Double Jeopardy v. Double Punishment--Confusion in California

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DOUBLE JEOPARDY V. DOUBLE PUNISHMENT—
CONFUSION IN CALIFORNIA

I. INTRODUCTION

It has been said "the California law on double jeopardy is a strange amalgam of constitutional and statutory provisions. It is often unclear whether a particular decision is based on the California Constitution or on a statute, . . . ." Aside from the Constitutional guarantees against double jeopardy, there are no less than eight separate California statutes in this field. The principal statutes, however, are Penal Code § 1023, prohibiting multiple prosecutions and Penal Code § 654, largely prohibiting multiple punishment for the same act or omission. This article explores the application and misapplication, past and present, of the two principal statutes. This topic is an important one because of the every day misapplication of these statutes by the California criminal courts. The purpose of the note is to clarify a confusing area of the California criminal practice.

II. THE MEANING OF "JEOPARDY"

Jeopardy is the danger of conviction and punishment a defendant undergoes when he is put on trial before a competent court, based on an indictment sufficient in form and substance to sustain a conviction, after the jury has been charged with his deliverance. A jury has been charged when it has been sworn. Once jeopardy has attached, the defendant cannot again be charged for the same offense unless the factual situation giving rise to his discharge comes within one of the recognized exceptions to this general rule.

The fundamental notion forming the basis of the doctrine was stated in Green v. United States, where the United States Supreme Court said:

2 U. S. CONST. amend V. The Fifth Amendment provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." California provides: "No person shall be twice put in jeopardy for the same offense." CAL. CONST. art. I § 13.
3 CAL. PEN. CODE §§ 654, 687, 793, 794, 1023, 1101, 1188, and 1387.
5 People v. Ammerman, 118 Cal. 23, 50 Pac. 15 (1897). Notwithstanding the fact that the indictment or information is invalid, either in form or substance, CAL. PEN. CODE § 1022 provides that the defense of once in jeopardy is available to the defendant if there has been a trial on the merits, and the defendant was acquitted.
6 People v. Finch, 119 Cal. App. Supp. 2d 892, 895, 258 P.2d 1124, 1127 (1953). In the case where the defendant has waived the jury trial and receives a court trial, jeopardy attaches when the trial has been entered upon. Usually this means that the evidence has been offered and received.
7 355 U.S. 184 (1957). For a historical view of the plea of double jeopardy, see the dissenting opinion of Justice Frankfurter, id. at 198.
The underlying idea, one that is deeply rooted in at least the Anglo-Saxon system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.\(^8\)

In *Green* the court was construing the Fifth Amendment, a part of the Federal Bill of Rights and not the California constitutional and statutory requirements. The provision against double jeopardy in the Federal Constitution was adopted and interpreted long before California incorporated such a provision and the California legislature adopted the interpretation and principles of the double jeopardy provision of the Fifth Amendment.\(^9\)

A balancing of conflicting interests is necessary between the principles expressed in *Green* and the interest of the state and the public in the prevention of crime and the punishment of criminals. Thus, under certain circumstances, it will be held that jeopardy has not attached after the jury has been charged with the defendant's deliverance or after the trial has commenced without a jury. In California, by statute, the trial court judge may dismiss the jury and declare a mistrial without jeopardy attaching where there appears good cause and necessity.\(^10\) Illness or incapacity of a juror,\(^11\) or the failure of the defendant to appear at the trial after it has commenced, vitiate the jeopardy which has attached at the beginning of the trial.\(^12\) A "hung" jury does not constitute jeopardy.\(^13\)

Another aspect of jeopardy, which illustrates the balancing of the conflicting personal and state interests, is the rule that jeopardy is a personal defense, and being so, it can be waived by the defendant. Mere silence, or failure to object at a second trial, has been held however, not to be a waiver of this important personal privilege.\(^14\)

\(^8\) 355 U.S. 184, at 187-88.
\(^12\) People v. Higgins, 59 Cal. 357 (1881).
\(^13\) At the expiration of the time which the trial court judge deems proper, if he is satisfied that there is no reasonable probability of a verdict, he may discharge the jury without jeopardy attaching. Paulson v. Superior Ct., 58 Cal. 2d 1, 8, 375 P.2d 641, 647, 22 Cal. Rptr. 649, 655 (1962). See Annot., 150 A.L.R. 764 (1944). Also see Cal. Pen. Code § 1140.
\(^14\) Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); In re Moore, 29 Cal. App. 2d 56, 59, 84 P.2d 57, 58 (1938).
III. Penal Code § 1023

Two major problems are raised by § 1023.\(^\text{16}\) They are (1) to determine what is the "identity of the offense" test and (2) what constitutes a "necessarily included offense" under § 1023? These are the tests for its application set down by the Code section, which in essence provides that once a defendant has been placed in jeopardy a bar is formed preventing a subsequent trial based on the same offense charged in the first trial or based on a charge which is necessarily included in the offense that was charged at the first trial. In applying these tests, the practicing attorney must remember that the double jeopardy provisions of § 1023 are only available where jeopardy has attached in a previous trial, and has no application to a trial in the first instance where the same crime is charged under different Penal Code sections by a multi-count indictment.\(^\text{16}\)

A. The "Identity of the Offense" Test

Penal Code § 1023 prohibits a second prosecution for the same offense charged in the first accusatory pleadings, if the first trial resulted in an acquittal, conviction, or the attachment of jeopardy. In determining what is the "same offense charged" the courts have developed the "identity of the offense" test. They have made it clear that in considering this plea they will look only to the accusatory pleadings to determine what the offense was, and not to the acts or omissions of the defendant that were the basis of the charge. This is so even though the acts and omissions of the defendant could have been the basis for charging the defendant with a violation of another penal section.\(^\text{17}\) Even if the same evidence is used in the second trial as was used in the first trial, § 1023 is not available to the defendant, for the same evidence may support a conviction for more than one violation under the Penal Code.\(^\text{18}\)

Since it would be rare for the defendant to be charged in a second trial for a violation of the same penal section, unless his acts or omissions were against multiple victims\(^\text{18}\) or for some reason enumerated under section II of this article jeopardy did not attach in the first proceeding, it appears that the "identity of the offense" test is of little help to the practicing attorney preparing a jeopardy defense.

\(^{16}\) CAL. PEN. CODE § 1023 provides: "When the defendant is convicted or acquitted or has been once put in jeopardy upon an accusatory pleading, the conviction, acquittal, or jeopardy is a bar to another prosecution for the same offense charged in such accusatory pleading, or for an attempt to commit the same, or for an offense necessarily included therein, of which he might have been convicted under that accusatory pleading."

\(^{17}\) People v. Tideman, 57 Cal. 2d 574, 370 P.2d 1007, 21 Cal. Rptr. 207 (1962).

\(^{18}\) People v. Majors, 65 Cal. 138, 3 Pac. 597 (1884).

\(^{19}\) People v. Mehra, 73 Cal. App. 162, 181, 238 Pac. 802, 809 (1925).

B. The "Included Offense" Test

The provision of § 1023 which is most likely to aid the attorney in preparing a jeopardy defense lies in the prohibition against charging an offense in a second trial which was "necessarily included" in an offense charged at a prior trial. Since the identical offense is seldom charged, it appears that § 1023 is pragmatically only an aid for "necessarily included offenses." As to what is a "necessarily included offense," a constant judicial expansion, by the Supreme Court of California, has taken place.

In People v. Krupa,\textsuperscript{20} the court in construing § 1023 specifically stated what constituted a "necessarily included offense."

It is clear that where an offense cannot be accomplished without necessarily committing another offense, the latter is a necessarily included offense. If, in the commission of acts denounced by one statute, the offender must always violate another, the one offense is necessarily included in the other.\textsuperscript{21} (Emphasis added.)

Thus a prosecution for battery could not be followed by a prosecution for an assault based upon the same acts. An assault would be a necessary element of the battery, it being impossible to commit a battery on a victim without committing an assault. This test has also been held to apply where there is a possibility of conviction for a greater offense, \textit{i.e.}, first or second degree murder. When the jury finds the defendant guilty of the lesser offense there is an implied acquittal of the greater and the defendant can no longer be prosecuted for it in another trial.\textsuperscript{22} Also, if the defendant is charged with a lesser offense and convicted, he cannot then be tried for a greater offense involving the same acts, because the conviction in the first trial negates a finding on the greater charge.\textsuperscript{23} \textit{Therefore, under § 1023, the greater and lesser offenses arising out of the same acts or omissions are necessarily included in each other.}

\textit{People v. Greer}\textsuperscript{24} is a graphic illustration of this test. The defendant was convicted of lewd and lascivious conduct and statutory rape. It was argued that the conviction in a previous trial on the charge of contributing to the delinquency of a minor included the

\textsuperscript{20} 64 Cal. App. 2d 592, 149 P.2d 416 (1944).
\textsuperscript{21} Id. at 598.
\textsuperscript{22} ROMASANTA, \textit{A New Approach to Double Jeopardy}, 10 Hastings L.J. 188 (1958).
\textsuperscript{23} People v. Ny Sam Chung, 94 Cal. 304, 28 Pac. 642 (1892). During the trial the judge dismissed the information against the defendant charging him with petty larceny, and the defendant was subsequently convicted of grand larceny. It was held that Penal Code § 1023 precluded the prosecution for the grand larceny because the defendant had already been in jeopardy for a lesser offense. Note, defendant could not have availed himself of Penal Code § 654 because in the first trial there had not been an acquittal, or a conviction, and sentence.
\textsuperscript{24} 30 Cal. 2d 589, 184 P.2d 512 (1947).
offenses of statutory rape and lewd and lascivious conduct, and that under § 1023 this subsequent conviction was barred. The court upheld this argument, holding that every violation of Penal Code § 261 (1) (defining statutory rape) is also a violation of Penal Code § 702, (defining the offense of contributing to the delinquency of a minor) because statutory rape under § 261 (1) includes always and necessarily contributing to the delinquency of a minor. Although one could contribute to the delinquency of a minor without committing statutory rape, one could not commit statutory rape without contributing to the delinquency of a minor.

The case of People v. Whitlow is based on facts similar to Greer but with a different result. Here the defendant was charged with forcible rape under Penal Code § 261 (3) and was found guilty by the jury of contributing to the delinquency of a minor under § 702. He appealed, contending that the trial court exceeded its jurisdiction in entering the judgment of conviction, because contributing to the delinquency of a minor was not necessarily included in the crime of rape and was not charged in the indictment. The court upheld his argument on the facts, but distinguished the Greer case. In Whitlow the defendant was charged generally with rape, and since this could be committed against an adult, it would not always and necessarily include the offense of contributing to the delinquency of a minor.

The application of § 1023 was considerably broadened by People v. Marshall, which looked to the facts alleged in the indictment to determine what was a "necessarily included offense." In Marshall, defendant pleaded not guilty to a charge in the information worded in the following manner:

Robbery, in violation of Penal Code 211, . . . committed as follows: That the [defendant] . . . did willfully, unlawfully, feloniously, and forcibly take from the person and immediate presence of Jack J. Martin . . . Seventy Dollars . . . and an automobile . . .

Defendant was found guilty of car theft, under Vehicle Code § 503 (now § 10851). He appealed, contending that car theft was not necessarily included in the offense of robbery, and that therefore his conviction was not supported by the indictment charging him with robbery. He based his appeal on Whitlow, which appeared to have limited the test of what constituted a "necessarily included offense" to the statutory definition of the offense charged in the accusatory pleadings. The Supreme Court of California agreed with this holding but observed that the statutory definition of the crime charged

27 Id. at 396, 309 P.2d at 457.
in the accusatory pleading was not the exclusive test of what constituted an "included offense." The ultimate criterion for such a determination was whether such a crime could be sustained from the facts alleged in the accusatory pleading. In Marshall, although the statutory definition of robbery did not necessarily include the offense of car theft, there were sufficient facts in the accusatory pleading to inform the defendant that he would have to defend against that charge. Thus, although the offense was not specifically mentioned by the statutory language, the offense was necessarily included because of the language of the accusatory pleading, and the conviction was sustained.

Due to Marshall, there is now a double test of what constitutes a "necessarily included offense" under § 1023. First, under the theory of the Krupa case the court will have to consider whether the offense in question could ever be committed without committing another offense. If it could, then there is no "necessarily included offense" as understood prior to Marshall. Second, the court will have to consider that even if the offense charged could be committed without committing another offense, it may be that the facts alleged in the accusatory pleadings could have sustained a conviction in the first trial. If this is so, then the offense charged in the second trial was "necessarily included" in the one charged in the first trial and § 1023 bars another prosecution.

As a result of Marshall, consideration must be given to the accusatory pleadings. California's liberal rule for drafting accusatory pleadings is based on the underlying philosophy that their purpose is to inform defendant of the charge, or charges, he will face at the trial and is not an exercise in precise draftsmanship. In formulating an indictment, complaint or information the District Attorney may draft it in the statutory language defining the offense charged, or in any simple, concise, and readily understandable language so long as it informs the defendant of the nature of the charges. Because of this liberality the form of the pleading may, or may not, broaden the scope of the "necessarily included offense" under § 1023. By drafting the pleading according to the exact statutory language, the

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28 Cal. Pen. Code § 952 provides: "In charging an offense, each count shall contain, and shall be sufficient if it contains, in substance, a statement that the accused has committed some public offense therein specified. Such statement may be in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

prosecutor may limit the application of § 1023 to only "necessarily included offenses" as understood prior to Marshall. However, by drafting the accusatory pleading in "simple, concise, and understandable language," the facts alleged in the pleading will determine whether or not there is a "necessarily included offense." For example, suppose the defendant was charged by an information in the following language: "Theft, in that the defendant John Doe took by means of force against the person, property belonging to one Jane Doe."

Under the wording of this information a jury could properly find the defendant guilty of at least the crime of second degree robbery, assault or battery. Thus, in this instance the drafting of the pleading increases the possible number of crimes for which defendant might be convicted in the first trial. On the other hand, assuming that under the same information, the defendant was acquitted of the crime of robbery, § 1023 would apply to bar a subsequent prosecution for assault or battery since under the rule laid down by Marshall, the crimes of assault and/or battery were necessarily included in the facts alleged in the indictment. Thus the diligent prosecutor has an initial consideration when he is preparing the indictment. (1) Should he take the "shotgun" approach, giving the jury the opportunity to convict on any possible crimes which defendant committed under the facts by alleging facts generally in the indictment or (2) should he take a more limited approach and charge only the crime under the exact statutory language, thus limiting § 1023 to the old "necessarily included offense" test of Krupa and saving other charges for a possibly more favorably inclined jury.

The expansion of § 1023 by the Marshall case raises an additional difficulty. A larger burden has been placed on the trial court judge when giving instructions to the jury. The general rule was stated in People v. Burns:

It is elementary that the court should instruct the jury upon every material question upon which there is any evidence deserving of consideration whatever. . . . The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. . . . That is a question within the exclusive province of the jury. However incredible the testimony of the defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true.30

It has been held that the trial court judge has this duty to the defendant whether or not he has been requested to give the instruc-

The courts have applied this general rule to the cases involving included offenses. If the trial court refuses to give requested instructions as to an included offense, and there has been some evidence to sustain this request, it is reversible error not to give the instructions. This is so, even if there is substantial evidence to sustain the conviction as to the greater offense charged. The only exception to this rule is where the evidence shows that if the defendant is guilty at all, he is guilty of the greater offense. In this case, if the trial court gives an instruction in regard to an included offense, it is reversible error.

Since it is the duty of the trial court judge to instruct as to a "necessarily included offense," a proper instruction would have to include not only those offenses that have been specifically proved at the trial, but also an instruction as to any offense that could be inquired of the facts alleged in the accusatory pleading and incidentally shown at the trial. Failure to so instruct would be reversible error.

**IV. Penal Code § 654**

**Double Punishment and Double Jeopardy**

California Penal Code § 654 has two important and distinct provisions. The first prohibits punishment for the same act or omission made punishable by different sections of the Penal Code, and the other provides that jeopardy will attach after an acquittal, or conviction and sentence for an act made chargeable by more than one section of the Penal Code.

**A. Double Punishment Under Penal Code § 654**

The scope of the proscription of § 654 against multiple punishment depends largely on the meaning given to the phrase "act or omission." Does this mean a single act or can it mean a series of acts prompted by one overriding intent? In construing the phrase, earlier cases alighted on the "necessarily included offense" test of

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33 Ibid.
34 People v. Huntington, 138 Cal. 261, 70 Pac. 284 (1903). The defendant was charged with murder. The prosecutor offered evidence of an illegal abortion which was denied by defendant. The only crime for which defendant could properly be convicted was murder and a manslaughter instruction is unnecessary and improper.
35 CAL. PEN. CODE § 654 provides: "Acts Made Punishable by Different Provisions of this Code. 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 any other. In the cases specified in Sections §§ 648, 667, and 668, the punishment therein prescribed must be substituted for those prescribed for the first offense, if the previous convictions is charged in the indictment and found by the jury."
Penal Code § 1023. If the crime was necessarily included in the greater offense charged, the courts held there could be no multiple punishment. 36

In People v. Keboe, 37 the California Supreme Court recognized § 654 could still apply where the crime was not necessarily included in another:

But although a given crime is not necessarily included within another one for the purposes of the double jeopardy statute, under certain circumstances conviction of both crimes cannot be justified. . . . The Penal Code recognizes this principle in Penal Code 654.

This section is not concerned with the question of whether the particular crime, in the abstract, necessarily and always is included within another one, but rather, it is directed to the question of whether two statutes punish one act of the defendant.

One year later, in People v. Knowles, 38 the defendant was charged with two counts of kidnapping for the purpose of robbery under Penal Code § 209, and with one count of armed robbery. He was convicted on all three counts. On appeal, the California Supreme Court reversed the conviction of armed robbery, stating that the acts of kidnapping could not be separated from the act of armed robbery, and that § 654 required that the defendant be punished only once.

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. It is the singleness of the act and not the offense that is determinative. 39

The leading case construing the legislative intent relative to the phrase "acts or omissions" is Neal v. State of California. 40 Here the defendant attempted to kill his victims by soaking the bed in which they were sleeping with gasoline and igniting it. Neither of his victims died but both were severely burned. The defendant was charged with two counts of attempted murder and with one count of arson. The California Supreme Court reversed the conviction of arson holding that the conviction violated Penal Code § 654. In construing the phrase "act or omission," the court postulated what later became known as the "indivisible transaction" test of § 654. Little weight was placed on the acts of defendant. The point of emphasis became defendant's intent and dominant purpose.

38 35 Cal. 2d 175, 217 P.2d 1; cert. denied, 340 U.S. 879 (1950).
39 Id. at 187, 217 P.2d at 8.
Whether a course of criminal conduct is divisible, and therefore gives rise to more than one act within the meaning of Penal Code 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.41

The conviction of the crime of arson was reversed because it was incidental to the dominant purpose of the actor, i.e., killing his victims. Under this test, the application of § 654 is no longer limited to where the crime is a necessarily included offense.42

The applicable scope of the double punishment provision of § 654 may best be explained by examples of the three possible acts to which it could apply. They are: (1) The situation where the defendant does one act against a single person; (2) the situation where the defendant commits a series of criminal offenses with one dominant purpose against a single victim; and (3) the situation where the defendant does any of the acts described in (1) or (2) against multiple victims.

Under the first category, where the defendant by a single act commits a criminal offense against a single victim, he may be charged and convicted under any or all applicable Penal Code sections. But Penal Code § 654 prohibits punishment for more than one of the offenses.43

Under the second category, where defendant does a series of criminal acts against a single victim, the Neal case is directly applicable, even though in Neal there were multiple victims. The court in Neal was not concerned with the punishment of the defendant on the charge of murder, but was concerned with the sentencing for arson. If all the acts which are criminal offenses are done under one dominant intent of the defendant, within the meaning of § 654, then the defendant can be punished under any one of them, but not under more than one. Thus in People v. Niles,44 defendant was

41 Id. at 19, 357 P.2d at 843-44, 9 Cal. Rptr. at 611-12.
42 Justice Schauer dissented in the Neal case. He felt that the opinion of the majority hinged on a factual situation which is properly determined at the trial court level. Further, he felt that the Neal test would open the doors to habeus corpus proceedings. He states: "Are the courts now to re-examine the cases of prisoners now serving final sentences of imprisonment for both murder and related robbery and to determine whether a defendant set out to rob and incidentally killed or set out to kill and incidentally robbed (in either of which events, under the majority holding, he could be sentenced at most for murder) or whether perchance he set out to commit both robbery and murder and executed both of his intents as part of the transaction by divisible acts?" 55 Cal. 2d at 25, 357 P.2d at 847, 9 Cal. Rptr. at 615.
43 KAHN, Double Jeopardy, Multiple Prosecutions, and Multiple Punishment; A Comparative Analysis, 50 Cal. L. Rev. 855, 857 (1962); People v. Kynette, 15 Cal. 2d 731, 762, 104 P.2d 794, 810 (1940).
charged and convicted of assault with force under Penal Code § 245 and with burglary under Penal Code § 459. The trial court sentenced him on both counts. On appeal the court found that the offenses charged were part of an "indivisible transaction," and that the dominant intent of the defendant was burglary. Therefore, the defendant could be convicted of both of the offenses, but § 654 prohibited punishment on more than one of them.

Under the third category, where the defendant commits a single act or a series of criminal acts dominated by one intent against multiple victims, the rule is well settled in California that Penal Code § 654 will not apply. The leading case in this category is People v. Brannon, wherein the defendant attempted to shoot and kill his wife, but the bullet missed her and killed an innocent bystander. Defendant was tried for assault with intent to commit murder and was acquitted. He was then tried for the murder of the innocent bystander. The trial court refused his plea of former jeopardy. The District Court of Appeals upheld this ruling, stating that § 654 is not applicable where one act has two results, each of which is an act of violence against separate individuals. Justice Traynor justified the rule as follows:

The purpose of the protection 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 means likely to cause harm to several persons is more culpable than a defendant who harms only one person.

B. Concurrent Sentencing Under Penal Code § 654

Concurrent sentencing poses an additional problem under the multiple punishment provision of § 654. Following Neal, two particular aspects of this problem arose: (1) What was the proper appellate court procedure in reversing improper sentencing under § 654, and (2) how could the trial courts avoid the ban of § 654 and allow a double conviction for a "single" act and sentence on each count so that if one conviction was reversed on appeal the other conviction and sentence would stand.

Under the first aspect where the sentences were ordered to run consecutively the appellate courts experienced no great difficulty.

46 70 Cal. App. 2d 253, 233 Pac. 88 (1924).
47 Neal v. California, 55 Cal. 2d at 11, 357 P.2d at 844, 9 Cal. Rptr. at 612. It is now the California law that a defendant cannot be punished for conspiracy and for the substantive offense that was the subject of the conspiracy. The case of People v. Keller, 212 Cal. App. 2d 210, 27 Cal. Rptr. 805 (1963) overruled a long line of precedents. Cf. People v. Hoyt, 20 Cal. 2d 306, 317, 125 P.2d 29, 35 (1942).
They reversed and ordered the sentences to run concurrently, thus avoiding the proscription of § 654.\textsuperscript{48} But under Neal, the appellate courts were required to act in such a fashion as to exclude from consideration of the Adult Authority the sentence of the "necessarily included offense." Therefore the problem was that concurrent sentences might prejudice the defendant when the Adult Authority made its final determination of the minimum length of defendant's sentence.\textsuperscript{49} So the appellate court cases, following Neal, reversed the judgment of conviction of the lesser of the two crimes, on the grounds that the imposition of the sentence on the lesser of the two crimes was in excess of the courts' jurisdiction.\textsuperscript{50}

Then in 1962 the case of People v. McFarland\textsuperscript{51} set down the proper appellate under these circumstances:

The appropriate procedure, therefore, is to eliminate the effect of the judgment as to the lesser offense \textit{insofar as the penalty alone is concerned}. It is true that there are cases which have, without qualification, reversed the judgment of conviction as to the lesser count thus apparently eliminating the effect of the judgment with respect to conviction as well as punishment. (Emphasis added.)\textsuperscript{52}

What now appears to be the proper appellate procedure is to reverse the concurrent sentencing for an "act" arising out of an "indivisible transaction" and only allow the lengthier sentence to stand. There is no reversal of the convictions. This has been the procedure taken by the cases since McFarland.\textsuperscript{53}

The second aspect has evidently been solved by People v. Niles.\textsuperscript{54} Neal and McFarland had set down no appropriate procedure for the trial court to adopt when sentencing a defendant for offenses that may be within the "indivisible transaction" under § 654. In Niles there was a conviction of assault and burglary which was part of an "indivisible transaction." The trial court sentenced the defendant on both the assault and burglary charges but stayed execution on the

\textsuperscript{48} People v. Kynette, 15 Cal. 2d at 762, 104 P.2d at 810.


\textsuperscript{50} People v. Logan, 41 Cal. 2d 279, 260 P.2d 20 (1953); People v. Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958).

\textsuperscript{51} 58 Cal. 2d 748, 376 P.2d 499, 26 Cal. Rptr. 473 (1962).

\textsuperscript{52} Id. at 763, 376 P.2d at 457, 26 Cal. Rptr. at 481. The usual method for applying the proscription of § 654 against double punishment was to vacate the conviction on the lesser offense. People v. Logan, 41 Cal. 2d 279, 260 P.2d 20 (1953). A few cases, however, allowed both convictions to stand, but gave effect to § 654 by giving concurrent sentences. People v. Sigel, 55 Cal. App. 2d 279, 130 P.2d 763 (1942). People v. Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958), suggested that the imposition of concurrent sentences may have a prejudicial effect on the defendant in the determination by the Adult Authority as to what length of time, if any, the defendant is to be imprisoned. See Cal. Pen. Code § 1168.


sentence of assault pending appeal and during such time as the Adult Authority was to pronounce on the minimum sentence for the burglary, and at the completion of the sentence on the burglary, the stay was to become permanent. The court stated:

[If . . . ] the trial court dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand no conviction at all. Nor can the trial court safely sentence on one count only, since it would lose jurisdiction after 21 days to sentence on the second count (Penal Code § 1191)—long before any possible disposition of an appeal. . . . [I]t follows that the procedure adopted by the trial court in this case was a reasonable—and so far as we can see—the only possible reconciliation of the various policies involved. Any other method either incurs the chance of letting a defendant escape altogether, or else imposes an unnecessary burden on an appellate court on the inevitable remand for correction of sentence.65

The case of People v. Quinn66 appears to the latest word on the application of § 654 to concurrent sentencing. In this case the defendant was charged with theft of narcotics, theft of money, and robbery. These acts were all against the same victim and all part of his dominant intent to obtain narcotics. The California Supreme Court stated, "Section 654 of the Penal Code proscribes double punishment of a criminal act that constitutes more than one crime, and concurrent sentences are double punishment. (Emphasis added)"67 This appears to be as yet the broadest construction of § 654, but on examination of the facts it would appear that concurrent sentencing is only double punishment within § 654 if the acts and omissions that are punished are part of an "indivisible transaction." Further, it must be remembered that § 654 can be applied only when the indivisible transaction test is met. In Quinn the court had specifically found that the defendant's primary intent was to obtain narcotics and that the other offenses were just a means to carry out the crime.

One leading case which recognizes the distinction between § 654 and the multiple punishment provision of Penal Code § 1023 is People v. Tideman.68 The defendant was charged with illegal abortion and murder. Each offense was alleged to have been committed on the same victim at the same time. The defendant pleaded guilty to the charge of illegal abortion, and immediately raised the defense of double jeopardy.69 Later the defendant was convicted of murder

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65 Id., at 822, 39 Cal. Rptr. at 15.
67 Ibid., at 612, 393 P.2d at 708, 39 Cal. Rptr. at 396.
68 57 Cal. 2d 574, 370 P.2d 1007, 21 Cal. Rptr. 207 (1962).
69 In People v. Mines, 136 Cal. App. 2d 828, 289 P.2d 539 (1955), the court allowed the defendant to plead guilty of petty theft. Later, the judge set aside the plea, and the defendant was found guilty of grand larceny. On appeal, the decision was reversed under § 1023.
and when he came before the court for sentencing, the judge ordered that the guilty plea on the abortion charge be set aside and dismissed, and sentenced the defendant on the murder count. Although the defendant had specifically based his appeal on Penal Code § 1023, the court found that the situation was precisely within Penal Code § 654. The court noted:

They have different origins. Each rests on a different base, has a different objective and performs, a different function. If confusion is to be avoided, it is important that the two are not intermingled.60

Since § 654 does not preclude multiple counts arising out of the same criminal act being charged and tried in the same trial, but only prohibits the imposition of punishment on more than one count when they are part of an "indivisible transaction," the trial court judge did not err in the Tideman case. He had not pronounced sentence on the plea of guilty to the illegal abortion, so there was no punishment within the meaning of § 654.

C. Double Jeopardy Under Penal Code § 654

The double jeopardy provision of § 654 includes the phrase "act or omission," as does the multiple punishment provision of the same section. As we have seen under the multiple punishment provision, the phrase has been the subject of expansion. This same expansion of the phrase applied to the multiple prosecution provision.

The landmark case which clearly explains the use and the restrictions of the double jeopardy provision of § 654 is Tideman, in which the court noted:

The next clause of section 654 [A]n acquittal for conviction and sentence under either . . . [of the violated provisions] has no application to the facts of this case. It has no application here for at least two reasons, each of which is independently compelling: (1) As has been shown, there has been but one prosecution; i.e., a single criminal action. (2) The trial judge wisely did not pronounce sentence on the plea of guilty to Count I [to the abortion]. Until sentence was pronounced for murder as charged in Count II there had been neither an acquittal of either charge nor a "conviction and sentence" under either; and, manifestly, no punishment for either.61

Section 654 of the Penal Code, in its provisions against subsequent prosecutions, affords the defendant protection beyond and different than that afforded by Section 1023. While §1023 forbids the prosecution for the crime charged in another trial, or one that is a necessarily included offense, § 654 is broader insofar as it also in-
cludes those crimes that are part of an indivisible course of conduct. But, under Tideman, the jeopardy provision of § 654 is only available after there has been a conviction and sentence, or an acquittal. In other words, the use of the double jeopardy provision of § 654 is expressly confined to subsequent prosecution for the same act or omission, where in the first trial there was (1) acquittal or (2) a conviction and sentence.

V. CONCLUSION

In perspective, what the Supreme Court of California has done through the Marshall and Neal cases has been to decrease the power of government to continually harass a defendant through multiprosecutions for basically one crime. First, by holding that double jeopardy will result where the facts of the first indictment could have supported a conviction of a crime charged in a second indictment, the Court has obviously broadened the right of the individual not to be subject to multiple prosecutions. Second, in holding a course of conduct prompted by one dominant intent to be only punishable once, the court has broadened the individual's right to be free from multiple punishment.

The broadened base of these individual liberties, although desirable from the point of view of justice in the individual case, has added new and confusing burdens to the already overworked California courts. It is hoped that this article might serve to clarify this confusing area.

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