SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JARVONNE FEREDELL JONES,** **Defendant and Appellant.**	Case No. S179552

SUPREME COURT
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The Honorable Jaime Roman, Judge

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ANSWERING BRIEF ON THE MERITS

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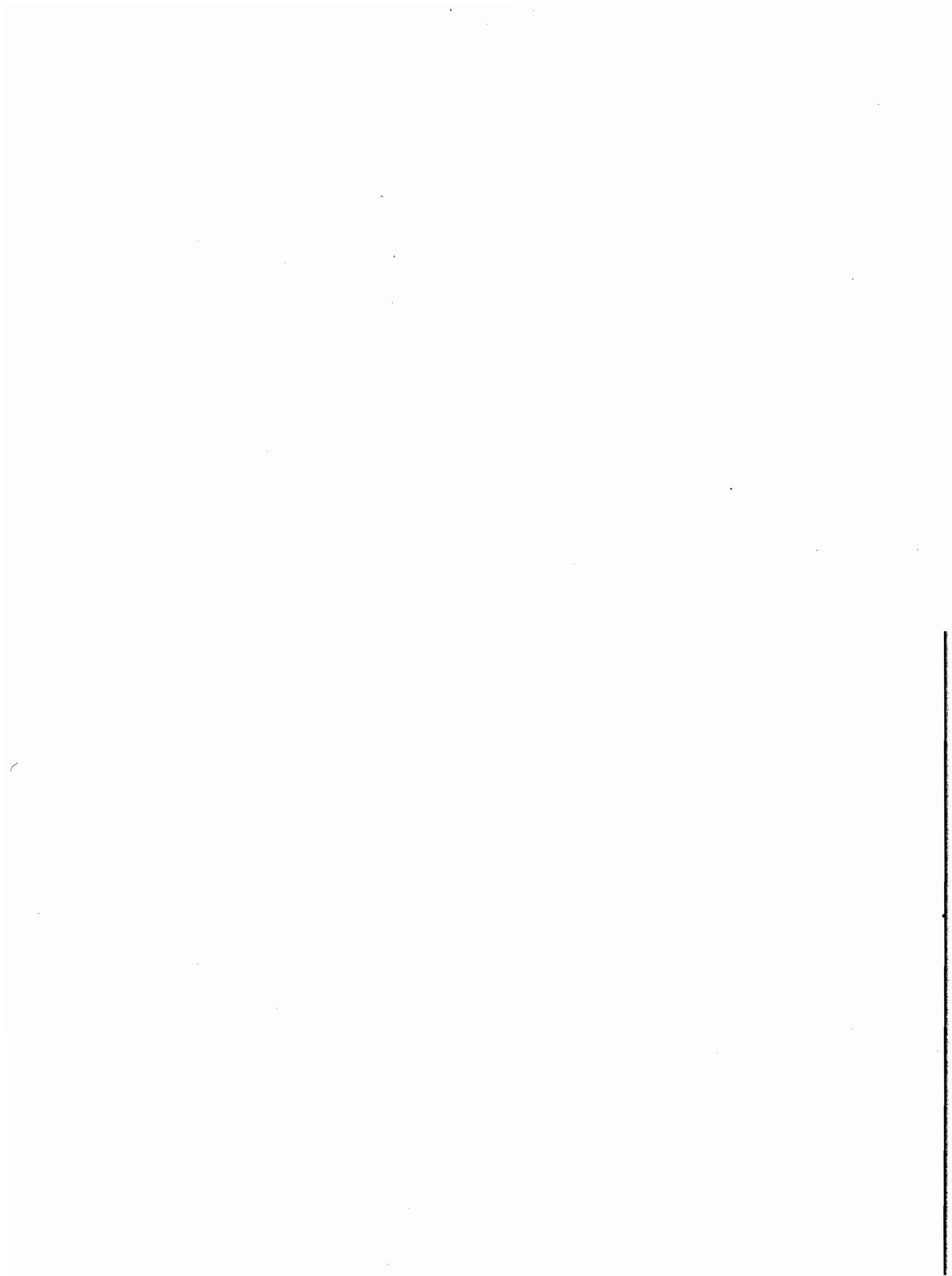

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ISSUE PRESENTED

Did the trial court properly impose concurrent sentences for being a felon in possession of a firearm (Pen. Code[1] section 12021, subd. (a)(1)) and carrying a loaded, concealed firearm (Pen. Code section 12025, subd. (b)(6)) under the present circumstances? (See Pen. Code, § 654; *People v. Harrison* (1969) 1 Cal.App.3d 115, 121-122.)

INTRODUCTION

Police officers stopped a vehicle appellant was driving and found a loaded revolver in the front driver's side door panel. Appellant admitted that he had purchased it three days prior for protection, kept it at his grandmother's house, picked it up from her house, and placed it inside his car. Appellant was convicted of the unlawful possession of a firearm (count one), carrying a concealed weapon (count two), and carrying a loaded firearm in public (count three). The trial court sentenced appellant to four years in state prison, imposing concurrent sentences on counts two and three. On appeal, appellant argued counts two and three should have been stayed pursuant to section 654. The Court of Appeal agreed as to count three, but upheld the concurrent sentence imposed on count two. Appellant now challenges the imposition of the concurrent sentence on count two.

STATEMENT OF THE CASE

On September 25, 2008, the district attorney filed amended information number 08F04254 in Sacramento County Superior Court charging appellant Jarvonne Feredell Jones with the unlawful possession of a firearm (§ 12021, subd. (a)(1); count one), carrying a concealed weapon

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

(§ 12025, subd. (b)(6); count two), and carrying a loaded firearm in public (§ 12031, subd. (a)(2)(f); count three). It was alleged that appellant had served a prior prison term within the meaning of section 667.5, subdivision (b). (CT 45-46.) Appellant waived formal arraignment and entered a not guilty plea. (CT 43.)

A jury was impaneled to try the case on September 25, 2008. (CT 43-44.) The jury found appellant guilty as charged. (CT 54-56, 59-61.)

On November 5, 2008, the trial court sentenced appellant to four years in state prison as follows: count 1: upper term of three years; counts 2 and 3: upper term of three years, concurrent to the sentence imposed in count 1; and one year pursuant to section 667.5, subdivision (b). (SCT 1.)

Appellant timely filed a notice of appeal on November 6, 2008. (CT 136-137.)

On December 11, 2009, the Third District Court of Appeal modified appellant's sentence by staying the term imposed on count three and otherwise affirmed the judgment. On January 19, 2010, appellant filed a petition for review in this Court. On March 24, 2010, this Court granted the petition for review.

STATEMENT OF FACTS

On May 26, 2008, at approximately 7:00 p.m., Sacramento Police Officer Bryan Weinrich stopped a car at the corner of North 16th and North B Streets in Sacramento because it did not have a rear license plate. (RT 19-22.) Appellant was the driver. (RT 23.) After the stop, Officer Weinrich conducted a search of the vehicle with the assistance of two other officers. (RT 22-23.) One officer found a loaded .38 caliber revolver on the front driver's side door panel. (RT 25-26, 29-30, 72.) Officer Weinrich

advised appellant of his *Miranda*[2] rights, which he waived. (RT 27.) Appellant admitted that the gun was his, he had bought it from a man on the street just three days before, and he bought it for protection.[3] (RT 27-28.) The parties stipulated that appellant was convicted of a prior felony on May 26, 2008, he was not the registered owner of the revolver, and an individual named Bobbie Richardson was the registered owner of the vehicle. (RT 87-88.)

SUMMARY OF ARGUMENT

The trial court properly imposed concurrent sentences on counts one and two because, under the facts of this case, neither section 654 nor the test as established in *Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*) barred the imposition of multiple punishment. Appellant committed two distinct criminal acts, and each criminal act was committed with a different intent and objective. Thus, multiple punishment was warranted in this case.

The Court of Appeal rejected this argument and instead upheld the concurrent sentences based on the rational and test as set forth in *People v. Harrison*, *supra*, 1 Cal.App.3d at pp. 121-122. Respondent submits that the evidence in this case supported multiple punishment and that *Harrison*, to the extent it is consistent with *Neal*, also lends support for multiple punishment.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

[3] During cross-examination, Officer Weinrich testified that appellant further explained that he kept the gun at his grandmother's house, but that he had picked it up from there and "that's why the gun was in the car." (RT 60-61.)

ARGUMENT

I. THE TRIAL COURT PROPERLY IMPOSED CONCURRENT SENTENCES ON COUNTS ONE AND TWO

A. General Principles

Section 654, subdivision (a) provides in pertinent 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.

The purpose of section 654 "is to insure that a defendant's punishment will be commensurate with culpability." (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211.) Under the plain language of the statute, multiple punishment may not be imposed for a single "act or omission." (*Ibid.*) However, "[c]ase law has expanded the meaning of section 654 to apply to more than one criminal act when there was a course of conduct that violates more than one statute but nevertheless constitutes an indivisible transaction." (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240; see also *Neal*, *supra*, 55 Cal.2d at p. 19.)[4] Thus, "[w]hether a course of

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[4] The Court, in *People v. Latimer*, *supra*, 5 Cal.4th at p. 1211, was critical of the "intent and objective" test as set forth in *Neal*:

> These criticisms have some merit. 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." [Citation.] Whether it should have been is debatable."

This Court, however, more recently acknowledged: "[a] decade ago, we criticized this test but also reaffirmed it as the established law of this state." (*People v. Britt* (2004) 32 Cal.4th 944, 952.)

criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor." (*Neal,* at p. 19; see also *People v. Britt*, *supra*, 32 Cal.4th at pp. 951-952; *People v. Harrison* (1989) 48 Cal.3d 321, 335.)

> If all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. On the other hand, if the defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.

(*Harrison*, at p. 335, internal citations and quotations omitted.)

Whether crimes constitute an indivisible course of conduct is a question of fact for the trial court, and its findings will not be disturbed on appeal if they are supported by substantial evidence. (*People v. Osband* (1996) 13 Cal.4th 622, 730; *People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5; *People v. Hutchins* (2001) 90 Cal.App .4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) "We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Hutchins, supra,* 90 Cal.App.4th at pp. 1312-1313; see also *People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [trial court's finding of "'separate intents'" reviewed for sufficient evidence in light most favorable to the judgment].)

Since *Neal*, the "test has generated a number of refinements in the area where the test is applicable." (*People v. Beamon* (1973) 8 Cal.3d 625, 638, fn. 10; see also *People v. Latimer*, *supra*, 5 Cal.4th at pp. 1211-1212 [cases decided since the *Neal* intent-and-objective rule have "limited the

rule's application in various ways," including, in some cases, by "narrowly interpret[ing] the length of time the defendant had a specific objective, and thereby found similar but consecutive objectives permitting multiple punishment."].) Consequently, there are "cases [that] have sometimes found separate objectives when the objectives were either (1) consecutive even if similar or (2) different even if simultaneous. In those cases, multiple punishment was permitted." (*Latimer*, at pp. 1211-1212; see also *People v. Britt*, *supra*, 32 Cal.4th at p. 952.)

B. The trial court correctly imposed concurrent sentences on counts one (unlawful possession of a firearm) and two (carrying a concealed weapon)

Section 12021, subdivision (a)(1), provides as follows:

> Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country or of an offense enumerated in subdivision (a), (b), or (d) of Section 12001.6, or who is addicted to the use of any narcotic drug, and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.

The purpose of section 12021 is to protect the public by banning possession of firearms by those who are more likely to use them for improper purposes. (*People v. Pepper* (1996) 41 Cal.App.4th 1029, 1037.)

> "Penal Code, section 12021, is part of the legislative scheme originally promulgated in 1917 (Stats. 1917, ch. 145, p. 221, § 1) and commonly known as the Dangerous Weapons Control Act. ... (24a) The clear intent of the Legislature in adopting the weapons control act was to limit as far as possible the use of instruments commonly associated with criminal activity [citation] and, specifically, 'to minimize the danger to public safety arising from the free access to firearms that can be used for crimes of violence.' [Citations.] The law presumes the danger is greater when the person possessing the concealable firearm has previously been convicted of felony, and the presumption is not impermissible. [Citation.]"

(*People v. Bell* (1989) 49 Cal.3d 502, 544, internal citations omitted.)

Whether a violation of section 12021 constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1144, citing *People v. Bradford* (1976) 17 Cal.3d 8, 22, *People v. Venegas* (1970) 10 Cal.App.3d 814, 821, internal quotations and footnote omitted.) "[W]here the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense." (*Jones*, at p. 1144, citing *Bradford*, at p. 22 [multiple punishment improper for assault with a deadly weapon upon a peace officer and possession of a firearm by an ex-felon convictions where defendant wrested away officer's revolver and shot at the officer with it];see, e.g., *Venegas*, at pp. 818-819 [multiple punishment improper for possession of a firearm by an ex-felon and assault with a deadly weapon where no showing defendant had possessed the gun before the assault]).

On the other hand, where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. (*People v. Jones*, *supra*, 103 Cal.App.4th at p. 1144, citing *People v. Killman* (1975) 51 Cal.App.3d 951, 959 [defendant "properly punished for his own personal possession of the gun before the robbery" where evidence demonstrated he purchased gun several months before robbery and had used it for target practice]; see, e.g., *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412 [". . . multiple punishment improper where evidence shows that, at most, 'fortuitous circumstances put firearm in defendant's hand only at the instant of committing another offense.'"]; *People v. Garfield* (1979) 92 Cal.App.3d 475, 478 [defendant properly sentenced for burglary and possession of a weapon by a narcotics

addict based upon his possession of a firearm stolen during the burglary; he had the weapon in his personal possession when arrested six days after the burglary and had not stored it with the rest of the fruits of the burglary].)

Thus, "[s]ection 654 is inapplicable when the defendant arrives at the crime scene already in possession of the firearm." (*People v. Maestas* (2006) 143 Cal.App.4th 247, 255, citing *People v. Jones*, *supra*, 103 Cal.App.4th at p. 1141.) There, "it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime." (*Ibid.*) Once the intent to possess a firearm is perfected by the actual possession, the commission of a crime under section 12021 is complete. (*People v. Ratcliff*, *supra*, 223 Cal.App.3d at p. 1414.)

In the instant case, substantial evidence supports the trial court's implicit finding that appellant's possession of the firearm was distinctly antecedent and separate from the primary offense of concealing it in his car. (*People v. Jones*, *supra*, 103 Cal.App.4th at p. 1144.) It is undisputed that appellant had purchased the gun for protection three days before he was stopped by Officer Weinrich. (RT 27-28.) It is also undisputed that appellant had kept the gun at his grandmother's house until he later decided to pick up the gun, which is why it was later found in the car. (RT 60-61.) Indeed,

> [c]ommission of a crime under section 12021 is complete once the intent to possess is perfected by possession. What the ex-felon does with the weapon later is another separate and distinct transaction undertaken with an additional intent which necessarily is something more than the mere intent to possess the proscribed weapon.

(*People v. Ratcliff*, *supra*, 223 Cal.App.3d at p. 1414, citing *People v. Harrison* (1969) *1* Cal.App.3d 115; *People v. Hudgins* (1967) 252 Cal.App.2d 174, 184-185.) Thus, appellant's intent to possess the gun was

perfected three days prior to the stop when he purchased the weapon, which he then kept at his grandmother's house. (RT 27-28.) Appellant's possession was distinctly antecedent and separate from his subsequent criminal act of physically taking the gun from his grandmother's house and hiding it in the front driver's side door panel. (RT 25-26, 29-30, 72.)

Although the Court of Appeal ultimately agreed that it was proper for appellant to be separately punished as between counts one and two, it rejected the above argument based on the following reasons:

> Defendant did not use his gun to commit a nonpossessory crime. And the People did not argue defendant was guilty of possession three days before his arrest: The prosecutor mentioned defendant's admission that he bought the gun three days before to bolster the theory that defendant knowingly possessed the gun, not to base liability on possession before the date of arrest. Accordingly, we question the theory of antecedent possession in this case.

(Opinion, p. 6.) Appellant similarly relies on statements made by the prosecutor in support of his argument that multiple punishment is barred in this case. (AOB 20-21, 26-27.) He also similarly argues that he did not "use the gun to commit other crimes" and instead engaged in "passive conduct" in support of his argument that multiple punishment is barred in this case. (AOB 30-33.)

Respondent submits that the prosecution's decisions on how to charge the case or use the evidence are not factors to consider when determining whether multiple punishment is barred pursuant to section 654. Rather, a defendant's intent is a factual question. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640.) It is well-settled that the trial court determines whether the defendant acted with a single, or multiple, criminal intents. (*People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 815.) Thus, its "findings will not be reversed on appeal if there is any substantial evidence to support them." (*People v. Yang Vang* (2010) 184 Cal.App.4th 912, 916.)

Consequently, the question of whether a defendant acted with a single or multiple criminal intents is determined by considering only the evidence produced at trial.

Respondent further disagrees with the characterization that the crime of carrying a concealed weapon is always a "possessory" crime involving "passive" criminal conduct.

> Statutory terms are to be understood in their ordinary and usual meanings unless the context indicates otherwise. (*Woosley v. State of California* (1992) 3 Cal.4th 758, 775 [13 Cal.Rptr.2d 30, 838 P.2d 758].) To conceal is "1: to prevent disclosure or recognition of: avoid revelation of: refrain from revealing: withhold knowledge of: draw attention from: treat so as to be unnoticed .... 2: to place out of sight: withdraw from being observed: shield from vision or notice ...." (Webster's New Internat. Dict. (3d ed. 1993) p. 469.)

(*People v. Hodges* (1999) 70 Cal.App.4th 1348, 1355; see also § 12025.) Under these circumstances, the evidence demonstrated that appellant took the gun from his grandmother's house, moved the gun into his car, and hid it on the passenger side door panel. (RT 26-27.) This is not "passive" criminal conduct. Even the Court of Appeal acknowledged as follows:

> Here, as stated, after [appellant] purchased the gun, he concealed it in the car, or had someone conceal it for him. Under the reasoning of *Harrison* just quoted, that act merits separate punishment from mere possession. Accordingly, a section 654 stay is not required as between counts one and two.

(Opinion, p. 9.) Thus, as argued in more detail above, appellant's act of concealing the weapon in his car was a separate and distinct act involving an intent other than mere possession.

C. The *Harrison* Case

Relying on *People v. Harrison* (1969) 1 Cal.App.3d 115, the Court of Appeal ultimately held that multiple punishment was appropriate as between count one and counts two or three "because of the purpose of the

ban on felons possessing firearms . . . ." (Opinion, pp. 6-9.) In *Harrison*, officers recovered a loaded revolver from underneath the right front seat of the vehicle defendant was driving. (*Harrison*, at pp. 118-119.) The defendant was convicted of and received punishment for possession of a firearm by a felon and possession of a loaded firearm on a public street. (*Id.* at pp. 117-118, 121-122.) The *Harrison* court found that the sentences did not violate section 654 and upheld the sentences imposed on both counts. (*Id.* at pp. 121-122.)

Initially, the *Harrison* court noted the "lesser included offense" test was sometimes used to determine whether section 654 applied and that the test was not met in the case. (*People v. Harrison*, *supra*, 1 Cal.App.3d at p. 122.) More relevant to the instant case, the *Harrison* court then acknowledged that the "two statutes strike at different things." (*Ibid.*) It explained as follows:

> One is the hazard of permitting ex-felons to have concealable firearms, loaded or unloaded; the risk to public safety derives from the type of person involved. The other strikes at the hazard arising when any person carries a loaded firearm in public. Here, the mere fact the weapon is loaded is hazardous, irrespective of the person (except those persons specifically exempted) carrying it.

(*Ibid.*) The *Harrison* court concluded as follows:

> The "intent or objective" underlying the criminal conduct is not single, but several, and thus does not meet another of the tests employed to determine if Penal Code section 654 is violated. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19-20 [9 Cal.Rptr. 607, 357 P.2d 839], cert. denied (1961) 365 U.S. 823 [5 L.Ed.2d 700, 81 S.Ct. 708].) For an ex-convict to carry a concealable firearm is one act. But loading involves separate activity, and while no evidence shows that appellant personally loaded the pistol, there seem little distinction between loading and permitting another to do so. Thus, two acts, not a single one, are necessarily involved and bring our case outside the prohibition against double punishment for a single act or

> omission. We therefore hold contrary to appellant's contentions on this point.

(*Ibid.*)

Based on the above *Harrison* rationale, the Court of Appeal reasoned as follows:

> Here, as stated, after [appellant] purchased the gun, he concealed it in the car, or had someone conceal it for him. Under the reasoning of *Harrison* just quoted, that act merits separate punishment from mere possession. Accordingly, a section 654 stay is not required as between counts one and two.

(Opinion, p. 9.)

For a number of reasons, appellant argues that the Court of Appeal's reliance on *Harrison* was misplaced and that *Harrison* should be disapproved. (AOB 12-22.) First, appellant contends that *Harrison* improperly created a section 654 "statutory purpose" test, which "is at odds with the *Neal* 'intent and objective' test." (AOB 11-12.) He further contends that *Harrison* predates this Court's decision in *People v. Bradford* (1979) 17 Cal.3d 8, and cannot be reconciled with the rule adopted in that case. (AOB 13-14.) Respondent disagrees.

Mere consideration of the legislative purpose is not prohibited in a section 654 analysis. Recently, the *Britt* court acknowledged as follows:

> Section 654 turns on the defendant's objective in violating both provisions, not the Legislature's purpose in enacting them, but examining the overall purpose behind the notification requirements helps illuminate the defendant's objective in violating them.

(*People v. Britt*, *supra*, 32 Cal.4th at p. 952, emphasis added; see also *People v. Jones*, *supra*, 103 Cal.App.4th at p. 1145 [in considering "important policy consideration" in enacting section 12021, court noted that *Ratcliff* court also distinguished section 12021 from other weapons charges, concluding that "a conviction for firearm possession by a felon represents

'a unique circumstance in the minefield of section 654 cases in that this charge involve[d] an important policy consideration.'".].)

The *Harrison* court certainly considered the different statutory purposes behind the code sections. One section penalizes the unlawful possession of a firearm while the other penalizes the possession of a loaded firearm on a public street. (*People v. Harrison, supra*, 1 Cal.App.3d at p. 122.) However, after citing to *Neal*, it concluded that double punishment was not prohibited because the defendant had engaged in two acts and not a single one. (*People v. Harrison, supra*, 1 Cal.app.3d at p. 122.) It reasoned that the two offenses required disparate intentions under the *Neal* test, noting that the former offense required the separate act of loading the firearm. (*Ibid.*)

In *Bradford*, this Court adopted the rule set forth in *People v. Venegas, supra*, 10 Cal.App.3d at p. 821, regarding the application of section 654 to cases involving the violation of section 12021. (*People v. Bradford*, supra, 17 Cal.3d at p. 22.) It stated as follows:

> "Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense."

(*Id.*, at p. 22, quoting *Venegas*, at p. 821.)

Thus, in order for a section 12021 violation in conjunction with another crime to fall outside the ambit of section 654, *Bradford* requires that the evidence show a possession distinctly antecedent and separate from the primary offense. (*People v. Bradford, supra*, 17 Cal.3d at p. 22.)

While it is questionable whether Harrison's possession of the revolver was distinctly antecedent and separate from his possession of a loaded firearm on a public street, the evidence in this case is clear. Again, appellant purchased the weapon three days prior to being stopped and had physically moved the gun from his grandmother's house to the side pocket of the driver's side door. (RT 27-28, 60-61.) Clearly, his initial possession of the firearm was antecedent and separate from when he concealed it in his car three days later. Thus, to the extent *Harrison* attempted to create a "statutory-purpose" test, it appears this Court has already rejected such a test in *Britt*. (*People v. Britt, supra*, 32 Cal.4th at p. 952.) In any event, it matters little in the instant case because, as discussed throughout this brief, multiple punishment was not barred from either section 654 or *Neal*.

Appellant also argues that the Legislature was fully aware of the *Neal* test and, rather than limit the application of section 654 in cases involving section 12021, it has instead taken an ex-felon's status into consideration by increasing the wobbler offense to a felony. (AOB 15-18.) A similar argument was rejected in *Latimer*:

> We have recognized that legislative inaction alone does not necessarily imply legislative approval. "The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors ...."

(*People v. Latimer*, *supra*, 5 Cal.4th at p. 1213, quoting *County of Los Angeles v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 391, 404, internal quotation marks omitted, quoted in *People v. King*, (1993) 5 Cal.4th 59, 75; see also *People v. Escobar* (1992) 3 Cal.4th 740, 750- 751.) While the Legislature plainly intended to increase punishment from a wobbler offense to a felony if the crime was committed by a felon, it cannot be argued that

by doing so it has chosen not to limit the application of section 654. (AOB 18.) Indeed,

> [t]he California Legislature views the possession of a handgun by an ex-felon to be a serious offense. The intent underlying section 12021, subdivision (a) was to limit the use of instruments commonly associated with criminal activity and to minimize the danger to public safety ... [and] properly presumes the danger is greater when the person possessing the firearm has previously been convicted of a felony.

(*People v. Cooper* (1996) 43 Cal.App.4th 815, 824-825 [holding that a sentence of 25 years to life for being a felon in possession of a handgun is not cruel and unusual punishment under state or federal law].) Consequently, it remains that whether the unlawful possession of a firearm by a felon can be separately punished from the primary offense depends on the facts of each case. (*People v. Osband*, *supra*, 13 Cal.4th at p. 730; *People v. Perez*, *supra*, 23 Cal.3d at p. 552, fn. 5.)

D. *In re Hayes* is instructive

Appellant argues *In re Hayes* (1969) 70 Cal.2d 604, is distinguishable and does not "mandate multiple punishment." (AOB 22-27.) Respondent disagrees. *Hayes* is instructive. In *Hayes*, the defendant pleaded guilty to and was sentenced for driving with knowledge of a suspended license and while under the influence of intoxicating liquor. (*In re Hayes*, at p. 605.) Our Supreme Court held that section 654 did not proscribe imposition of sentence for both driving while intoxicated and with knowledge of a suspended license. (*Id.* at p. 611.)

The *Hayes* court explained as follows:

> The proper approach, therefore, is to isolate the various criminal acts involved, and then to examine only those acts for identity. In the instant case the two criminal acts are (1) driving with a suspended license and (2) driving while intoxicated; they are in no sense identical or equivalent. Petitioner is not being punished twice - because he cannot be punished at all- for the "act of

> driving." He is being penalized once for his act of driving with an invalid license and once for his independent act of driving while intoxicated.

(*Id.* at p. 607.) The Court concluded as follows:

> Nor can we subscribe to a contention that because petitioner may have had only one "intent and objective"- driving - when he committed the two violations, he comes within the ambit of the test established in *Neal v. State of California* (1960) *supra*, 55 Cal.2d 11. In *Neal*, the defendant had attempted murder by means of arson (burning down the victims' house by igniting gasoline therein). We viewed that circumstance as an indivisible "course of criminal conduct," the criminal act of arson being only the means toward an ultimate criminal objective of murder. We stated that where there was only a single "intent and objective" involved in such a course of criminal conduct, section 654 precluded multiple punishment.
>
> Here neither of the two violations can realistically be viewed as a "means" toward the other and as such a part of a single course of criminal conduct, in the sense that the arson in *Neal* was committed not to burn property but only as a means toward the single objective of murder. Moreover, the petitioner's intent and objective to drive from one place to another is no more relevant to our analysis than what he intended to do when he arrived there. (See *In re Ward* (1966) *supra*, 64 Cal.2d 672, 676.) Just as it is the criminal "act or omission" to which section 654 refers, it is the criminal "intent and objective" that we established as the test in *Neal*. (E.g. *In re Johnson* (1966) *supra*, 65 Cal.2d 393, 395 [intent to sell heroin]; *In re Ward* (1966) *supra*, 64 Cal.2d 672, 676 [intent to rob].) In *Neal* we found to be crucial not the defendant's possible intent and objective to acquire money, to gain revenge or to ignite gasoline, but only his intent and objective to commit murder. Although the absence of a single intent and objective does not necessarily preclude application of section 654 . . . , it is clear that under the instant circumstances this test of *Neal* cannot be of aid to defendant.

(*Id.* at pp. 609-610.)

Appellant argues *Hayes* is distinguishable because in "this case the concealment violation *was* 'a means towards the objective of the

commission of the other' offense." (AOB 24, emphasis in original, citing *People v. Beamon*, *supra*, 8 Cal.3d at p. 639.) In other words, appellant had to conceal the weapon to possess it for protection. (AOB 24.) Not so.

Like *Hayes*, appellant engaged in two distinct "*criminal* acts." (*In re Hayes*, *supra*, 70 Cal.2d at pp. 606-607, emphasis in original.) He possessed the firearm and then concealed it three days later. (RT 25-26, 29-30, 60-61, 72.) Moreover, "[j]ust as it is the criminal 'act or omission' to which section 654 refers, it is the criminal 'intent and objective' that we established as the test in *Neal*." (*In re Hayes*, *supra*, 70 Cal.2d at pp. 609-610.) Again, as set forth in more detail above, appellant had separate criminal intents. His initial intent was to possess a weapon, which he fulfilled when he purchased it three days prior to being stopped by Officer Weinrich. (RT 27-28.) His subsequent criminal intent was to then conceal the weapon in his car, which he completed when he hid the revolver on the right, front, driver's side door panel three days later. (RT 25-26, 29-30, 60-61, 72.) As noted by the *Hayes* court, "[i]n *Neal* we found to be crucial not the defendant's possible intent and objective to acquire money, to gain revenge or to ignite gasoline, but only his intent and objective to commit murder." (*Id.* at pp. 609-610.) Thus, what is relevant is appellant's criminal intent to possess and conceal, not his intent to protect himself as suggested by appellant. (See *In re Hayes*, at pp. 609-610, citing *In re Ward*, *supra*, 64 Cal.2d at p. 676 ["Moreover, the petitioner's intent and objective to drive from one place to another is no more relevant to our analysis than what he intended to do when he arrived there."].)

Appellant also relies on *People v. Britt*, *supra*, 32 Cal.4th 944, in support of his argument that *Hayes* is distinguishable. (AOB 24-25.) In *Britt*, the defendant was convicted and punished for failing to comply with two separate registration requirements. Specifically, he moved "once from one county to another within California without notifying the authorities in

either county, and hence violat[ed] both subdivisions (a) and (f) of section 290[.]" (*Britt.* at p. 949, italics omitted.) He violated subdivision (a) by failing to notify the authorities in the county he left, and he violated subdivision (f) by failing to notify the authorities in the county he entered. (*Id.* at p. 952.) The *Britt* court approved multiple convictions in this situation, but held that section 654 precluded multiple punishment because both of the violations had "the same objective - to prevent any law enforcement authority from learning of [the defendant's] current residence." (*Id.* at pp. 951-952.) In so holding, the Court emphasized that objective was achieved just once, by the defendant's act of changing residence on a single occasion. (*Id.* at p. 953.)

This case is also distinguishable. Unlike *Britt*, "[t]his is not a case of a single act or course of conduct that results in multiple offenses. This matter involves separate triggering events giving rise to separate offenses." (*People v. Meeks* (2004) 123 Cal.App.4th 695, 706.) Again, as set forth in more detail above, appellant engaged in two separate criminal acts when he unlawfully possessed and then three days later concealed a firearm. (RT 25-28, 29-30, 60-61, 72.) He engaged in these acts with two separate criminal intents: first to possess and then to conceal. (*In re Hayes*, *supra*, 70 Cal.2d at pp. 609-610.)

In sum, the uncontroverted evidence in this case established that appellant not only engaged in two distinct criminal acts, but that each act was committed with a different criminal intent. Thus, under the well-established rules and tests governing the applicability of section 654 to unlawful firearm possession cases, the trial court properly imposed concurrent sentences on counts one and two.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that appellant's sentence should be affirmed.

Dated: October 15, 2010 Respectfully submitted,

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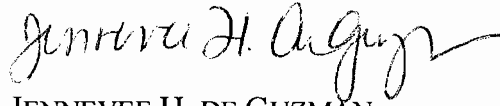

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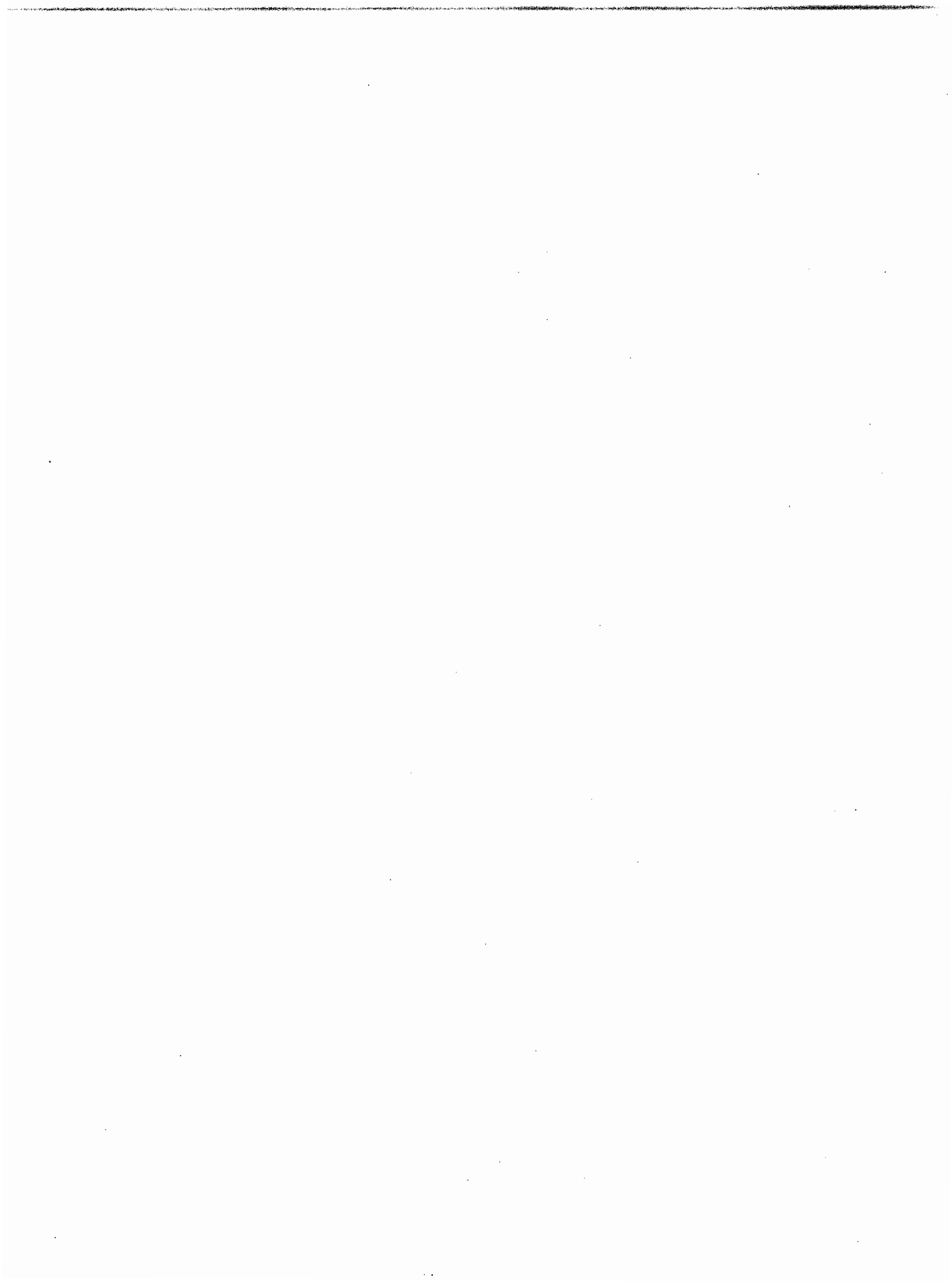

CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 5,680 words.

Dated: October 15, 2010

EDMUND G. BROWN JR.
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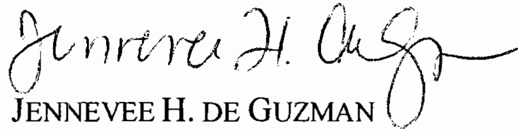

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S179552**

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 October 15, 2010, I served the attached **ANSWERING BRIEF ON THE MERITS** 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:

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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 October 15, 2010, at Sacramento, California.

____
Declarant

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