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 REPLY BRIEF ON THE MERITS

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

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ARGUMENT

I.

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

A. Summary of Appellant's Argument.

Appellant committed one physical act, that of possession of a firearm. Under Penal Code[1] section 954 that one act may be charged, depending on the circumstances, as multiple crimes. That was done so here

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

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)[2].) (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).) Appellant was charged in count four with street terrorism. (§ 186.22, subd. (a).) (1CT pp. 173-175.)

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

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[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.

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 Disagreement Between the Parties.

As would be expected, respondent disagrees with appellant's position. While both appellant's argument and respondent's argument revolves around legislative intent and interpretation of this court's prior rulings, it might be helpful to outline the basic area of disagreement between the parties.

As both parties have previously argued, a single act or course of conduct may be charged as multiple crimes under section 954, but only punished a single time under section 654. There is no disagreement between the parties that all three gun possession charges may be brought against appellant, and that he may be convicted of all three gun possession

charges. Appellant further believes that respondent would agree that, despite three separate convictions, appellant can only be punished for one of the three offenses, as all involve the same act or the same course of conduct. Appellant and respondent further agree that the gun charge punishable as a felony, that of felon in possession of a gun (§ 12021, subd, (a)(1), may be used to establish the elements of the substantive gang charge. (§ 186.22, subd. (a).)

The disagreement revolves around whether the same act of gun possession can be used to both establish the substantive gang charge *and* elevate the two otherwise misdemeanor gun offenses to felony gun offenses. In the most simple terms the issue is whether elevation of the misdemeanor gun offenses to felonies requires felonious criminal conduct distinct from the act of possession of the gun; in other words an entirely different felony crime encompassing a different criminal act or different criminal course of conduct.

C. Respondent's Argument.

Respondent argues that the felony gun charge, section 12021, subdivision (a)(1), may be used to establish the third element of the substantive gang charge, section 186.22, subdivision (a). (Respondent's Brief at p. 5.) Respondent then argues that since all of the elements of section 186.22, subdivision (a) have been established independent of any proof under section 12031 or 12025, the two misdemeanor gun possession

charges, the elements of those sections have been established and the violation of section 12021, subdivision (a)(1) "constitutes *independent* felonious criminal conduct and properly elevates sections 12031 and 12025 to felonies." (Respondent's Brief at p. 5, emphasis added.) Appellant disagrees. There is only one act, one course of conduct, one possession of the gun. There is no *independent* criminal conduct, only the *same* criminal conduct.

In *Lamas,* this court held 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.)

Respondent argues that all the holding from *Lamas* means is that the two misdemeanor gun possession charges cannot be first used to satisfy the substantive gang charge and thereafter used to satisfy the substantive gang charge's "felonious criminal conduct" element and thereby elevate the two misdemeanor gun charges to felonies. (Respondent's Brief at p. 6.) Respondent argues that all this quote means is to clarify the order of proof;

that misdemeanor gun possession, without more, cannot satisfy the felonious criminal conduct element of the substantive gang charge. (Respondent's Brief at pp. 6-8.) Respondent's position is not persuasive.

Common sense dictated the holding in *Lamas.* Misdemeanor criminal conduct is not felonious criminal conduct. However the court in *Lamas* went a step further and clarified its position: "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.)

What does the term "conduct distinct" mean? Does it mean the *same* conduct if a separate felony offense may be charged based on the same underlying conduct? Logically the answer is no; this court is looking for distinctly different felony conduct from the act of possessing a gun. That interpretation is supported by this court's charge to counsel in this case, which 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)." This court is equating the term "distinct" criminal conduct with "independent" criminal conduct.

Appellant noted that the court in *In re Jorge P.* (2011) 197 Cal.App.4th 628, 635, the published opinion that agreed with appellant's position, based its decision in part 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.)

Respondent disagrees with this analysis, arguing that there is no distinction between "felony conduct" and "felony offense." (Respondent's

Brief at pp. 10-14.) Respondent argues that "felonious criminal conduct" simply means the commission of an offense punishable as a felony. (Respondent's Brief at p. 11.) Respondent is correct, to a point, but does not carry his analysis further. "Felonious criminal conduct" is the commission of an offense punishable as a felony. However that one act of "felonious criminal conduct" may also result in charges and convictions of multiple felony offenses under section 954. Therefore "felonious criminal conduct" may result in one felony offense, or multiple felony offenses. To put it another way, one act of felonious criminal conduct may result in three felony offenses, but three felony offenses do not necessarily arise because of one act of felonious criminal conduct; they may arise because of three separate acts of criminal conduct.

Appellant argued that 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. Respondent rejects this reasoning, noting that section 186.22 pre-dated the changes made to sections 12031 and 12025 (providing for the elevation to a felony) by eight years.

(Respondent's Brief at p. 13.) However appellant's argument as to the language used in section 186.22 was not only as to its application in this case, but to the application in any case. As argued, "conduct" and "offense" do not have the same meaning. If the legislature wanted to refer to "offense" it could have done so. By otherwise referring to "conduct," the legislature meant the very same interpretation as this court found in *Lamas;* it is requiring distinct criminal conduct, not the same conduct that can be charged as separate criminal offenses. (*People v. Lamas, supra,* 42 Cal.4th 516, 524.)

Respondent argues that *People v. Jones* (2009) 47 Cal.4th 566, stands for the proposition that section 654 "may increase a defendant's criminal liability under different code sections." (Respondent's Brief at p. 15.) Respondent is mistaken, as *Jones* does not mention section 654 nor does it rely on section 654.

In *Jones*, the defendant was convicted of shooting at an inhabited dwelling (§ 246). "By itself, that felony carries a maximum sentence of seven years in prison. But when, as here, the crime is committed to benefit a criminal street gang, the punishment is life imprisonment, with a minimum parole eligibility of 15 years. (§ 186.22(b)(4).) And when, as here, a defendant personally and intentionally discharges a firearm in the commission of '[a]ny felony punishable by ... imprisonment in the state prison for life' (§ 12022.53, subd. (a)(17)), section 12022.53(c) requires

imposition of an additional 20–year prison term." (*People v. Jones, supra,* 47 Cal.4th at p. 572.) "At issue [wa]s whether defendant committed a 'felony punishable by ... imprisonment... for life' (§ 12022.53, subd. (a)(17)), thus triggering application of the 20–year sentence enhancement under section 12022.53(c)." (*Id.* at p. 569.)

The defendant argued "the trial court's finding [he] shot at an inhabited dwelling (§246) to benefit a criminal street gang (§ 186.22(b)(4)) does not transform the section 246 violation and its seven-year maximum prison term into a felony punishable by life imprisonment[with a minimum parole eligibility of 15 years], because section 186.22(b)(4) sets forth a penalty, not a substantive offense." (*People v. Jones*, supra, 47 Cal.4th at p. 572.) The *Jones* court noted, "Defendant is correct that section 186.22 [subdivision] (b)(4) is a penalty provision. A penalty provision 'sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute.' " (*People v. Jones, supra,* 47 Cal.4th at p. 576.) "Unlike an enhancement, which provides for an additional term of imprisonment, [a penalty provision] sets forth an alternate penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute." [Citation]. Here, defendant committed the felony of shooting at an inhabited dwelling (§ 246), he personally and intentionally discharged a firearm in the commission of that felony (§

12022.53(c)), and because the felony was committed to benefit a criminal street gang, it was punishable by life imprisonment (§ 186.22(b)(4)). Thus, imposition of the 20–year sentence enhancement of section 12022.53(c) was proper." (*People v. Jones, supra,* 47 Cal.4th at p. 578.)

Jones therefore only stands for the proposition that where a criminal act may be punished in alternative ways, an enhancement that applies to the alternative punishment may be imposed. Here, the elevation of the misdemeanor gun charges to felony charges is not an alternative penalty provision nor an enhancement.

And while respondent begs to differ, another *Jones* case decided by this court, and interpreting section 654, does apply to this case. In *People v. Jones* (2012) 54 Cal.4th 350, the defendant was driving with a loaded .38–caliber revolver. (*Id.*, at p. 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.)

Respondent argues that appellant's reliance on *Jones* is misplaced, as "nothing in *Jones* reversed the defendant's convictions for violating sections 12021, 12025, and 12031." (Respondent's Brief at p. 16.) The argument here is not about reversal of appellant's convictions, but is instead about elevation of appellant's misdemeanor gun offenses to felonies. Respondent argues that "the issue in our case concerns the defendant's potential conviction, not the potential multiple punishment for the same act." (Respondent's Brief at p. 17.)

What respondent does not address is appellant's claim that elevation of the two misdemeanor offenses to felonies carries serious adverse consequences. 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* (2000) 23 Cal.4th 1106, 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.

Finally, respondent argues, as the Court of Appeal held, the reasoning and conclusion reached in *Jorge P.* "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; Respondent's Brief at pp. 18-20, and fn. 8.)

As noted in appellant's opening brief, and not acknowledged by respondent, 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.

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: June 19, 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 REPLY BRIEF ON THE MERITS contains 3638 words as calculated by Microsoft Word 2003.

Dated: June 19, 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 REPLY BRIEF ON THE MERITS

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:

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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 June 20, 2013.

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 20, 2013, at Truckee, California.

Stephen Hinkle