Court of Appeal correctly determine that defendant committed independent felonious conduct that elevated his otherwise misdemeanor firearm possession to a felony and supported the charge of being an active participant in a criminal street gang in violation of Penal Code[1] section 186.22, subdivision (a)?

STATEMENT OF THE CASE

An information filed on June 3, 2010, charged appellant Daniel

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

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

On October 25, 2011, appellant filed a motion to dismiss counts one, two, and four, pursuant to section 995. (1CT p. 219.) On November 4, 2011, the court granted the motion as to counts one and two, and dismissed counts one and two[3]. (1CT pp. 252-254.)

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 appellant entered into a plea agreement where appellant 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.)

On October 2, 2012, the Court of Appeal issued a published opinion

---

[2] After this case was filed, sections 12021, 12031, and 12025 were renumbered without substantive changes as sections 29800, 25850, and 25400, respectively. As the record refers only to the prior sections, appellant will continue to refer to sections 12021, 12031, and 12025.

[3] The court originally reduced both counts to misdemeanors. (1RT p. 11.) At the later request of the prosecution the court agreed to dismiss both counts. (1RT pp. 14-15.)

reversing the trial court. On January 16, 2013, this court granted review.

STATEMENT OF FACTS[4]

On April 1, 2010, appellant was driving a car with a fellow gang member and was stopped by the police. (1CT pp. 9-12.) A search of the car revealed two loaded firearms in a hidden compartment. (1CT pp. 20-21.) Appellant was a convicted felon and, it was argued, an active participant in a criminal street gang. (1CT pp. 61-65, 152-153.)

ARGUMENT

I.

THE EVIDENCE DOES NOT SHOW THAT APPELLANT COMMITTED DISTINCT INDEPENDENT FELONIOUS CRIMINAL CONDUCT SEPARATE FROM HIS POSSESSION OF A GUN.

A. Introduction.

Appellant committed one physical act, that of possession of a firearm. Under section 954 that one act may be charged, depending on the circumstances, as multiple crimes. That was done so here with appellant being charged in count one with having a concealed firearm in a vehicle as an active participant in a criminal street gang (§ 12025, subd. (a)(1)(b)(3)); in count two with carrying a loaded firearm in public as an active participant in a criminal street gang (§ 12031, subd. (a)(1)(a)(2)(C)); and in count three with possession of a firearm by a felon (§ 12021, subd, (a)(1).)

[4] Taken from the preliminary hearing.

(1CT pp. 173-175.)

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 this case the Court of Appeal held that the felony offense of felon in possession of a gun (§ 12021, subd., (a)(1)) was sufficient to establish the substantive gang charge as well as elevate the other nominally misdemeanor offenses into felony offenses. This court has held, however, in *People v. Lamas* (2007) 42 Cal.4th 516, that what is required is felonious conduct that is *distinct* from the otherwise misdemeanor possession of the firearm. In defining the issue in this case, this court clarified that the question was whether "defendant committed *independent* felonious conduct that elevated his otherwise misdemeanor firearm possession to a felony and supported the charge of being an active participant in a criminal street gang in violation of section 186.22, subdivision (a)." (emphasis added). Appellant's position is that since all three of these offenses occurred during a single physical act, appellant did not commit *independent* felonious conduct that would allow his

misdemeanor firearm possessions to be elevated to felonies by the same felony that was used to establish the substantive gang offense.

B. The Standard of Review.

The issue presents a pure question of law, and is reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894.)

C. The People Must Show Felonious Conduct Distinct From Appellant's Otherwise Misdemeanor Possession of a Gun.

As noted above, 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).)

In *People v. Robles* (2000) 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 this 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.*)

This 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, this 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, subdivision (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, this court again confronted the interplay between section 186.22, subdivision (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, subdivision (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.

This court corrected the situation by holding 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, supra,* 42 Cal.4th 516, 524, italics original.) This 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 issue was 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.* (2011) 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, italics added.)

The Court of Appeal in the present case disagreed with the holding in *Jorge P.,* stating: "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 "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)." (Court of Appeal opinion at pp. 3-4.)

The flaw in this reasoning is that the identical conduct is being used by the Court of Appeal to elevate the misdemeanor gun charge into a felony on the basis of that conduct being independently punishable as a felony. This court stated "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, supra,* 42 Cal.4th 516, 524, italics original.) The charge to counsel in this case was defined as whether "defendant committed *independent* felonious conduct that elevated his otherwise misdemeanor firearm possession to a felony and supported the charge of being an active participant in a criminal street gang in violation of section 186.22(a)." It would therefore appear that this court is equating the term "distinct" criminal conduct with "independent" criminal conduct, an interpretation that is consistent with case law.

The conduct or the physical act in this case - that of having a loaded weapon or having a concealed weapon - is the identical conduct or physical act to possession of a gun by a felon. The only difference between what would be a misdemeanor charge and what would be a felony charge is appellant's status as a felon. This is therefore not felony conduct *distinct* or *independent* from the otherwise misdemeanor conduct, but is the *identical* conduct.

The court in *Jorge P.* based its decision on the distinction between felony conduct, and a felony offense. 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 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.)

This court in *Lamas* alluded to the distinction between conduct and offenses as well. It noted, " 'misdemeanor convictions do not constitute "felonious criminal conduct[,]" ' " and that "[i]t 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.)

In this case the single physical act required of all three firearm offenses was the possession or carrying of the gun. Appellant's behavior, actions and omissions constituted a single course of conduct from which all

three offenses arose. As the court in *Jorge P.* stated: "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 rationale behind *Jorge P.* is well reasoned, and consistent with this court's holding in *Lamas.* The legislature in specifically referring to criminal *conduct* in section 186.22 as opposed to criminal *offenses*, is requiring distinct or independent 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 physical act to bootstrap a misdemeanor into a felony.

The Court of Appeal in this case noted another issue with the holding in *Jorge P.* It stated "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." (Court of Appeal opinion at pp. 12-

13.)

The flaw in this reasoning is that *nothing* prevents a defendant from being convicted of violating section 186.22, subdivision (a), where the underlying felonious criminal conduct involved a convicted felon's possession of a firearm. (§ 12021, subds. (a)(1).) The error would come about if the prosecution attempted to bring additional charges of having a concealed firearm in a vehicle (§ 12025, subd. (a)(1), and carrying a loaded firearm in public (§ 12031, subd. (a)(1), nominally misdemeanor offenses, and then attempting to elevate both offenses to felonies (§ 12025, subd. (b)(3), § 12031, subd. (a)(2)(C)) based on the identical physical act charged as a felon in possession of a firearm. (§ 12021, subd. (a)(1).) Based on the reasoning advanced here, those additional charges could be brought, but only as misdemeanors. The Court of Appeal is correct in stating that the felony possession offense is not conduct distinct from the misdemeanor possession offenses, but the distinct conduct is not at issue in using the felony possession offense to establish the substantive gang offense. Distinct or independent conduct is only required if the prosecution has used the felony possession offense to establish the substantive gang offense and *also* seeks to use the same felony possession offense to elevate the misdemeanor possession offenses to felonies.

While the specific issue before this court has only been addressed in published opinions in *Jorge P.* and the instant case, there is a voluminous

history of decisions addressing the interplay between single physical acts of criminal conduct and multiple criminal offenses, and when additional punishment can be imposed for multiple criminal offenses, and that is with regard to section 654. Section 654, subdivision (a) states, in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision...." (§ 654, subd. (a).) This provision prohibits multiple punishments for: (1) a single act; (2) a single omission; or (3) an indivisible course of conduct. (*People v. Deloza* (1998) 18 Cal.4th 585, 591.) When a defendant is convicted of two offenses falling within the ambit of section 654, the execution of one of the sentences must be stayed. (*People v. Deloza, supra*, 18 Cal.4th 585, at p. 592.)

While appellant is not facing an additional sentence for elevating the two misdemeanor offenses to felonies (*People v. Jones* (2012) 54 Cal.4th 350, 352), appellant would certainly experience an additional adverse consequence from the elevation of the two misdemeanor offenses to felonies. A conviction for a misdemeanor makes that crime, by definition, less serious than those convicted of a felony. (See, e.g., *People v.. Haendiges* (1983) 142 Cal.App.3d Supp. 9, 24.) It follows that a conviction for a felony is more serious than a conviction for a misdemeanor. Further, a violation of section 12031, subdivisions (a)(2)(C) includes a substantive

violation of section 186.22, subdivision (a). (*People v. Robles*, 23 Cal.4th at p. 1115.) Therefore, a conviction of violating section 12031, subdivision (a)(2)(C) (or a violation of 12025, subd. (b)(3)), constitutes a conviction of a "felony offense[ ] which would ... constitute a felony violation of Section 186.22" within the meaning of section 1192.7, subdivision (c)(28), i.e., a serious felony. The prospect of two additional strike convictions is a serious adverse consequence. The rationale behind the application of section 654 should therefore apply in this case.

This court's recent decision in *People v. Jones, supra,* 54 Cal.4th 350, interpreting section 654, contains an extensive analysis of just why a single physical act cannot be punished under multiple criminal statutes. In *Jones*, the defendant was driving with a loaded .38–caliber revolver. (*People v. Jones*, *supra,* 54 Cal.4th 350, 352.) The defendant was convicted of three crimes: (1) possession of a firearm by a felon; (2) carrying a readily accessible concealed and unregistered firearm; and (3) carrying an unregistered loaded firearm in public. (*Ibid.*) He was sentenced to concurrent three-year prison terms on each of the three counts, plus a one-year enhancement. (*Ibid.*)

The defendant appealed, arguing that execution of his sentences on two of the counts had to be stayed under section 654. (*People v. Jones*, *supra,* 54 Cal.4th 350, 352.) This court agreed, holding that a single physical act which violates multiple provisions of law may only be

punished once under section 654. (*People v. Jones*, *supra,* 54 Cal.4th 350, 352.) In so doing this court reversed *In re Hayes* (1969) 70 Cal.2d 604 and disapproved *People v. Harrison* (1969) 1 Cal.App.3d 115.

In *Hayes*, the defendant drove while intoxicated and without a valid license. (*In re Hayes*, *supra,* 70 Cal.2d 604, 605.) He pled guilty to the separate offenses of driving with knowledge of a suspended license and while under the influence of intoxicating liquor. (*Ibid.*) He was sentenced for both offenses. (*Ibid.*)

The *Hayes* court held that the sentencing on both violations did not run afoul of section 654. (*In re Hayes*, *supra,* 70 Cal.2d 604, 605.) *Hayes* recognized that the crucial inquiry in section 654 cases is determining whether there is a "single act" being punished. (*In re Hayes*, *supra,* 70 Cal.2d 604, 605-606.) The *Hayes* court held that the appropriate mode of analysis was to examine only the criminal acts at issue (e.g., driving with a suspended license and driving while intoxicated), not the noncriminal acts (e.g., driving), to determine if there was a "single act." (*Id.* at pp. 607–608.) *Hayes* rejected the contention that because both violations were predicated on the singular act of driving, they can only be punished once. (*Ibid.*)

In *Harrison*, the defendant was convicted of possession of a revolver by a felon and carrying a loaded firearm in a vehicle on a public street. (*People v. Harrison, supra,*1 Cal.App.3d 115, 118.) Relying on *Hayes*,

the *Harrison* court held that the defendant's sentence did not violate section 654. (*Id.* at p. 122.) The *Harrison* decision added an additional component to its reasoning by describing the distinct goals of the two violated statutes: eliminating the potential hazard posed by an ex-felon's possession of firearms (whether loaded or not); and eliminating the potential hazard posed by any person carrying a loaded firearm in public (whether a felon or not). (*Ibid.*) Citing *Neal v. State of California* (1960) 55 Cal.2d 11, 19–20, disapproved on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, the *Harrison* court concluded that the "intent or objective" underlying the criminal conduct was therefore not singular, but several. (*People v. Harrison, supra,* 1 Cal.App.3d 115, 122.)

This court, in rejecting the holdings in *Hayes* and *Harrison,* succinctly held: "Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law." (*People v. Jones, supra,* 54 Cal.4th 350, 358.) The court further specifically rejected the *Harrison* court's analysis of the distinct goals of the individual statutes noting that the legal rules it logically engenders are inconsistent with section 654's actual language. (*People v. Jones, supra,* 54 Cal.4th 350, 355.)

Jones stands for two points of law in the context of a section 654 analysis that are particularly relevant here. First, the courts look at whether a single physical act is being punished, not whether distinct criminal acts

are being punished. (*People v. Jones*, *supra,* 54 Cal.4th 350, 355-357.) Second, the courts do not look to whether the statutes that a defendant violated have distinct purposes. (*Id.* at p. 355.)

The rationale of *Jones* should apply here. Appellant was charged with the felony offense of being a felon in possession of a gun (§ 12021, subd., (a)(1)), and that same felony offense was used to establish the substantive gang offense. (§ 186.22, subd. (a).) The issue is whether that same felony offense for being a felon in possession of a gun can also be used to elevate two misdemeanor offense into felony offenses. (§§ 12025, subd. (b)(3), 12031, subd. (a)(2)(C).) This court stated "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, supra,* 42 Cal.4th 516, 524, italics original.) This court further clarified the term "*distinct*" in posing the issue in this case: "whether "defendant committed *independent* felonious conduct that elevated his otherwise misdemeanor firearm possession to a felony and supported the charge of being an active participant in a criminal street gang in violation of section 186.22, subdivision (a)." (emphasis added.)

Only a single physical act occurs by virtue of possessing a gun, regardless of how many intentions the possessor may have for the object. (See e.g., *People v. Jones*, *supra,* 54 Cal.4th 350, 353.) It therefore follows

that a single physical act is only one course of conduct. (*Id.* at p. 352.) This one course of conduct is therefore not "conduct *distinct from* [or *independent* from] the otherwise misdemeanor conduct of carrying a loaded weapon in violation of section 12031, subdivision (a)(1)." (*People v. Lamas, supra,* 42 Cal.4th 516, 524, italics original, comment added.)

CONCLUSION

Appellant's behavior, actions and omissions constituted a single course of conduct, a single physical act, from which all three offenses arose. Therefore appellant did not engage in felonious conduct that was distinct or otherwise independent from his misdemeanor conduct, and his misdemeanor gun offenses may not be elevated to felonies by use of the same physical act of possession of a gun.

Dated: March 20, 2013

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

Supreme Court No. S206084

I, Stephen M. Hinkle, certify under penalty of perjury under the laws of the State of California that the attached APPELLANT'S OPENING BRIEF contains 4912 words as calculated by Microsoft Word 2003.

Dated: March 20, 2013

_____

Stephen Hinkle

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

SUPREME COURT CASE NO. S206084
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:

APPELLANT'S OPENING BRIEF

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 Kern Valley State Prison P.O. Box 3130 Delano, CA 93216

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Truckee, California, on March 25 2013.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 25, 2013, at Truckee, California.

_____
Stephen Hinkle