IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Petitioner, v. MAURICE DION SANDERS, Defendant and Respondent.	S191341

RESPONDENT'S ANSWERING BRIEF ON THE MERITS

Fifth District Court of Appeal, No. F059287
Kern County Superior Court, No. BF126309A,
Hon. Michael E. Dellostritto, Judge

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ARGUMENT

I

PENAL CODE SECTION 12021.1, SUBDIVISION (a), IS A NECESSARILY INCLUDED OFFENSE OF SECTION 12021, SUBDIVISION (a)(1)

The first issue presented for review by this Court is:

> Is possession of a firearm after conviction of a specified violent offense (Pen. Code, § 12021.1, subd. (a)) a necessarily included offense of possession of a firearm after conviction of a felony (Pen. Code, § 12021, subd. (a)(1))?

In the Court of Appeal, petitioner agreed with appellant Sanders that his convictions in Counts 2 and 4 for violation of Penal Code[1] section 12021.1, subdivision (a) [possession of firearm by person

[1] All undesignated statutory references are to this code.

convicted of a violent felony] must be reversed, because they were necessarily included offenses of his convictions in Counts 1 and 3 for violation of section 12021, subdivision (a)(1) [possession of firearm by person convicted of a felony].

On review, petitioner now argues that the reverse is actually the case: Because a defendant illegally in possession of a firearm may have as his prior conviction only a non-violent felony such as grand theft, he will have violated section 12021, subdivision (a)(1), which applies to any felony, but not section 12021.1, subdivision (a), which applies only to certain enumerated felonies, not including grand theft. (PBOM 6-7.)

The analysis by petitioner appears to be correct as far as it goes. However, it does not apply to this case, and it does not actually address the question whether, in a multiple conviction context, either of the statutes at issue is a lesser included offense of the other. Under the scenario given by petitioner, a defendant whose prior conviction was grand theft only could never be charged with, or convicted of, a violation of section 12021.1, subdivision (a), because the prior conviction offense is not enumerated therein. Therefore, because the question of lesser included offenses would never arise under those facts, petitioner's argument is directed only at an abstract or hypothetical issue. (See *City of Oakland v. Carpentier* (1859) 13 Cal. 540, 542 ["Courts do not

decide on abstract questions"].)

It appears to respondent that the issue this Court designated for review concerns only the factual situation presented by this case, in other words, where a defendant's prior conviction *is* an enumerated felony in section 12021.1, subdivision (a), and he stands convicted of both type of offenses for gun possession by a felon.

In that factual situation, the test for determining a lesser included offense would result in a finding that section 12021.1, subdivision (a), is the lesser included offense of section 12021, subdivision (a)(1). "Under the elements test, a court determines whether, as a matter of law, the statutory definition of the greater offense necessarily includes the lesser offense." (*People v. Parson* (2008) 44 Cal.4th 332, 349.)

Here, section 12021, subdivision (a)(1), which applies to *any* felony conviction, is the "greater" offense, because by definition it includes all of the enumerated felonies in section 12021.1, subdivision (a), making the latter offense a "lesser included" one. Therefore, the Court of Appeal correctly determined that the convictions in Counts 2 and 4 (§ 12021.1, subd. (a)) must be reversed because they are lesser included offenses of the offenses in Counts 1 and 3.

II

THE COURT OF APPEAL CORRECTLY DECIDED THAT IMPOSITION OF SENTENCE ON COUNT 3 SHOULD HAVE BEEN STAYED PURSUANT TO SECTION 654

The second issue presented for review by this Court is:

> Was defendant properly sentenced to concurrent terms for his simultaneous possession of two firearms in violation of Penal Code section 12021, subdivision (a)(1)?

"Section 654 is intended to ensure that punishment is commensurate with a defendant's criminal culpability. (*People v. Perez* (1979) 23 Cal.3d 545, 551 []; accord, *People v. Latimer* (1993) 5 Cal.4th 1203, 1211 [].)" (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 196, parallel citations omitted.) As *Alvarado* noted, there are two prongs to section 654:

> It expressly prohibits multiple sentences where a single act violates more than one statute. For example, a defendant may be guilty of both arson and attempted murder for throwing gasoline into an inhabited room and lighting it, but the single act may be punished only once. (See, e.g., *Neal v. State of California* (1960) 55 Cal.2d 11, 19 [].)
>
> Section 654 also prohibits multiple sentences where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct engaged in with a single intent and objective. (*Neal v. State of California, supra*, 55 Cal.2d at p. 19 [].) "If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Ibid.*) Thus, in legal effect, different acts that violate different statutes merge under the perpetrator's single intent and objective and are

> treated as if they were a single act that violates more than one statute.

(*People v. Alvarado, supra,* 87 Cal.App.4th at 196, parallel citations omitted.) As shown in the above quote, *Neal* is the source that identified the two aspects of section 654's application. In footnote 1, *Neal* interpreted section 654 as also applying to multiple convictions of the same offense when the "basic principle" of section 654 is involved. (*Id.* at 18, fn. 1.)

Thus, where there are two convictions of the same offense, under *Neal*, section 654 would bar double punishment only where the perpetrator had a single intent and objective. Notwithstanding section 12001, subdivision (k), which provides that for purposes of section 12021 and 12021.1, each firearm is a distinct and separate offense, if there is but one act and/or objective and intent, then section 654 should apply. Further, section 12001, subdivision (k), does not expressly bar application of section 654 to the cited felon gun possession offenses.

As a matter of implementing section 654's purpose of ensuring punishment that is commensurate with culpability, petitioner makes no argument compelling a bar to it's application in cases where a single statute is violated multiple times in a single act or with the same objective and intent. In the usual case, where a single offense can be arguably divided into separate acts, only one charge will be brought. If a defendant steals 10 jewels from a store, he will be charged with one

count of robbery. Thus, where a defendant brandished one weapon at several police officers, he did not commit several offenses of brandishing a weapon:

> The People contend that since there were three officers outside defendant's home, there were three victims of defendant's brandishing, but this argument would suggest that the single act of exhibiting a firearm could have been punished 10 times if 10 officers were present.
>
> However, the multiple-victim exception is just that: a multiple-victim exception, not a multiple-observer exception. Assaults have victims; exhibitions have observers. And, as mentioned, the crime of exhibiting a firearm under section 417, subdivision (c), does not act upon an officer, but is only committed in the presence of an officer.
>
> We do not underestimate the seriousness of the risk faced by peace officers when a person brandishes a firearm in an angry manner, but its seriousness lies in the risk that the crime could evolve into an assault. However, our criminal laws punish based on the crime committed, not on the crime not yet committed.
>
> The trial court erred when it imposed three consecutive sentences for the single exhibition of a firearm in violation of section 417, subdivision (c). It should have stayed two of the terms.

(*People v. Hall* (2000) 83 Cal.App.4th 1084, 1096.)

Respondent contends that brandishing a weapon in front of multiple police officers is a far more dangerous situation than the single act of storing two firearms in a closet at the same time. (1CT 239.) If section 654 bars multiple punishment where one act of violating section 417, subdivision (c), was committed in the presence of several police officers, there is no viable policy reason why a single act of storing two

weapons deserves multiple punishment. If the facts establish that a defendant possesses a firearm in several locations, or possesses different firearms for which he intends separate purposes, then section 654 would have no application.

Petitioner challenges the continuing viability of footnote 1 in *Neal v. California, supra*, by suggesting that the cases cited therein do not support the proposition that multiple violations of the same criminal offense can be reduced to a single offense under the principles of section 654. Petitioner claims that none of those cases support the proposition. (ROBM 9.) The contention is incorrect.[2]

In *People v. Roberts* (1953) 40 Cal.2d 483, the defendant was charged with conspiracy to sell drugs, and three violations of "illegally (2) transporting, (3) selling, furnishing and giving away, and (4) possessing heroin" under the same criminal code section. (*Id.* at 486.) The government maintained that the defendant's sale of heroin to an undercover officer, constituted the distinct crimes of transporting, selling and possessing heroin. The court said that the one act constituted only one crime although each of the constituent parts of the offense had been violated. (*Id.* at 491.) This holding does support *Neal*, because

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[2] Respondent agrees with petitioner that *People v. Brown* (1958) 49 Cal.2d 577, does not discuss multiple violations of one criminal offense. The case, however (which involves an illegal abortion and resulting death) is very similar to *Neal*'s situation of an arson being the implement causing a murder in a single course of conduct.

it upholds the principle of 654 that a single act with a single intent should not be divided into components that make it into multiple violations of the one offense.

On this point, *Roberts* cited *People v. Clemett* (1929) 208 Cal. 142, and *Clemett* is also included in footnote 1 of *Neal*. In *Clemett*, the defendant was charged with two counts of the same criminal violation (possessing and operating a still). One count was for possession of the still on a certain date, and the second count for having control and operating that still from the same date but also forward for five months. (*Id.* at 145-146.) The Court found there was only one offense and there should only be one punishment. (*Id.* at 150.) Again, the case supports *Neal* because it upholds the purpose of section 654 to make punishment equal to culpability and where one act constitutes both charges of the same violation, only one punishment should be allowed.

The fourth case cited in the *Neal* footnote also supports the analysis of the *Neal* Court, and directly supports the contention in this case. In *People v. Nor Woods* (1951) 37 Cal.2d 584, the defendant was charged with and convicted of two counts of grand theft on the theory that his fraudulent sale of an automobile contained two acts of theft, one of the money he received in the transaction and another in the form a title to a vehicle which was also part of the sale. (*Id.* at 586.)

The Court held, however, "In the present case both the car and

the money were taken at the same time as part of a single transaction whereby defendant defrauded Campouris of the purchase price of the 1949 Ford." (*Ibid.*) This case exemplifies what respondent suggested above that the theft of several rings from a jeweler at the same time is still a single theft. Arguably, the Legislature could enact a provision similar to section 12001, subdivision (k), which would provide that every form of theft or item in a theft involved in one fraudulent scheme is to be considered a "separate and distinct offense." But, under *People v. Nor Woods, supra,* and *Neal*, if the two forms of the offense (as in this case the two shotguns are forms of one offense) occur in a single act with a single purpose, there is no legal impediment to the application of 654 to bar double punishment.

On the foregoing basis, respondent contends that the Court of Appeal was correct in its analysis and holding that the possession of two shotguns at the same time and place with no evidence of multiple objectives constitutes only one violation of section 12021, subdivision (a)(1).

CONCLUSION

Respondent respectfully submits that the judgment of the Court of Appeal be affirmed.

Dated: August 25, 2011

Respectfully submitted,

/s/ Robert Navarro
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)

I, Robert Navarro, appointed counsel for Maurice Dion Sanders, under penalty of perjury under the laws of the State of California, hereby certify that the attached brief contained 2,165 words (excluding cover and tables) as calculated by WordPerfect X3.

Dated: August 25, 2011

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DECLARATION OF SERVICE BY MAIL

I am a resident of the State of California, over the age of eighteen and am not a party to this action. My business address is P.O. Box 8493, Fresno, California 93747. I am readily familiar with the business practices of the law office of Robert Navarro for the collection and processing of correspondence for mailing with the United States Postal Service, as described in Code of Civil Procedure section 1013(a). In the ordinary course of business, correspondence placed for collection and mailing is on the same day deposited with United States Postal Service in a sealed envelope with the postage fully prepaid. I am employed in the county where said collection and processing of mail takes place.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed August 25, 2011, at Fresno, California.

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