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Penal Code Section 654: The Prosecutor's Dilemma

By Gerald M. Schneider

CALIFORNIA Penal Code section 654 provides that “an act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under the other. . . .” Penal Code section 654 manifestly has a dual purpose: (1) to prevent the imposition of multiple punishments for a single criminal act and (2) to bar prosecutions based on a single act after a court has either formerly acquitted or convicted and sentenced the defendant for that particular act or indivisible course of criminal conduct.

The objectives of Penal Code section 654 are clear, but their attainment has posed difficult problems for California courts. Specifically, it is the section 654 decisions of our appellate courts commencing with Neal v. State and continuing to the present that have left in their wake serious problems. It is the function of this article to define these problems, especially as they arise in municipal courts, and suggest methods of resolving them. The multiple punishment and multiple prosecution clauses will be treated under separate headings in this article.

Multiple Punishment Clause

In Neal, the leading case on section 654's bar against multiple punishment, the defendant threw gasoline into a married couple's...
bedroom, then ignited it. As a result, severe injuries were sustained by the husband and wife. The defendant was tried and convicted on two counts of attempted murder and one count of arson. The trial court imposed consecutive sentences on each of the attempted murder counts. The defendant then sought a writ of mandamus to compel the Adult Authority to set aside the convictions on both the second count of attempted murder and the count of arson. As one of the grounds for the issuance of the writ, the defendant maintained that the trial court had punished him three times for a single act, and had therefore violated the prohibition against multiple punishment contained in section 654. The Supreme Court set aside the conviction for arson on the ground that the trial court violated section 654's multiple punishment prohibition because the defendant's primary objective was to murder the husband and wife and arson "was merely incidental to the primary objective of killing." The court thus held that because the defendant had only a single objective he could be punished only once, even though he violated two distinct criminal statutes, one of which was not a necessarily included offense of the other. The two consecutive attempted murder convictions and sentences were allowed to stand.

To appreciate the significance of the Neal decision it is essential to note that the court cited an earlier case for the rule that, "section words "same act or omission" contained in § 654. Id. at 19, 9 Cal. Rptr. at 611, 357 P.2d at 843. According to Shepard's Citations, CAL. PEN. CODE § 654 was cited by California appellate courts 17 times between 1872 and 1942, and 46 times between 1942 and 1960. From 1960, the year of the Neal decision, to 1965, the section has been cited 78 times.

6 CAL. PEN. CODE §§ 187, 664.
7 CAL. PEN. CODE § 447a.
8 The Supreme Court treated the petition for mandamus as one for habeas corpus. This was done pursuant to the rule that where a defendant states a set of facts justifying the issuance of habeas corpus, his mistaken application for an inappropriate writ will not prevent the court from issuing habeas corpus.
10 This was done on the theory that section 654's prohibition against multiple punishment is to "insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person." Ibid. This statement reflects a legitimate criminal law goal. However, as Professor Perkins aptly points out, where a defendant's "act or omission" serves as the basis for punishment, society's interests are often inadequately protected, because the determinative factor for imposition of punishment should be the social harm caused by the defendant's "act or omission." Thus, the goal of section 654, as set forth by the Supreme Court, is unlikely to be attained, because the focus for punishment consideration is the "act or omission" itself. See Perkins, CRIMINAL LAW 6 (1957).
654 has been applied not only where there was but one ‘act’ in the ordinary sense . . . but also where a *course of conduct* violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.”12 The court in Neal endeavored to distinguish a divisible course of conduct from a single act by formulating the “intent and objective” test.13 In establishing this new guideline for determining whether the defendant’s criminal conduct constituted a single act or course of criminal conduct, or several acts, the Supreme Court stated:

> Whether a course of 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. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.14

The court did not cite any authority as a basis for the “intent and objective” test, and therefore it authored new law for California.

The significance of the “intent and objective” test is of major importance to California prosecutors; a prosecuting attorney’s failure to understand the ramifications of this test can result in a substantial injustice to the state. Conversely, the failure of defense lawyers to appreciate the significance of the test may result in a disservice to criminal defendants.

**Criticism of the Neal Intent and Objective Test**

Justice Schauer, dissenting in Neal,15 attacked the “intent and objective” test on the basis that the majority, by formulating and applying it, “[struck] down a factual determination which rested upon evidence that supports the contrary inferences on which the trial court

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12 55 Cal. 2d at 19, 9 Cal. Rptr. at 611, 357 P.2d at 843. (Emphasis added.)
13 For a list of the various tests which California courts have used for determining whether the defendant’s conduct was a single act or several acts see McKissack, *Recent Developments in the Criminal Law: The Included Offense Doctrine in California*, 10 U.C.L.A.L. Rev. 870, 885 (1963). For other divisibility tests see Note, *The Protection From Multiple Trials*, 11 Stan. L. Rev. 735, 742 (1959); Horack, *The Multiple Consequences of a Single Criminal Act*, 21 Minn. L. Rev. 805, 812-14 (1937). One test is predicated on the number of injuries to the state, but this has been used primarily in double jeopardy cases; see 20 Harv. L. Rev. 642, 643 (1907) and 51 Harv. L. Rev. 925, 926 (1938). The “intent and objective” test remains as the divisibility yardstick to be used by California courts today. See People v. McFarland, 55 Cal. 2d 748, 760, 26 Cal. Rptr. 473, 479, 376 P.2d 449, 455 (1962).
14 55 Cal. 2d at 19, 9 Cal. Rptr. at 611, 357 P.2d at 843. This language in Neal illustrates that the scope of § 654 extends beyond necessarily included offenses.
15 Id. at 21, 9 Cal. Rptr. at 613, 357 P.2d at 845.
based its final judgments." He said the majority had erroneously permitted habeas corpus to be used for the purpose of reviewing or initially deciding "questions of the intent and objective of the criminal actor," and that the "intent and objective" test is not a satisfactory one to be applied by a court. In the later case of People v. McFarland, Justice Schauer further criticized the "intent and objective" test on the ground that the formulation of that test was unnecessary in Neal because the majority could have reached the same result by finding that defendant committed only a single act, viz., throwing gasoline into his victims' bedroom. Since section 654 specifically refers to "an act" and bars multiple punishment based on a single act, "there was therefore no need to go on to discuss what rule might be invoked in an entirely different class of cases, i.e., those involving not a single act—the only situation embraced by the language of the code section—but a 'course of criminal conduct' encompassing multiple acts . . . ." Justice Schauer further contended that the majority, in formulating the intent and objective test, had confused the word "act" contained in section 654, with the "intent and objective of the actor," a phrase not contained in section 654 and which the majority coined in the Neal case. He pointed out another defect inherent in the majority's "intent and objective" test when he wrote that it distracts "from the factual analysis necessary to achieve the purpose of section 654, and instead becomes enmeshed in a post hoc speculation as to the scope of the criminal's objective." He continued the attack on the test set forth by the majority, and aptly pointed out that the criminal himself often has an ill-defined objective in the initial planning of his crime(s) and rarely considers "such matters as sudden interruptions by third parties and alternative means of perpetration, escape, or concealment." Justice Schauer contended that the Neal dictum (meaning

16 Id. at 22, 9 Cal. Rptr. at 613, 357 P.2d at 845. This objection is premised on the rule that the function of appellate courts is to review errors of law rather than pass on questions of fact. See 3 Witkin, California Procedure, Appeal § 69 (1954).
17 55 Cal. 2d at 24, 9 Cal. Rptr. at 614, 357 P.2d at 846. Here the dissenting opinion pointed out that the court quoted an earlier case, In re Chapman, 43 Cal. 2d 385, 273 P.2d 817 (1954), where the court held: "Whether the evidence accepted by the trier of fact shows petitioner guilty of one crime or of two [or of a course of criminal conduct, which, although it constitutes two separately defined crimes, can be punished but once by reason of section 654] is in part a factual question." Id. at 390, 273 P.2d at 820. The Chapman court relied on this rule as an alternate ground for denying habeas corpus.
19 Id. at 765, 26 Cal. Rptr. at 489, 376 P.2d at 465.
20 Id. at 768, 26 Cal. Rptr. at 491, 376 P.2d at 467.
21 Ibid.
the "intent and objective" test) resulted in appellate courts resorting to conjecture and speculation as to what the defendant's intent and objective was at the time of the crime(s) and that in making their decisions they often had ignored the trial record.22

The preceding objections to the Neal court's establishment of the "intent and objective" test are but some of Justice Schauer's criticisms.23 There are, however, additional objections to the Neal test not discussed by Justice Schauer which seriously impede the administration of criminal justice and interfere with the prosecution's duty to protect the public from criminal conduct. Some of these objections can be illustrated by considering the current strategic use of section 654 by defense lawyers in criminal cases.

The Strategic Use of Section 654 by Defense Lawyers

The California Supreme Court has indicated that the protection of section 654 extends to the Vehicle Code,24 and the District Court of Appeal has specifically ruled that section 654 is applicable to that code.25 This application to the Vehicle Code becomes quite significant in consideration of the fact that in 1963-64 there were 3,034,797 non-parking traffic violations filed in California municipal courts.26 In view of the foregoing, consider the following hypothetical situation:

A police officer files a report with the district attorney's office indicating that he had initially observed D while D was driving an auto-

22 Ibid. In the same dissenting opinion, Justice Schauer stated that the majority had apparently formulated the "intent and objective" test from the suggestion of a New York inferior court, People v. Savarese, 1 Misc. 2d 305, 114 N.Y.S.2d 816, 835-36 (Kings County Ct. 1952), and that New York's highest court had never adopted the lower court test Justice Schauer also detailed how the United States Supreme Court, in Morgan v. Devine, 237 U.S. 632 (1915), had expressly rejected the "intent and objective" test. It should be noted that New York has a statute identical to § 654 (N. Y. PEN. LAW § 1938).

23 Not all of Justice Schauer's criticisms of the Neal "intent and objective" test were listed in the text. For example, in Neal he formulated a hypothetical situation illustrating the undesirable results which would follow if courts applied that test, and in McFarland he engaged in a comparison between cases, decided subsequent to Neal, having comparable fact situations, but which were decided differently even though each court used the "intent and objective" test to determine the issue of divisibility of criminal conduct.

24 See People v. Brown, 49 Cal. 2d 577, 591 n.4 320 P.2d 5, 14 n.4 (1958), where the Supreme Court stated that section 654 not only prohibits multiple punishment arising from Penal Code offenses, but applies to punishments provided by other codes also.

25 People v. Young, 224 Cal. App. 2d 420, 36 Cal. Rptr. 672 (1964). In this case the court decided the section 654 issue by resorting to the strict language of the section and completely refrained from using the "intent and objective" test.

26 20 CAL. JUDICIAL COUNCIL BIENNIAL REP. 120 (1965).
mobile 70 miles per hour in a 35-mile per hour zone. The officer's report indicates that he pursued D in a patrol car with his siren on and flashing his red light in an attempt to stop D. D ignored the red light and siren and drove faster. During the course of this pursuit D drove to the left of a double line, went through a stop sign, and then struck and killed a pedestrian in a cross-walk. The district attorney's office issues a complaint charging D with excessive speeding, refusing to obey an officer's lawful order, failure to drive on the right-hand side of the road, going through a valid stop sign, and reckless driving. The complaint further charges D with misdemeanor vehicle manslaughter.

When D is arraigned in municipal court on the preceding charges, his attorney pleads D guilty to excessive speeding and not guilty on all other counts. D's lawyer then asks that D receive sentence immediately. The court, exercising its discretion, complies by imposing a fine on D for the speeding violation, and sets a trial date on the other counts to which D pleaded not guilty. When D subsequently appears in court for trial on those counts, his lawyer claims the protection of section 654, contending that the "intent and objective" test established by Neal prevents the court from imposing punishment on D, even though he may be found guilty on the remaining counts. Thus, D's lawyer contends, a trial on those counts would be a nullity. D's lawyer argues that during D's entire course of conduct he had only a single intent and objective—to drive an automobile. Since the court

27 While D's situation is hypothetical, district attorneys throughout the state regularly see actual cases comparable to it.
28 CAL. VEHICLE CODE § 22350.
29 CAL. VEHICLE CODE § 2800.
30 CAL. VEHICLE CODE § 21650.
31 CAL. VEHICLE CODE § 22450.
32 CAL. VEHICLE CODE § 23103.
33 CAL. PEN. CODE § 192(3)(b).
34 A municipal or justice court judge must wait six hours but not more than five days to sentence D on the count to which he pleaded guilty. CAL. PEN. CODE § 1449. But a defendant in D's situation waives the six-hour delay in order to be punished immediately. Thus, the judge cannot wait for the prosecution of the other counts to sentence D unless he refers D to the probation department. Ibid. See note 61, infra, for further details on the procedure relative to probation referrals by courts.
35 The author has seen actual court cases where defense lawyers have used § 654 in the manner described in D's hypothetical situation. Other deputy district attorneys have reported comparable incidents to the author.
36 In response to this defense contention, the prosecution could argue that the intention to drive an automobile is not a criminal intention or objective. Virtually all the Supreme Court and district court of appeal cases in applying the Neal "intent and objective" test have looked at only the defendant's criminal intentions and objectives. Thus, to use a defendant's non-criminal intent seems inappropriate.
previously punished D for his "course of criminal conduct," which was motivated by his single "intent and objective," section 654 prohibits further judicial punishment.\textsuperscript{37} If the court agreed with this interpretation of the Neal "intent and objective" test D would not face punishment or prosecution on the remaining counts.

Can it be said that the foregoing result is one that the legislature intended when it enacted Penal Code section 654, or that such a result properly safeguards the public from dangerous criminal behavior? Would this result achieve the end that the Neal majority intended, viz., that "the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability"?\textsuperscript{38}

Manifestly, the legislature never intended that section 654 be used in the manner just described. What then was the intention of the legislature when it enacted the section? The answer might be revealed by considering those crimes for which D could actually be charged in a multiple-count complaint for the conduct ascribed to him in the hypothetical situation. For driving at an excessive rate of speed, D could have been charged with violating four different sections of the Vehicle Code.\textsuperscript{40} For ignoring the officer's red light and siren, D could have been cited for violating two sections of the Vehicle Code and one section of the Penal Code.\textsuperscript{41} D could be cited with violating three Vehicle Code sections\textsuperscript{42} for the act of driving to the left of the double line and two Vehicle Code sections\textsuperscript{43} for the stop sign violation. For striking the pedestrian, D could be charged with violating two Vehicle Code sections\textsuperscript{44} as well as one Penal Code section.\textsuperscript{45} In addition to the

\textsuperscript{37} It should be noted that, while lawyers often make this argument, and the trial courts sometimes accept it, they are not justified in so doing. Even if punishment would be barred, the issue could not properly be raised until after trial. See text accompanying notes and infra.

\textsuperscript{38} 55 Cal. 2d 11, 20, 9 Cal. Rptr. 607, 612, 357 P.2d 839, 844 (1960).

\textsuperscript{39} Cal. Vehicle Code §§ 2352 (exceeding prima facie speed limit), and 23103 (reckless driving).

\textsuperscript{40} Cal. Vehicle Code §§ 2800 (refusing to obey an officer's lawful order) and 21806 (failure to yield the right-of-way to an emergency vehicle).

\textsuperscript{41} Cal. Pen. Code § 148 (resisting, delaying or obstructing an officer in the performance of his duty).

\textsuperscript{42} Cal. Vehicle Code §§ 21650 (failure to drive on the right-hand side of the road), 21460 (driving to the left of double parallel solid lines, and 21658(a) (moving out of a lane of traffic without first ascertaining that such movement could be made safely).

\textsuperscript{43} Cal. Vehicle Code §§ 22450 (failure to stop at a valid stop sign) and 22350 (this section requires a driver to operate his vehicle at a reasonable and prudent speed; D's speed, when he went through the stop sign, should have been zero).

\textsuperscript{44} Cal. Vehicle Code §§ 23104 (reckless driving proximately causing bodily in-
preceding possible charges against D, he could be cited for violating county and municipal ordinances which are comparable in their language and effect to those Vehicle and Penal Code sections just listed.

A reasonable judicial test, which would reflect the legislative intent behind section 654, should prevent D from being punished for violating all the preceding listed statutes and should also prevent D's escaping the more serious consequences arising from the manslaughter charge. This result could be achieved by permitting punishment for a violation of any statute which is not a necessarily included offense of another.\(^4\) The application of the necessarily included offense doctrine to D's situation would preclude D's being punished for violating the multitude of statutes listed in the preceding paragraph, but at the same time it would still subject him to possible conviction on the manslaughter charge, despite the speeding fine. If D is to be punished commensurately with his criminal liability, which is the purpose of the prohibition against multiple punishment according to the Neal majority,\(^5\) it is a non sequitur to hold that the imposition of a fine for the speeding violation will prevent D from being judicially punished for the unlawful killing of a pedestrian.\(^6\)

An additional defect in the "intent and objective" test is that it  


\(^5\) This, of course, is contrary to the holding in Neal and several other cases preceding it. The Neal case stated: "The proscription of section 654 against multiple punishment of a single act, however, is not limited to necessarily included offenses." 55 Cal. 2d at 20, 9 Cal. Rptr. at 612, 357 P.2d at 844. The lesser included offense doctrine was defined in People v. Greer, 30 Cal. 2d 589, 596, 184 P.2d 512, 516 (1947), where the court said: "[W]here an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense."

\(^6\) Vehicle Code offenses are mala prohibita, and it is settled law in California that the doing of an act malum prohibitum may be a criminal offense regardless of the actor's intent. Thus, Justice Traynor, author of the majority's Neal opinion, stated in People v. Vogel, 46 Cal. 2d 798, 801, n.2, 299 P.2d 850, 853 n.2 (1956), that certain classes of statutes "enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations" do not have the actor's wrongful intent as a necessary element of the offense. Since intent is not an element of Vehicle Code offenses, would it be rational to apply an "intent and objective" test to them in order to ascertain a defendant's criminal liability? Further, in all the § 654 cases to date, the California courts have been considering the wrongful intent(s) of the defendant for purposes of determining divisibility of conduct. But in Vehicle Code cases, the mere intent to drive is not unlawful, and thus it would seem inappropriate to determine a defendant's lawful intentions for the purpose of resolving the divisibility of criminal conduct issue. This last observation would not, however, hold true in cases where the defendant started to drive knowing his license was suspended or revoked. In this limited instance his intent to drive would be unlawful.
does not provide a guideline which enables courts to determine the scope of a defendant's intent and objective. Thus, an appellate court reviewing a case where the record is silent on the subject of multiple punishment must resort to conjecture. For example, consider a case where D shoplifts a ten-dollar skateboard in a merchant's store and escapes without detection. Three hours later D shoplifts another ten-dollar skateboard in the same store and is arrested on the premises for that offense. An appellate court could conclude that at the time D stole the first skateboard he had but a single objective, and that was to steal from his victim just that one time; if it reached this conclusion then D would properly be subject to separate punishments for each theft because his intent and objective did not extend to the subsequent theft. Conversely, the court could conclude that D had but a single objective at the time he stole the first skateboard, and that was to steal both items; this conclusion by the court would result in D being punished only once even though D stole two different items at different hours because D had but a single intent and objective. The appellate court's choice in the preceding situation is a significant one because D would be subject to two consecutive terms in the county jail if he intended to steal only once at the time of the first theft, whereas he would be subject to only one jail term if his intent and objective encompassed the theft of both items. This result clearly demonstrates the lack of merit in the "intent and objective" test in that as a defendant's criminal intent and objective initially expands, his criminal liability diminishes. The absence of a guideline enabling appellate courts to apply the "intent and objective" test can only result in uneven application of the test by California courts; thus both prosecuting and defense attorneys are handicapped in attempting to assess a defendant's ultimate criminal liability. The "intent and objective" test thus defeats two of the primary purposes of the criminal law,—to forewarn members of the community as to what constitutes punishable criminal behavior, and to insure that the law imposing punishment for criminal conduct is uniformly applied.

The, "intent and objective" test, which currently applies only to

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49 This would constitute a violation of Cal. Pen. Code §§ 484, 488 (petty theft).
50 In People v. Bynes, 223 Cal. App. 2d 268, 273, 35 Cal. Rptr. 633, 637 (1963), the District Court of Appeal applied the "intent and objective" test in a unique manner. The court concluded the evidence indicated that each defendant had two objectives from the outset, and this permitted dual punishment to be imposed.
Penal Code 654’s multiple punishment clause, and not to its multiple prosecution clause, affects all stages of criminal proceedings. Therefore, it is essential to consider the legal effect of that test at the pre-trial and trial levels.

Pre-Trial and Trial Proceedings

At the complaint drafting stage, the prosecution is forced to speculate on the subject of the defendant’s intent and objective. The prosecution, at this time, is thereby put in a situation similar to that of the appellate courts in section 654 cases where the trial record is silent on that subject. The failure of the prosecution to indulge in “intent and objective” speculation at the complaint drafting phase may well lead to unsatisfactory results from the prosecutor’s point of view. For example, consider the following hypothetical case. A police report indicates that D was initially observed by witnesses screaming profanities while pounding on a house door at night. A woman was seen to open the door, and D grabbed her, pulled her outside and began to strike her. D finally knocked the woman down, removed a knife from his clothing and made slashing movements at her with the knife without striking her person. The police then arrived at the scene and ordered D to drop his knife; D refused and the police informed him he was under arrest. D refused to submit and the officers were compelled to use force to subdue him.

If the prosecution drafts a single complaint charging D with disturbing the peace, assault, battery, exhibiting a deadly weapon in a threatening manner, and resisting arrest, it provides defense counsel an opportunity to plead his client guilty to the disturbing the peace charge, get him immediately sentenced upon that charge by waiving time for the imposition of sentence, and plead him not guilty on the remaining counts. This strategic maneuver places the prosecution in the position of having to resist defense counsel’s contention

53 “Section 654’s preclusion of multiple prosecution is separate and distinct from its preclusion of multiple punishment.” Neal v. State, 55 Cal. 2d 11, 21, 9 Cal. Rptr. 607, 612, 357 P.2d 839, 845 (1960). However, the District Court of Appeal appears to be divided on the question of applying the “intent and objective” test, as a means of determining divisibility of conduct, to both clauses. Compare People v. Wilson, 224 Cal. App. 2d 738, 37 Cal. Rptr. 42 (1964) with People v. Manago, 230 Cal. App. 2d 645, 41 Cal. Rptr. 260 (1964).
54 CAL. PEN. CODE § 415.
55 CAL. PEN. CODE § 240.
56 CAL. PEN. CODE § 242.
57 CAL. PEN. CODE § 417.
58 CAL. PEN. CODE § 148.
that section 654 prohibits the court from imposing further punishment upon D even though D is ultimately convicted on all the counts to which he pleaded not guilty. The court would then be required to determine whether the disturbing the peace charge, to which D pleaded guilty, was within the "intent and objective" of those counts to which D had pleaded not guilty. If the court agreed with the defense attorney, the prior imposition of punishment for disturbing the peace would prevent the court from imposing additional punishment on D in the event he proceeded to trial and was found guilty on the remaining counts. In view of the foregoing, one solution to the problem confronting the prosecutor is to file a complaint charging D with the most serious offense (resisting arrest) and omit other possible statutory charges. However, this "single-count solution" does not serve the best interests of the courts or the public; it also increases the possibility that the prosecuting attorney will obtain no conviction at all.

In cases where the scope of the defendant's intent and objective is uncertain, if the prosecution adopts the "single-count" solution, it may preclude a court from determining that the defendant's course of conduct was divisible and thereby punishable more than once. Thus, if the prosecutor reacts to the defense counsel's strategic use of section 654 by charging a defendant with a single count, this "solution" works against the stated objective of section 654 pronounced by the Neal majority: to insure that a defendant's punishment will be commensurate with his criminal liability. Therefore, the prosecution should not readily adopt the "one-count solution" even though the Neal formulation of the "intent and objective" test tends to encourage such a result. In view of the foregoing, the question that remains is: should the prosecution charge a defendant with several counts in a single complaint, thereby risking the prospect that the defense will use section 654 in the strategic manner previously described?

In drafting criminal complaints the prosecution must distinguish between "single-act" cases where several statutes are violated in the same instant of time, such as the Neal case where the defendant violated both arson and attempted murder statutes by the act of throwing gasoline into the victims' bedroom, and cases where statutory violations seemingly arise from the same act but are not confined to the same instant of time. In the first group of cases the prosecution should

55 Cal. 2d at 29, 9 Cal. Rptr. at 611, 357 P.2d at 844.

60 An example of this latter type of case occurs when a defendant is charged with going through an arterial stop sign (CAL. VEHICLE CODE § 22450) and with driving
charge a defendant only with the most serious crime; such a procedure would be in accordance with the purpose of section 654. But in the latter group of cases, the prosecution should file a single complaint charging the defendant with violating each statute which is not a lesser included offense of another. In those cases where the prosecution is unable to predict how a court would apply the Neal "intent and objective" test it should file a multiple-count complaint in order that a court will have the opportunity to pass on the question of divisibility of conduct. In the last group, the prosecution can counteract the defense's strategic use of section 654 by requesting the court to refer the defendant to the probation department for a sentencing report when he enters his plea of guilty to the least serious crime contained in the complaint. Then the prosecution can bring the defendant to trial on the more serious charges contained in the multiple-count complaint before he is actually sentenced on the matter referred to the probation department. This procedure evades the defense's strategic use of section 654 because the defendant has not been punished on the charge to which he pleaded guilty in the initial phase of the judicial proceeding.

Both the prosecution and the defense are confronted with problems in those cases where the defendant enters a plea of guilty to the least serious count in a multiple-count complaint, pleads not guilty to the remaining counts, and is punished upon the count to which he pleaded guilty. The defense attorney’s problem in this connection arises at the time for trial on the remaining counts to which the defendant pleaded not guilty. At this stage of the proceeding, counsel for the defendant will endeavor to invoke the protection of section 654 against multiple punishment on the theory that his client has already been punished for the “same course of criminal conduct” in a prior judicial proceeding. But Penal Code section 1016, which enumerates the pleas a defendant may enter in a judicial proceeding, provides:

- While under the influence of intoxicants (Cal. Vehicle Code § 23102). In this situation, the defendant commits but a single act, driving, but the violation of driving while under the influence of intoxicants precedes, coincides with, and also follows the point of time at which the stop sign violation occurred.

- Under Cal. Pen. Code § 1449, the court may extend the time for sentencing not more than twenty-one days in any case where the question of probation is considered. The court can order a probation report on its own motion under this section even if the defendant objects or states that he will refuse to accept probation; see People v. Billingsley, 59 Cal. App. 2d Supp. 846, 139 P.2d 362 (App. Dep’t Super. Ct., Los Angeles, 1943).

- People v. Tideman, 57 Cal. 2d 574, 21 Cal. Rptr. 207, 370 P.2d 1007 (1962), is a case where the prosecution successfully used this strategy. See text accompanying notes 64-67 infra.
fendant can enter in a criminal proceeding, does not specifically pro-
vide for a plea of prior punishment—though it does permit a plea of
once in jeopardy. The question raised then is whether the defendant’s
plea of guilty to the first count placed him in jeopardy so as to bar a
trial on the counts to which he pleaded not guilty.63 The question was
answered in *People v. Tideman.*64 In that case the defendant was
charged in a single complaint with abortion65 and murder.66 At the
time for trial the defendant entered a plea of guilty to the abortion
count and a plea of once in jeopardy, along with his plea of not guilty,
to the murder count. The trial judge referred the defendant to the
probation department on the abortion count and then proceeded with
the jury trial on the murder count. The jury found the defendant
guilty of murder; the court then dismissed the abortion count and
sentenced the defendant on the murder count. On appeal the Cali-
ifornia Supreme Court held that

in a single criminal action (pleading any number of counts), no plea
of guilty to, or order of dismissal or acquittal of any separately
pleaded offenses, included or otherwise, will bar the progress of that
prosecution as to the other counts. The prosecution on such other
counts may continue until each, on its own merits, has been severally
and finally disposed of by bringing the defendant to conviction and
sentence or to acquittal.67

A defendant, then, is precluded from raising the plea of former jeop-
dardy at the trial on those counts to which he pleaded not guilty. Thus,
Penal Code section 1016 does not provide a defendant with a plea
which will enable him to bar the actual trial on those counts to which
he pleaded not guilty; he must raise Penal Code 654’s prohibition
against multiple punishment subsequent to trial, such as at sentencing
or on appeal.68

63 A defendant may bar a second trial on a meritorious plea of former jeopardy by
obtaining a writ of prohibition; this procedure was established in *Gomez v. Superior
Court,* 50 Cal. 2d 640, 653, 328 P.2d 976, 984 (1958) and was followed in *Cardenas
v. Superior Court,* 56 Cal. 2d 273, 275, 14 Cal. Rptr. 657, 659, 363 P.2d 889, 891
(1961).

64 57 Cal. 2d 574, 21 Cal. Rptr. 207, 370 P.2d 1007 (1961). In this case the court
said that federal and state statutes dealing with double jeopardy and § 654 “are neither
identical shields nor (properly applied) do they overlap. They have different origins.
Each rests on a different base, has a different objective, and performs a different func-
tion. If confusion is to be avoided it is important that the two not be intermingled.”
Id. at 578, 21 Cal. Rptr. at 209, 370 P.2d at 1009.

65 CAL. PEN. CODE § 274.

66 CAL. PEN. CODE § 187.

67 57 Cal. 2d at 583, 21 Cal. Rptr. at 212, 370 P.2d at 1012.

68 The defendant should not be able to invoke the multiple prosecution clause of
The prosecution's problem also occurs when the defendant succeeds in being punished on his guilty plea to the least serious count in a multiple-count complaint. The problem is whether or not the offense to which the defendant pleaded guilty is connected by his "intent and objective" to the counts in the same complaint to which he pleaded not guilty. If the prosecution concludes that there is a section 654 connection, it might appear that to continue with prosecution of the case would be pointless because the application of the "intent and objective" test would preclude a court from imposing further punishment upon the defendant if he were convicted. However, such a conclusion would be erroneous. The prosecution has substantial reasons for obtaining convictions, even though a court could not impose punishment upon those convictions by virtue of section 654. For example, a record of conviction for writing fraudulent checks affords the basis upon which the prosecution may charge a defendant with a prior conviction in a felony complaint; the existence of the prior conviction converts the second offense from a misdemeanor to a felony. If the prosecution did not proceed with the defendant's trial because it appeared that a court could not impose punishment, no "prior" could be charged against the defendant and the legislature's intent in this area would be defeated. A further important reason for the prosecution to obtain convictions, even when punishment is not possible, is to aid various administrative agencies. For instance, the Department of Motor Vehicles is charged with the responsibility of suspending or revoking drivers' licenses upon receipt of abstracts of conviction in certain cases. If the prosecution does not proceed against the defendant on those charges to which he pleaded not guilty, the Department would not be able fully to perform its statutory duties. In McFarland, the Supreme Court made a pronouncement which is compatible with the viewpoint that the prosecution should

§ 654 as a means of barring the trial upon those counts to which he pleaded not guilty, for the reason contained in People v. Tideman, supra note 62, viz., because there is no second prosecution. The trial upon those counts to which defendant pleaded not guilty ensues as a result of the defendant's pleadings and not because the prosecution filed more than one complaint.


70 Ibid. There are many other crimes in addition to writing fraudulent checks which impose heavier penalties for their commission in the event a defendant has a prior conviction for the same offense. For example, driving a vehicle while under the influence of intoxicants (Cal. Vehicle Code § 23102) and possessing marijuana (Cal. Health & Safety Code § 11530).


seek convictions even though section 654 would preclude punishment upon those convictions.\(^3\) There the court stated:

\[(I)\text{t should be stressed that section 654 proscribes double punish-}
\]ment, not double conviction; conduct giving rise to more than one offense within the meaning of the statute may result in initial conviction of both crimes, only one of which, the more serious offense, may be punished. . . . The appropriate procedure, therefore, is to eliminate the effect of the judgment as to the lesser offense insofar as the penalty alone is concerned.\(^4\)

A further consideration for the prosecutor is that a study of Neal and the section 654 cases following it indicates that the time for avoiding the problems stemming from appellate court application of section 654 is at the trial itself. Neal makes it clear that the question of whether or not a defendant’s course of conduct is divisible for punishment purposes should be raised at trial. In a case prior to Neal the Supreme Court said. “It is, of course an established rule that habeas corpus may not be used instead of an appeal to review determinations of fact made upon conflicting evidence after a fair trial.”\(^5\) But the Neal court said it was not reviewing determinations of fact made upon conflicting evidence, because the subject was not raised during trial and the Attorney General on the return to the order to show cause did not contest the defendant’s statement of facts.\(^6\) In view of the

\(^3\) However, there is a District Court of Appeal case, In re Keller, 232 A.C.A. 637, 42 Cal. Rptr. 921 (1965), which held that only a burglary count could be pleaded as a “prior” for the purpose of using it against the defendant in an habitual criminal proceeding. The theft could not be pleaded as a “prior” because it was indivisibly connected to the burglary. This holding works against the Supreme Court’s ruling in People v. McFarland, 58 Cal. 2d 748, 762, 26 Cal. Rptr. 473, 481, 376 P.2d 449, 457 (1962), which specifically stated that section 654 bars multiple punishment and not multiple conviction. But for a contrary District Court of Appeal holding, see People v. Wallace, 217 Cal. App. 2d 440, 31 Cal. Rptr. 697 (1963).

\(^4\) 55 Cal. 2d 748, 762, 26 Cal. Rptr. 473, 481, 376 P.2d 449, 457 (1962). The court seems to have overruled itself on this point because in the earlier Neal case it stated: “If only a single act is charged as the basis of the multiple convictions, only one conviction can be affirmed, notwithstanding that the offenses are not necessarily included offenses.” 55 Cal. 2d at 19, 9 Cal. Rptr. at 611, 357 P.2d at 844 (1960). However, this language from Neal refers to “a single act” whereas the McFarland language referred to “conduct giving rise to more than one offense.” It is possible that the Supreme Court intentionally made a distinction, thereby creating two classes of section 654 cases with regard to the question of whether more than one conviction will be allowed to stand. If such was the court’s intention then only one conviction can be affirmed in the “single act” cases.

\(^5\) In re Chapman, 43 Cal. 2d 385, 390, 270 P.2d 817, 820 (1954).

\(^6\) The Supreme Court in Neal, 55 Cal. 2d at 17, 9 Cal. Rptr. at 610, 357 P.2d at 842 (1960), apparently conceded the validity of the Attorney General’s contention that the question of divisibility of the defendant’s course of criminal conduct is a
foregoing, the prosecution should be prepared to raise either during
the trial or at sentencing the divisibility of criminal conduct issue in
all multiple-count single complaint cases.\textsuperscript{77} Such a procedure has twin
advantages. It would preclude the defendant from raising the ques-
tion by habeas corpus and it would relieve appellate courts of the
burden of having to speculate about a defendant’s “intent and ob-
jective”—a burden forced upon them by previous trials where there was
a complete failure to raise the question of the defendant’s intent and
objective for criminal liability purposes.\textsuperscript{78}

\textbf{Multiple Prosecution Clause}

While the multiple punishment clause is designed to prohibit dual
punishment for “the same act,” the multiple prosecution clause has
the purpose of preventing harassment of criminal defendants, which
would occur if they were subjected to trials based upon an “act” for
which they had previously been acquitted, or convicted and sen-
tenced.\textsuperscript{79} The issue of multiple prosecution arises in cases where the
prosecution files several complaints; it does not arise in cases where
the prosecution files a single complaint charging multiple counts.\textsuperscript{80}

Section 654’s multiple prosecution clause provides that where a
defendant has been acquitted, or convicted and sentenced, under one
code provision, a subsequent prosecution based upon the same act
or omission is barred. This rule applies even though a different code

\textsuperscript{77} People v. Mistretta, 221 Cal. App. 2d 42, 34 Cal. Rptr. 365 (1963) provides a
cue as to how the question of divisibility of the defendant’s course of criminal conduct
can be raised during trial. In analyzing that case, the appellate court determined
that the fact situation indicated that the defendant’s intent and objective \textit{changed} during
the course of his criminal conduct. The court found that this change was manifested
by the defendant switching from one criminal act to an entirely different criminal act
during the period that the defendant was terrorizing his victim. The court concluded
that the defendant’s alteration of his original intent and objective exposed the defend-
ant to punishment for each crime charged in the complaint.

\textsuperscript{78} Since \textit{Neal}, the district courts of appeal have considered approximately seventy
cases involving § 654. However, if the rule regarding the scope of what an appellate
court can review on appeal were adhered to, and if the question of multiple punish-
ment is resolved at the trial level upon sufficient evidence, it should be precluded from
consideration at the appellate level. This is based on the premise that the question of
multiple punishment is one of fact; the function of an appellate court is to review
questions of law only.

\textsuperscript{79} Neal v. State, 55 Cal. 2d 11, 21, 9 Cal. Rptr. 607, 612-13, 357 P.2d 839, 844
(1960).

\textsuperscript{80} People v. Tideman, 57 Cal. 2d 574, 583, 21 Cal. Rptr. 207, 212, 370 P.2d 1007,
1012 (1962).
section is used as the basis for the second prosecution. Significantly, both the multiple punishment and multiple prosecution clauses of section 654 refer to the "same act or omission." Thus, the test formulated to determine what constitutes an act or acts for one clause should also be used for the other clause.\textsuperscript{81} In \textit{Neal}, the Supreme Court stated that "section 654's preclusion of multiple prosecution is separate and distinct from its preclusion of multiple punishment."\textsuperscript{82} The court did not indicate whether the "intent and objective" test was to be applied to the prosecution clause in the same way it had been applied to the multiple punishment clause. In the subsequent case of \textit{Seiterle v. Superior Court},\textsuperscript{83} the Supreme Court seemed to indicate that the "intent and objective" test would be used in connection with the multiple prosecution clause. In \textit{Seiterle}, the defendant entered pleas of guilty to two counts of first degree murder, one count of kidnapping for the purposes of robbery with bodily harm, and one count of conspiracy to commit murder. After a jury trial was conducted for the purpose of fixing the penalty, defendant received the death penalty for the murder counts, and life imprisonment for the kidnapping offenses and the conspiracy to commit murder. On appeal, the sentence on the murder counts was reversed because of prejudicial error, but the life imprisonment sentence imposed for the kidnapping was modified only to the extent that the words "without possibility of parole" were added. The defendant then applied to the Supreme Court for a writ of prohibition, contending that the pending penalty "retrial" on the two murder counts should be barred because it would violate the multiple prosecution clause of section 654. Defendant also raised the issue of double jeopardy. In answering defendant's contentions, the Supreme Court stated that "it is only if, as petitioner claims,\textsuperscript{84} the record compels the conclusion that the murders of Mr. and Mrs. Duvel were the culmination of an 'indivisible' transaction involving their kidnapping with bodily harm and terminating with their ultimate murders that the provisions of section 654 would properly be applicable."\textsuperscript{85} Then the court quoted section 654's multiple punishment clause, omitting mention of the clause barring multiple prosecution. The subject of multiple prosecution was not otherwise discussed in

\textsuperscript{82} 55 Cal. 2d 11, 19, 9 Cal. Rptr. 607, 611, 357 P.2d 839, 843 (1960).
\textsuperscript{83} 57 Cal. 2d 397, 20 Cal. Rptr. 1, 369 P.2d 697 (1962).
\textsuperscript{84} The court is apparently referring to the petitioner's claim that the penalty retrial would violate section 654's multiple prosecution clause.
\textsuperscript{85} 57 Cal. 2d 397, 400, 20 Cal. Rptr. 1, 2, 369 P.2d 697, 698 (1962).
the decision and the court apparently considered the issue before it to be multiple punishment. If the Supreme Court intended to rule that the Neal "intent and objective" test was applicable to the multiple prosecution clause, it did not adequately do so. The discussion, as it relates to Neal, is dictum, rather than law, because the "retrial" was for the purpose of determining penalty (punishment) only; the defendant was attempting to bar multiple punishment, not multiple prosecution. Justice Schauer, who concurred and dissented, succinctly pointed out that the penalty retrial was not a subsequent prosecution because the defendant was subjected to a single prosecution upon several counts.86 Thus, section 654's multiple prosecution clause was not applicable to the case, and the court rendered its decision on the basis of the multiple punishment clause.87

The Supreme Court's vague method of dealing with the question of whether the "intent and objective" test should be applied to section 654's multiple prosecution clause is undoubtedly responsible for the "split" decisions on that subject rendered by the district courts of appeal. The significance of applying either the test set forth in Neal, or some other test, to the multiple prosecution clause can readily be appreciated when consideration is given to some of the representative split decisions.

District Court of Appeal Multiple Prosecution Cases

People v. Wilson88 involved a situation where the defendant was informed of his arrest by an officer while both were seated in the latter's car. The defendant fled to his father's house a short distance away. The officer pursued the defendant, and demanded that he surrender, but the defendant refused to do so. The officer returned to his car, obtained handcuffs, and returned to the house. The defendant then threatened him with a rifle, and escaped. A complaint was filed against the defendant, charging him with exhibiting a firearm in a rude, angry and threatening manner.89 The trial of the cause resulted in a hung jury. A complaint was next filed charging the defendant with resisting arrest.90 The first case was not brought to trial within

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86 Id. at 404-405, 20 Cal. Rptr. at 5, 369 P.2d at 701.
87 Mr. Witkin states that "the multiple prosecution preclusion of P.C. 654 is governed by the same 'ultimate object' test of 'act or omission' as the multiple punishment prohibition," and he cites Seiterle as authority. 2 Witkin, CALIFORNIA CRIMES Punishment for Crime § 950 (1963). Thus, Witkin and this author are in disagreement as to the effect of Seiterle on the multiple prosecution clause.
89 CAL. PEN. CODE § 417.
90 CAL. PEN. CODE § 148.
thirty days after the mistrial, and defendant, not having waived his right to a speedy trial, obtained a dismissal. After the information charging him with resisting arrest was filed in superior court, the defendant successfully moved for an order setting it aside, pursuant to Penal Code section 995, and dismissing the action. From that order, the People appealed. The appellate court felt that the two Penal Code sections charged against the defendant in separate misdemeanor complaints were not the "same offense" within the meaning of Penal Code section 1387 and therefore the defendant could not prevail by relying on that statute. The court also rejected defendant's contention that Penal Code section 1023, which prohibits "double jeopardy," would stay prosecution of the defendant on the second misdemeanor complaint, which was filed after the mistrial. The court, commenting on defendant's double jeopardy theory, held that the second prosecution was based upon a crime which was neither the same as the first crime nor a necessarily included offense of the initial crime charged against the defendant.

The court then considered the multiple prosecution clause of section 654, and held that since there had been neither conviction nor sentence in either action, the only question was whether or not the dismissal of the first action amounted to an "acquittal" within the meaning of section 654. The defendant contended that the second prosecution was based upon the same act which served as the foundation for the first prosecution and therefore the dismissal of the first action was an "acquittal" under section 654 which would bar the second prosecution. This contention was rejected as a non sequitur by the court, which held that "the act upon which the first prosecution was based is but one incident in the entire conduct of defendant upon which the second prosecution is based." The court concluded by holding that the second prosecution was not based upon the same act

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91 CAL. PEN. CODE § 1382.
92 Since CAL. PEN. CODE § 995 provides for dismissal of an information only on the grounds that the defendant had not been legally committed by a magistrate before it was filed, or that he had been committed without legal or probable cause, the order setting aside the information must have been based on the proposition that defendant's commitment was illegal, since prosecution would be barred.
93 CAL. PEN. CODE § 1387 provides: "An order for the dismissal of the action, made as provided in this chapter [§§ 1381-1387], is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony." (Emphasis added.)
94 "When the defendant is convicted or acquitted or has been once placed in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the offense charged in such accusatory pleading." CAL. PEN. CODE § 1023.
95 224 Cal. App. 2d at 744, 37 Cal. Rptr. at 46.
within the meaning of section 654, reversed the order which had dismissed the action in superior court, and remanded the case for further proceedings.86 Thus, the First District Court of Appeal, Division Two, did not employ the Neal "intent and objective" test as a means of determining the issue of multiple prosecution.

Nine months later, People v. Manago97 was decided by Division Three of the same court. In Manago, the defendant entered a locker room in a department store and was observed rummaging through clothing contained in two lockers. He was arrested in the store, and a search of his person revealed that he was carrying a concealed straight-edge razor. Defendant was charged with burglary in a felony complaint; he was charged in a separate misdemeanor complaint with violating a city ordinance which proscribed the carrying of a concealed weapon while "hiding, lurking, or loitering upon or about the premises of another." The first trial was based on the felony, resulted in a hung jury, and was reset for trial. Five days later, defendant was tried on the misdemeanor charge and was convicted. He was sentenced to six months in the county jail. A new trial was had on the burglary charge, and defendant was found guilty of burglary in the first degree, the first degree finding being based on his possession of the razor at the time of the burglary.

The court stated: "It seems clear, however, that the rule against multiple prosecution is at least as broad as that against double punishment,"88 citing Neal. After reiterating the Neal "intent and objective" test, the court said it would be guided by those cases which dealt with double punishment in deciding the case at hand.99 The

86 Significantly, the court analogized the term "the same offense," contained in CAL. PEN. CODE § 1387, to the term "the same act" in section 654. The effect of this is a holding that the words "the same act" in the multiple prosecution clause are to be applied in accordance with the "necessarily included offense" doctrine for the purpose of determining if there has been a prohibited multiple prosecution in violation of section 654.


88 Id. at 647, 41 Cal. Rptr. at 262.

89 In Neal the Supreme Court said that a defendant could be punished separately for the harm done to each victim even though there was but a single act. 55 Cal. 2d at 20, 9 Cal Rptr. at 612, 357 P.2d at 844. Since the Manago court said it would follow the double punishment cases for guidance in deciding multiple prosecution cases would the preceding Neal pronouncement apply to multiple prosecution cases? If it did apply the existence of multiple victims would enable the prosecution to file separate complaints, one for each victim, even though the defendant committed but a single act. The Supreme Court probably will not, however, permit the prosecution to file separate complaints in the multiple victim situations. In the concluding part of the Neal opinion the court said, "the rule against multiple prosecutions is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed; double
court rejected the Attorney General's contention that defendant entered the locker room carrying the concealed razor with the intent to commit theft, and then formed a new intent to "hide, lurk, or loiter" there while carrying the weapon. Emphasis was apparently placed on the fact that the issue of an alteration by the defendant of his original intent and objective was not raised during either trial. The court concluded that the prosecution had relied upon identical conduct to establish both the felony and the misdemeanor since there was insufficient evidence introduced at trial on the subject of whether or not the defendant's original intent and objective changed during his course of conduct. The court said that the evidence placing the defendant in the locker room for "three or four minutes" weakened the attorney general's contention regarding the defendant's change of intent, apparently feeling that it was unlikely defendant's intent and objective had changed in that time. Concluding its opinion, the court specifically states that there was no bar of double jeopardy operating in favor of the defendant, because the misdemeanor was not an offense necessarily included in the felony charge. Thus, the court applied the Neal "intent and objective" test to bar the subsequent prosecution on the burglary charge.

Applicability of the Neal Test to the Multiple Prosecution Clause

Despite the split in the district courts of appeal on the question of the applicability of the Neal "intent and objective" test to the multiple prosecution clause, it seems doubtful that the Supreme Court will apply that test to the one clause and not the other. However, there is a basis upon which the Supreme Court can make a divided application of the test. In Neal, the Supreme Court stated that "section 654's preclusion of multiple prosecution is separate and distinct from its preclusion of multiple punishment. The rule against multiple prosecution may be precluded even when double punishment is permissible." 55 Cal. 2d 11, 21, 9 Cal. Rptr. 607, 612-13, 357 P.2d 839, 844-45 (1960). (Emphasis added.)

100 Apparently the People were relying on the same theory that was advanced in People v. Mistretta, 221 Cal. App. 2d 42, 34 Cal. Rptr. 365 (1963), where the District Court of Appeal held that a defendant could be exposed to multiple punishment within the meaning of section 654 if the evidence indicated that the defendant's original intent and objective changed during his course of criminal conduct.

101 Kellert v. Superior Court, 235 A.C.A. 673, 45 Cal. Rptr. 355 (1965) is another district court of appeal case dealing with § 654's multiple prosecution clause. The court did not apply the Neal "intent and objective" test; it resorted to the language of section 654 and held that the second prosecution was based upon the "same act" for which the defendant had previously been prosecuted and punished.
utions is a procedural safeguard against harassment and is not necessarily related to the punishment to be imposed . . . “102 Because the two clauses contained in section 654 are separate and distinct, each having a different purpose, the Supreme Court could conceivably apply a different divisibility of conduct test to each clause. While the ultimate purpose of each clause is different, the principal factor being considered by the courts in both clauses is the interpretation to be given to the words “an act or omission”; this is the common denominator of the two clauses. But the presence of both common and uncommon factors in the two clauses provides the Supreme Court with the opportunity to apply the Neal “intent and objective” test to either the multiple punishment clause alone or to both clauses. If the Supreme Court ultimately applies the Neal “intent and objective” test to cases similar to Manago and Wilson, where the prosecution filed more than one complaint against a defendant, the result will be that the multiple prosecution clause will not achieve the goal set for it by that court, viz., to prevent harassment of a criminal defendant, for the reasons outlined below in the discussion of procedural problems.

Procedural Aspects of the Multiple Prosecution Clause

It is clear that there is a strong, direct relationship between Penal Code section 654’s multiple prosecution clause and the double jeopardy doctrine set forth in Penal Code section 1023.103 Both statutes are primarily intended to prevent the harassment of a criminal defendant by means of subsequent trials.104 However, despite their similarity, the procedure for invoking protection is different in each case. The procedural method for invoking the multiple prosecution clause renders that clause, for practical purposes, ineffectual in many cases.

Penal Code section 1016, enumerating the various pleas a defendant can enter in a criminal action, provides for a plea of once in

103 See note 94, supra.
104 However, one substantial distinction between the former jeopardy doctrine and § 654’s multiple prosecution preclusion is that § 654 requires that there must have been “an acquittal or conviction and sentence” before its protection is available. The former jeopardy doctrine’s protection becomes available when a defendant is “(1) placed on trial, (2) for the same offense, (3) on a valid indictment or information or other accusatory pleading, (4) before a competent court, (5) with a competent jury, duly impaneled and sworn and charged with the case; or, if the trial is by the court, it must be ‘entered upon’. ” 1 WITKEN, CALIFORNIA CRIMES Defenses § 184 (1963). Thus, a defendant may avail himself of the former jeopardy protection without ever having reached the stage of acquittal or conviction and sentence.
jeopardy. A defendant can avail himself of this once in jeopardy protection by establishing that he previously faced trial for the same offense, or for an offense which is either a lesser or greater included offense. But in those cases where the offenses charged against the defendant are not included offenses, and he is subjected to separate prosecutions, the defendant cannot invoke section 1016's once in jeopardy plea. The question then is, can a defendant invoke the multiple prosecution clause protection in advance of the second trial in those cases where he cannot enter the once in jeopardy plea? Such cases involved situations where the defendants were not permitted to raise the protection of Penal Code sections 1023 and 1016 because the offenses in the separate complaints were neither lesser nor greater included offenses under California law. Thus, a defendant in the Manago-Wilson situation is not able to raise the former jeopardy doctrine as a bar, and cannot raise the shield provided by section 654's multiple prosecution clause because Penal Code section 1016 does not provide for such a plea. Since there is no statutory plea available

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105 Ibid.
107 Id. §§ 205, 207.
108 See note 46 supra for the California judicial interpretation of what constitutes necessarily included offenses. In California the greater offense is included in the lesser; see 1 Witkin, California Crimes Defenses § 209 (1963).
109 Can a defendant raise some other plea in the trial court in advance of the second trial for the purpose of barring it under § 654's prohibition? If the charge in the prior trial and the pending trial are connected within the meaning of section 654's multiple prosecution clause, the trial court involved in the pending trial would be without jurisdiction. Cal. Pen. Code § 1004 provides that a demurrer for lack of jurisdiction can be entered only where that defect appears on the face of the accusatory pleading. Since the trial court would necessarily have to consider the defendant's entire fact situation and its relation to the prior trial in which the defendant was either acquitted or convicted and sentenced, it is obvious that the jurisdictional defect would not appear on the face of the complaint. Thus, a defendant cannot raise the issue of the court's lack of jurisdiction in § 654 multiple prosecution cases having fact situations comparable to those of Wilson and Manago. Cal. Pen. Code § 1385 provides that the court, either on its own motion or by application of the district attorney, can order the dismissal of a case in the furtherance of justice. The reason for the dismissal must be set forth and no dismissal can be made for any cause which would be a ground of demurrer to the accusatory pleading. Cal. Pen. Code § 1387 says, "An order for the dismissal of the action . . . is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony." In cases where the prosecution has filed more than one complaint the question arises as to whether or not a defense attorney would be able to persuade the court to dismiss the second action on its own motion under Cal. Pen. Code § 1385. If the court did dismiss on its own motion in misdemeanor cases the defendant would not gain an advantage because the prosecution has the right of appeal from such dismissal by virtue of Cal. Pen. Code § 1466(a). In felony cases where a court dismissed on its own motion under section 1385 the de-
to a defendant in this situation, the only method whereby he may bar the subsequent municipal court trial is to apply to superior court for a writ of prohibition.\textsuperscript{110} Section 654's multiple prosecution clause is thereby rendered substantially ineffective as a protective procedural device, because of the nature of the proceedings involved in a petition for a writ of prohibition.

A writ of prohibition may be issued when: (1) there is a threatened judicial act which, if executed, would be without or in excess of the acting court's jurisdiction; (2) the threatened act has not been completed; and (3) there is no other adequate remedy.\textsuperscript{111} The criminal defendant who finds himself in a situation comparable to that in Wilson and Manago will meet all three of the preceding criteria.\textsuperscript{112} The state, as the real party in interest, has an opportunity to oppose the issuance of a writ of prohibition.\textsuperscript{113} This initial opposition is not an adversary pleading or a return; "it is merely a legal argument designed to prevent issuance of an alternative writ or order to show

\textsuperscript{110} Seiterle v. Superior Court, 57 Cal. 2d 397, 399, 20 Cal. Rptr. 1, 2, 369 P.2d 697, 698 (1962). The general rule adhered to by the Supreme Court and the district courts of appeal is that a defendant may not by-pass the superior court in applying for a writ of prohibition. The rule exists because the appellate courts do not have machinery designed to hear cases where facts are in dispute. In the few cases where the appellate courts have permitted a defendant to by-pass the superior court, the grounds have been an emergency involving the public welfare. See 3 Witkin, California Procedure Extraordinary Writs § 8 (1954) Kellet v. Superior Court, 235 A.C.A. 673, 45 Cal. Rptr. 355 (1965), appears to be a section 654 case where the District Court of Appeal ignored the preceding general rule. In this case the defendant was charged in a misdemeanor complaint with violating Cal. Pen. Code § 417 (exhibiting a firearm in a threatening manner); he pleaded guilty to the charge and was sentenced to jail. Before the plea was entered, the prosecution filed a felony complaint against the defendant for violation of Cal. Pen. Code § 12021 (possession by a convicted felon of a firearm capable of concealment). The defendant was held to answer at the preliminary hearing and he applied for a writ of prohibition to bar the superior court trial. The District Court of Appeal was in a position to review all the facts because it had the preliminary hearing transcript, which showed that the facts of the case were not in dispute at that hearing. The court specifically commented upon the fact that the prosecution had not raised at the preliminary hearing the issue of whether the defendant had committed one act or two acts. The court, in issuing the writ, did not deviate from the rule that a defendant cannot by-pass the superior court in his application for a writ when the fact situation is unsettled, because there was no dispute over the facts in the preliminary transcript.


\textsuperscript{112} This point is demonstrated by Seiterle v. Superior Court, 57 Cal. 2d 397, 20 Cal. Rptr. 1, 369 P.2d 697 (1962).

\textsuperscript{113} 3 Witkin, California Procedure Extraordinary Writs § 57 (1954).
cause where the petition is clearly without merit." If the petition survives this stage, "the matter should then be considered on its merits with the opposing party permitted to answer." When the superior court deliberates on the merits of the case at the hearing on the order to show cause, it can consider questions of law and fact which may be raised in an answer filed by the People, and it can also receive evidence. Thus, the defendant who petitions for a writ of prohibition for the purpose of barring a subsequent trial is subjected to a judicial proceeding which is somewhat comparable to a trial. The superior court will receive evidence on the entire fact situation surrounding the criminal conduct and consider the fact situation in relation to the former matter in which the defendant was either acquitted or convicted and sentenced. The issue of guilt or innocence is, of course, not determined. The multiple prosecution clause of section 654 is thus rendered partially ineffective because the only procedural device which the defendant can invoke results in almost the very thing which the defendant seeks to avoid—a judicial proceeding where questions of law and fact are passed upon concerning the case itself. Despite the fact that section 654's multiple prosecution clause does not prevent the harassment of a defendant, it can afford protection from ultimate conviction. Thus, in the Manago case, the conviction itself was eliminated when the defendant invoked the multiple prosecution clause subsequent to trial. However, the purpose of the clause is to prevent multiple prosecution, rather than eliminate a conviction subsequent to prosecution.

The Defendant's Waiver of the Multiple Prosecution Protection

The strong similarity between the prohibition of double jeopardy and that of multiple prosecution raises the question of whether the

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114 Id. § 58.
115 Id. § 59. (Emphasis added.)
116 "If an answer be made, which raises a question as to a matter of fact . . . affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury and postpone the argument until such trial can be had, and the verdict certified to the court." CAL. CODE CIV. PROC. § 1090. (Emphasis added.)
117 If the superior court grants the writ, this would be comparable to an acquittal, but if it is not granted the defendant must face the trial which he attempted to bar.
118 The plea of once in jeopardy provided by CAL. PEN. CODE § 1016 is also subject to the same procedural defect as the multiple prosecution clause in cases where the defendant seeks a writ of prohibition to bar a trial. However, under the once in jeopardy plea the defendant has alternatives to seeking a writ of prohibition and therefore the jeopardy plea is not completely ineffective.
waiver rule in the former jeopardy cases will be applied to the multiple prosecution clause. It is established law in California that the failure of the defendant to raise the special plea of once in jeopardy results in a waiver of that defense. It has already been noted that Penal Code section 1016 provides for a specific plea of once in jeopardy but makes no provisions for pleading the multiple prosecution clause of section 654. However, this omission should not prevent the application of the waiver rule to the multiple prosecution clause. Defendant should not be afforded more opportunity to raise the defense of multiple prosecution than that of double jeopardy. A firm rule should be established providing that the failure of a defendant to apply for writ of prohibition when he seeks to invoke the protection of the multiple prosecution clause will operate as a waiver of that protection.

Conclusion

Multiple Punishment

What is needed in the multiple punishment area is a Penal Code section that will preclude the imposition of punishment for offenses which are necessarily included offenses of one for which the defendant has already been punished. The Neal "intent and objective" test should be overruled, to prevent defendants from using their initial intent and objective status as a complete shield to punishment for all the statutory violations committed in their course of criminal conduct. The application of the lesser included offense doctrine to the issue of multiple punishment would restore predictability to an area of criminal law where predictability is essential; it should be applied in all cases except those where the multiple statutory violations coincided exactly in point of time. An absence of predictability in the punishment area of criminal law has the effect of placing the defense lawyer, the prosecuting attorney, and the community in a position of complete ignorance as to the ultimate liability of a criminal defendant.

Multiple Prosecution

There is no need for the legislature to enact a substitute for the multiple prosecution clause because the necessarily included offense doctrine is already codified in Penal Code section 1023; that doctrine provides the proper protection for both defendants and the public.

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119 Witkin, California Criminal Procedure, § 244 (1963).
120 Neal itself would be an example of this last type of case because there the arson and attempted murder violations occurred simultaneously.