People v. Hicks: Sentencing Laws and Sex Offenses - A Disingenuous Approach by the California Supreme Court

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Notes

People v. Hicks: Sentencing Laws and Sex Offenses — A Disingenuous Approach by the California Supreme Court

The California Legislature, over the past two decades, has been developing a stiffer penal system in regards to the sentencing of sex offenders. The California Supreme Court, during the 1980s, has eagerly followed suit and, through the use of judicial interpretation, has extended these sentencing statutes to their outermost limits. However, over the past five years and, more recently, in December 1993, the California Supreme Court has exceeded the interpretive limits of the sex offender sentencing statutes. The court, in People v. Hicks, held that sex offenders are subject to multiple full-term consecutive sentences for both non-sex and sex offenses in spite of the potentially applicable statutory prohibition regarding multiple punishment. This holding abuses the court’s interpretive authority and opens the door to a potential dramatic increase in sentences that the legislature never intended.

I. INTRODUCTION

Increasingly over the past decade, a main focus of the United States

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criminal justice system has been on the penalization of sex offenders. Recent legislative acts enhancing criminal sentences and judicial decisions interpreting these acts reflect the heightened concern of punishing sex offenders. One such example of a judicial interpretation is the California Supreme Court decision, People v. Hicks.

Hicks, as this Note will explain, has opened the door for prosecutors to obtain longer sentences in criminal sex offender cases. Moreover, Hicks is a perfect example of the California Supreme Court’s unbound use of the canons of statutory interpretation to achieve ends that the California Legislature may have never intended.

This Note will first briefly explain the applicable California statutes to a Hicks' type of situation. Second, a brief history of the state of the law preceding Hicks will be provided. Third, the actual Hicks decision will be discussed. Fourth, a critical analysis of the Hicks decision will be conducted. Finally, the Hicks decision's future effects on the criminal justice system will be discussed.

II. THE APPLICABLE STATUTES: CALIFORNIA PENAL CODE SECTIONS 654 AND 667.6

Two Penal Code statutes are at issue here. Understanding the way that these statutes correlate with each other is imperative to understanding the court’s holding and rationale in Hicks.

A. California Penal Code Section 654

Section 654 of the California Penal Code, entitled “Offenses punishable in different ways by different provisions; double jeopardy,” states, in pertinent part, “[a]n 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.” This statute, in its strict textual sense, prohibits punishing a criminal twice for the same “act or omission.” The Penal Code provides different ways for sentencing a single act and section 654 is designed to safeguard the risk of a prosecutor or judge attempting to

1. For discussions on reform in this area of the law; see generally CASSIA SPOHN AND JULIE HORNEY, RAPE LAW REFORM (1992); Public Hearing on Legal Problems of Rape Before the California Legislature Senate Comm. on Judiciary (1987).
4. Id. § 667.6.
5. Id. § 654.
6. Id. (emphasis added).
invoke more than one of these methods. The rationale behind section 654 is rooted in the double jeopardy clause of the United States Constitution.

Despite section 654’s limited textual application only to “an act or omission,” this statute has been extended, through judicial interpretation, to apply to much broader situations. The extension, often referred to as the “Neal test,” makes section 654 applicable to situations where more than one act was actually committed, but several of the acts were conducted in what is called “an indivisible course of conduct” or “indivisible transaction.” In other words, a criminal may be convicted of several offenses, but he or she will only be sentenced for the crimes in which the criminal had a separate intent for that crime. The criminal will not be sentenced for crimes that were only incidental to his or her main objective. As the California Supreme Court stated in Neal: “If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.”

7. For example, if a defendant committed and was convicted of a single act of rape and a single act of sodomy, the court could impose a sentence for each crime. However, if the prosecution also wanted to have the defendant sentenced for a general lewd and lascivious conduct conviction that was solely based on the rape and sodomy acts, the court would be prohibited by section 654 to impose such a sentence because the lewd and lascivious charge was based on the same acts as the rape and sodomy. See People v. Siko, 45 Cal. 3d 820, 755 P.2d 294, 248 Cal. Rptr. 110 (1988).

8. The Fifth Amendment of the U.S. Constitution states, in pertinent part, “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. This portion of the Fifth Amendment has been held to be applicable to the individual states via the Fourteenth Amendment’s due process clause. Benton v. Maryland, 395 U.S. 784, 795 (1969).

9. The name for this test is derived from the California Supreme Court case, Neal v. California. 55 Cal. 2d 11, 357 P.2d 839, 9 Cal. Rptr. 607 (1960), cert. denied, 365 U.S. 823 (1961). However, Neal was not the first case to establish the legal principle for which the case is famous. People v. Brown was the first case to establish the doctrine now referred to as the Neal test. People v. Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958).

10. Neal, 55 Cal. 2d at 19, 357 P.2d at 843, 9 Cal. Rptr. at 611.

11. In determining whether the crimes were part of an indivisible course of conduct, “[i]t is defendant’s intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible.” People v. Harrison, 48 Cal. 3d 321, 335, 768 P.2d 1078, 1086, 256 Cal. Rptr. 401, 409 (1989).

12. Neal, 55 Cal. 2d at 19, 357 P.2d at 844, 9 Cal. Rptr. at 612. The following illustration may help eliminate any confusion as to what constitutes “an act or omission” provided in section 654 and what constitutes a Neal test situation: A defendant lights the outside of a building on fire. There is more than one possible statutory way to punish the defendant for his criminal act. For example he could be punished for arson
Section 667.6(c) of the California Penal Code specifically addresses permissive (versus mandatory) sentencing when the crimes being punished are sex offenses. Subdivision (c), of section 667.6, gives a judge discretion to impose a full, separate, and consecutive term for particular sex offense convictions such as rape, genital penetration with a foreign object, and sodomy, among others.  

Section 667.6(c) is a discretionary alternative to the general consecutive sentencing formula provided by Penal Code section 1170.1. 

and some sort of vandalism. However, under section 654, the court would only allow one of the sentences to be invoked. Changing the facts slightly, the defendant enters the building to light the building on fire. He is then charged with burglary and arson. Under the Neal rule concerning section 654, the burglary is arguably incidental to the defendant's main objective of arson. Therefore, the defendant would not be sentenced for both the burglary and the arson.

13. Section 667.6(c) states in pertinent part:

In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), or (7) of subdivision (a) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 288.5 or 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of Section 288a, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person whether or not the crimes were committed during a single transaction.

Cal. Penal Code § 667.6(c) (West 1994) (emphasis added).

In order to properly implement section 667.6(c), the sentencing judge must satisfy two requirements. First, the judge must identify the criteria used to justify the use of section 667.6(c) and, second, the record must show that the court recognized that utilizing section 667.6(c) is a separate and additional sentencing choice. People v. Belmontes, 34 Cal. 3d 335, 348, 667 P.2d 686, 693, 193 Cal. Rptr. 882, 889 (1983).

14. CAL. PENAL CODE § 1170.1 (WEST 1994). Section 1170.1 is the general sentencing formula when multiple sentencing is involved. Section 1170.1(a) states, in pertinent part:

When any person is convicted of two or more felonies . . . the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed pursuant to [other statutes permitting additional terms]. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes. . . . The subordinate term for each consecutive offense . . . shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction . . . for which a consecutive term of imprisonment is imposed. . . . In no case shall the total of subordinate terms for these consecutive offenses . . . exceed five years.

Id.
Therefore, section 1170.1 should briefly be discussed. Section 1170.1 pertains to sentencing when two or more felony convictions are involved. The general formula of section 1170.1, subject to certain exceptions, consists of a principal term, which is the greatest term of imprisonment for any of the crimes, and subordinate terms, which are one-third of the middle term provided for each of the additional felonies. The subordinate terms are not to exceed five years in the aggregate. The sum of the imprisonment sentence can not exceed twice the principle term.15

The following demonstrates the general formula. A defendant is convicted of three felonies that carry terms of four, six, and eight years respectively. Suppose the court, following section 1170.1, first imposes a principal term of eight years, which is the largest felony sentence. To this principal term the court would determine the middle term for the other two felonies, which would be two and three years. One-third of each middle term would be added to the principal term, providing a total sentence of nine years eight months. It is important to note that the sentencing formula of section 1170.1 is subject to the limitations set forth by section 654.16 Thus, sentencing the same act twice is prohibited.17

Section 667.6(c), as noted earlier, expressly provides an alternative to the general formula of section 1170.1. Section 667.6(c) allows a judge to sum the full principle terms of each sex offense irrespective of length of time that results from the summation. The rationale behind this rule is that a criminal has a separate intent for each sex offense committed.18 However, the primary theme of this Note addresses a different question: Whether punishment of non-sex offenses not listed in section 667.6(c), which were merely incidental to committing the enumerated sex offenses, are still protected under the indivisible transaction rule of section 654.

15. Id. § 1170.1(g)(2).
16. Section 1170.1(a) states: “Except as provided in subdivision (c) and subject to Section 654. . . .” Id. § 1170.1(a).
17. Furthermore, when invoking section 1170.1, crimes that are part of an indivisible course of conduct or, in other words, incidental to the main objective of the defendant’s act are not subject to sentencing because of the Neal rule.
III. STATE OF THE LAW PRIOR TO HICKS

The California Supreme Court has been moving toward a general trend of imposing stiffer penalties for sex offenders. This most likely reflects societal concerns of sexual abuse and sexual crimes. 19

The trend began in the California Supreme Court case of People v. Perez. 20 Perez involved a defendant who committed a brutal sexual attack on the victim, who was also the manager of the apartment complex in which the defendant lived. The sexual acts included oral copulation, sodomy, penetration with a foreign object, and rape. 21 The defense counsel claimed that “section 654 precluded imposition of sentence on the oral copulation and sodomy convictions because those crimes were committed pursuant to the same intent and objective as the rape.” 22 The California Supreme Court disagreed. The Perez court held that none of the sex offenses were committed as a means of committing any other, and none were incidental to the commission of any other. Therefore, section 654 did not prohibit multiple punishment. 23 Perez was handed down during the time in which section 667.6(c) was being discussed by the legislature, but it had not yet been codified. 24 Thus, section 667.6, because not yet enacted, was inapplicable to Perez.

In 1989, the California Supreme Court, in People v. Harrison, 25 again without invoking section 667.6(c), 26 imposed consecutive full-term sentences (versus the 1/3 term mid-term formula of 1170.1) for various sex offenses committed by the defendant. 27 The court held that section

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21. Id. at 549, 591 P.2d at 65, 153 Cal. Rptr. at 42.
22. Id.
23. Id. at 553-54, 591 P.2d at 69, 153 Cal. Rptr. at 45.
24. Perez was handed down in March, 1979, section 667.6(c) was enacted in September 1979. Act of Sept. 22, 1979, ch. 944, § 10, 1979 Cal. Stat. 3258.
26. Section 667.6(c) was on the books at the time of the Harrison decision, but it is not clear why the court did not use this section, or at least, explain why section 667.6(c) did not apply. The court's reasoning indicates that the court, following Perez, found separate intents for each sexual offense. However, in essence, this is the exact finding that section 667.6(c) codifies—the criminal defendant has a separate intent for each sexual offense and therefore consecutive full-term sentences can be imposed. CAL. PENAL CODE § 667.6(c) (West 1994).
27. Harrison, 48 Cal. 3d at 338, 768 P.2d at 1088, 256 Cal. Rptr. at 411-12. The sex crimes in Harrison consisted of three convictions of penetration of the genital opening with a foreign object under Penal Code section 289. The defendant went into
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654 did not prohibit imposing the consecutive full-term sentences.\textsuperscript{28} The \textit{Harrison} court stated: "Since ‘none of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental’ to any other, section 654 did not apply."\textsuperscript{29} The court’s holding was based on the finding that, even though the defendant’s actions were conducted during a continuous attack, the defendant “harbored ‘multiple criminal objectives’.”\textsuperscript{30} The \textit{Harrison} court, following \textit{Perez}, rejected the defendant’s argument that he had a single intent and objective of obtaining sexual gratification.\textsuperscript{31}

The California Supreme Court, addressing and interpreting section 667.6(c), decided \textit{People v. Jones}.\textsuperscript{32} The defendant in \textit{Jones} forcefully entered the victim’s house with two other defendants, tied and gagged the victim’s husband, and then raped and sodomized the victim.\textsuperscript{33} The defendants then ransacked the house and took various household items. As a result of a plea bargain, the defendant Jones pleaded guilty to one count of rape and robbery.\textsuperscript{34}

In \textit{Jones}, the California Supreme Court made two significant findings in regard to section 667.6(c). First, the court held that “a single conviction of an enumerated sex offense is sufficient to trigger” the use of section 667.6(c).\textsuperscript{35} Second, and as the means of reaching the first holding, the court held that the words “the crimes” in the phrase “whether or not the crimes were committed during a single transaction”\textsuperscript{36} were not limited to the enumerated sex offenses listed in

\begin{itemize}
  \item the victim’s home and, over a span of about ten minutes and while fighting strong resistance from the victim, inserted his fingers into the victim’s vagina three different times. \textit{Id.} at 325, 768 P.2d at 1079, 256 Cal. Rptr. at 402.
  \item \textit{Id.} at 338, 768 P.2d at 1088, 256 Cal. Rptr. at 411-12.
  \item \textit{Id.} at 336, 768 P.2d at 1086, 256 Cal. Rptr. at 410 (quoting \textit{People v. Perez}, 23 Cal. 3d 545, 553-54, 591 P.2d 63, 69, 153 Cal. Rptr. 40, 45). It is important to note that even though the \textit{Harrison} court found that section 654 did not preclude consecutive sentences for the sex offenses, the trial court stayed the execution of a six year burglary sentence pursuant to section 654. \textit{Id.} at 326, 768 P.2d at 1080, 256 Cal. Rptr. at 403.
  \item \textit{Id.} at 335, 768 P.2d at 1086, 256 Cal. Rptr. at 409.
  \item \textit{Id.}
  \item 46 Cal. 3d 585, 758 P.2d 1165, 250 Cal. Rptr. 635 (1988).
  \item \textit{Id.} at 590, 758 P.2d at 1167, 250 Cal. Rptr. at 636.
  \item \textit{Id.}
  \item \textit{Id.} at 589, 758 P.2d at 1166, 250 Cal. Rptr. at 636. For further discussion of the \textit{Jones} court’s decision, \textit{see infra} notes 107-11 and accompanying text.
  \item \textit{CAL. PENAL CODE § 667.6(c)} (West 1994) (emphasis added).
\end{itemize}
subdivision(c). “The crimes,” the court found, extended to any crime sufficient to trigger section 1170.1, the general sentencing statute. 37

The Jones court’s holding resulted in the triggering of punishment under section 667.6(c) when only one sexual offense was committed with another non-sex felony. 38 However, the defendant in Jones had a separate intent for each crime he committed, making section 654 inapplicable. 39 Because the defendant had separate intents for each

37. Jones, 46 Cal. 3d at 593-94, 758 P.2d at 1169-70, 250 Cal. Rptr. at 639. The Jones court stated:

Finally and most importantly, the assumption that the words “the crimes” in subdivision (c) refer only to the ESO’s is incorrect. Subdivision (c) starts with the phrase “In lieu of the term provided in Section 1170.1” and in order to bring section 1170.1 into play at all, the defendant must have been convicted of multiple crimes. In our view, it is to these multiple crimes that the language “the crimes” in the final clause of subdivision (c) must refer.

Id.

38. Id. at 600, 758 P.2d at 1174, 250 Cal. Rptr. at 643. The court stated: “We conclude that where a defendant stands convicted of multiple felonies, subdivision (c) vests the sentencing court with discretionary authority to impose a full, consecutive term for any ESO conviction, even when the defendant stands convicted of only one ESO.” Id.

Justice Mosk, dissenting in Jones, makes a compelling argument by showing that the Legislative intent behind section 667.6(c) was that the statute should only take effect when more than one enumerated sex offense is involved. He points out that every other section of the statute only takes effect when multiple enumerated sex offenses are involved. Id. at 604, 758 P.2d at 1176-77, 250 Cal. Rptr. at 646-47. He stated: “In determining [Legislative] intent, we must view each part of a statute in the context of the whole statute and its purpose.” Id. (citing People v. Black, 32 Cal. 3d 1, 5, 648 P.2d 104, 106, 184 Cal. Rptr. 454, 456 (1982)). Justice Mosk concluded that because the other sections only applied to multiple sex offense situations and because no exception to this was stated in subdivision (c), subdivision (c) is only triggered when more than one enumerated sex offense is committed. Id. at 604-05, 758 P.2d at 1177, 250 Cal. Rptr. at 647.

This author strongly disagrees with the Jones court’s interpretation of section 667.6(c)—especially that the words “the crimes” extend beyond enumerated sex offenses. Disagreement with “the crimes” holding leads to the author’s disagreement with the holding that only one sex offense is needed to trigger section 667.6(c), that is, the Jones court reliance on its “crimes” interpretation to reach this holding.

Because this Note is purported to be an analysis of the Hicks decision, I am reluctant to enter into an in-depth analysis of the Jones decision for fear of losing focus of the paper for the reader. However, Jones does need to be discussed to some extent because it is directly related and interwoven with the theme of the Hicks decision. Moreover, it further exemplifies the California Supreme Court’s disingenuous attitude toward this issue and its abuse of the statutory interpretation rules. A further discussion of Jones can be found in Part V(A).

39. In Jones, the defendant first committed the violent sex crimes and then subsequently stole items from the victims house. Jones, 46 Cal. 3d at 589-90, 758 P.2d at 1166, 250 Cal. Rptr. at 636. The defendant did not commit the sex crimes to facilitate his robbery.

The Jones court, later in its opinion, infers that their holding applied to separate intent crimes by providing a hypothetical in which their holding would be applicable:
crime, the court never had to address the issue as to what the section 667.6(c) language “whether or not the crimes were committed during a single transaction” meant—the precise issue in *Hicks*.

In summation, in *Perez, Harrison,* and *Jones* the defendants had separate intents for their crimes, making section 654 inapplicable. The differences between the way the cases were decided is most likely a result of the how the prosecution decided to argue the case and how the defense counsel defended the case.

The California Courts of Appeal have been in conflict as to whether section 654 is applicable to the sentencing scheme under section 667.6(c) when both sex and non-sex offenses are involved. The California Supreme Court decided to review the *Hicks* appellate court decision to resolve this conflict.

IV. THE *HICKS* DECISION

The defendant, Eric Tomont Hicks, entered a bakery at approximately three a.m. where the victim was working alone. The door was closed but unlocked. Hicks, after determining the victim was alone, grabbed her and pushed her into the bathroom. He raped her six times, committed two acts of sodomy, and on two separate occasions inserted his fingers into her vagina. Hicks then ordered her to clean both of

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A burglar breaks into a residence, assuming it to be unoccupied and intending only to steal some items inside, when he comes upon a woman who is unarmed and alone. The burglar recognizes an opportunity to take advantage of the circumstances and commits a 'convenient,' additional offense involving a separately formed criminal intent—forcible rape, sodomy or oral copulation. *Id.* at 598, 758 P.2d at 1173, 250 Cal. Rptr. at 642 (emphasis added). The court never addressed the issue of whether section 654 should apply.

Even though the *Jones* holding was limited to crimes where the defendant had a separate intent to commit each crime, the *Jones* case, as the discussion of *Hicks* in Part V points out, makes for an easy extension to create an exception to section 654 for all of the crimes in a sex offense situation, regardless of whether they are sex offenses listed in section 667.6(c).

them, and they then dressed. He then told her he would help her complete her duties. The victim resumed working until two men entered the bakery to deliver newspapers. At this time the victim asked Hicks to leave and he did as she asked. She locked the door and called her supervisor to report that she had been raped.41

Hicks was convicted of two counts of forcible sodomy42, six counts of rape43, two counts of genital penetration by a foreign object44, and one count of burglary.45 The total sentence amounted to 83 years—3 years of which were for the burglary conviction.46

The sole issue that was addressed by the California Supreme Court was “whether imposition of sentence on the burglary count constitutes an impermissible multiple punishment” under section 654.47 More specifically, the court had to decide whether section 667.6(c) created an implicit exception to the “indivisible” or “single” transaction doctrine judicially engrafted by the court when interpreting section 654.48

41. People v. Hicks, 6 Cal. 4th 784, 788, 863 P.2d 714, 716, 25 Cal. Rptr. 2d 469, 471.

*Hicks* is factually different from *Jones* (see supra notes 32-34 and accompanying text) in that the defendant’s sole purpose for entering the bakery, which resulted in a burglary, was to commit forced sexual acts on the defendant. Entering the bakery is arguably part of an indivisible course of conduct—the conduct being sexual assault. In *Jones*, the defendant raped the victim and then went and ransacked and robbed the house where the rape occurred. The defendant did not commit rape to achieve the purpose of committing robbery or vice-versa.

42. CAL. PENAL CODE § 286(c) (West 1993).

43. CAL. PENAL CODE § 261(2) (West 1986). At the time of Hick’s rape conviction, section 261(2) defined rape as “an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances

(2) Where it is accomplished against a person’s will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another.” *Id.* The statute has been since amended and the relevant provision is now section 262(a)(1). The amended section includes in the rape definition acts of intercourse accomplished by duress or menace. CAL. PENAL CODE § 261(a)(1) (West Supp. 1995).

44. CAL. PENAL CODE § 289(a) (West 1993).

45. CAL. PENAL CODE § 459 (WEST 1993). The specific charge was “burglary with the intent to commit rape, sodomy, or penetration by a foreign object.” People v. Hicks, 18 Cal. App. 4th 88, 100, 7 Cal. Rptr. 2d 166, 173 (1992) (subsequently depublished).

46. Hicks, 6 Cal. 4th at 787, 863 P.2d at 716, 25 Cal. Rptr. 2d at 471.

47. *Id.* at 788, 863 P.2d at 716, 25 Cal. Rptr. 2d at 471. Hicks did not appeal the sentences for his sex offense convictions. He only was appealing the burglary sentence. Hicks probably did not appeal the sex offenses because, as the *Hicks* court noted, the California Supreme Court had previously held that section 654 “does not prohibit the imposition of multiple punishment for separate sexual offenses committed during a continuous attack.” *Id.* at n.4 (citing People v. Harrison, 48 Cal. 3d 321, 336, 768 P. 2d 1078, 1086, 256 Cal. Rptr. 401, 410 (1989)).

48. *Id.* at 789, 863 P.2d at 717, 25 Cal. Rptr. 2d at 472.
The procedural posture of the case should be noted. After the trial court convicted and sentenced Hicks on all counts, the Court of Appeal reversed the burglary sentence. On appeal, Hicks argued that the three year burglary term violated section 654 "because the burglary was incidental to the forcible sexual offenses for which he also was punished." The appellate court, following California precedent, concluded that the burglary count violated section 654's prohibition against multiple punishment. The California Supreme Court disagreed with the Court of Appeal and in an opinion by Justice George, concluded that section 667.6 "created an exception to section 654 so as to permit the imposition of consecutive full-term sentences for enumerated offenses constituting separate acts committed during an 'indivisible' or 'single' transaction."

A. The Majority Opinion

Justice George began his discussion with an explanation of the scope of section 654. He explained that the literal meaning of section 654 only prohibits multiple punishment arising out of the same act or omission. He then acknowledged that the section has been extended to cases involving several offenses "committed during a 'course of conduct deemed to be indivisible in time.'" In determining whether a course of conduct is indivisible, Justice George, quoting a previous California Supreme Court decision, stated:

> It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. . . . If all of the offenses

49. Id. at 787, 863 P.2d at 716, 25 Cal. Rptr. 2d at 471.
50. Id. at 788, 863 P.2d at 716, 25 Cal. Rptr. 2d at 471. See supra notes 9-12 and accompanying text for further discussion on the incidental objective/indivisible course of conduct principle.
52. Hicks, 6 Cal. 4th at 787, 863 P.2d at 716, 25 Cal. Rptr. 2d at 471.
53. Id. at 786, 863 P.2d at 715, 25 Cal. Rptr. 2d at 470.
54. The Hicks majority consisted of Justice George writing the opinion, Chief Justice Lucas, and Justices Panelli, Kennard, Arabian, and Baxter. Id. at 797, 863 P.2d at 722, 25 Cal. Rptr. 2d at 477.
55. Id. at 789, 863 P.2d at 716, 25 Cal. Rptr. 2d at 471.
56. Id. at 789, 863 P.2d at 717, 25 Cal. Rptr. 2d at 472.
were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once.\textsuperscript{57}

Applying the interpretation of section 654, Justice George conceded that Hicks “entered the bakery with the single criminal objective of sexually assaulting the victim.”\textsuperscript{58} Therefore, as Justice George found, if section 654 was applicable, Hick’s could not be punished for both the burglary and the sexual offense convictions.\textsuperscript{59}

Justice George framed the issue for the court: “We must determine, therefore, whether section 654 prohibits such multiple punishment when a trial court imposes consecutive full-term sentences for the enumerated sexual offenses under the authority of section 667.6, subdivision (c). . . .”\textsuperscript{60}

Justice George, after explaining why a previous California Supreme Court case did not address this issue,\textsuperscript{61} next proceeded with an interpretation of section 667.6(c) to determine whether the legislature intended to create an exception to section 654, which would result in allowing the imposition of the burglary sentence.

The statutory analysis began with the literal meaning of the words used in section 667.6(c). Because section 667.6(c) does not expressly refer to section 654, Justice George found it necessary to determine whether the statute’s phrase “whether or not the crimes were committed during a single transaction”\textsuperscript{62} referred to section 654’s ban on multiple punishment for acts committed during an indivisible course of con-

\textsuperscript{57} Id. at 789, 863 P.2d at 717, 25 Cal. Rptr. 2d at 472 (citing and quoting People v. Harrison, 48 Cal. 3d 321, 335, 768 P.2d 1078, 1086, 256 Cal. Rptr. 401, 409 (1989)).

\textsuperscript{58} Hicks, 6 Cal. 4th at 789, 863 P.2d at 717, 25 Cal. Rptr. 2d at 472.

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} In this portion of his opinion, Justice George discussed the decision of People v. Siko, 45 Cal. 3d 820, 755 P.2d 294, 248 Cal. Rptr. 110 (1988). Referring to Siko, Justice George stated that the court in that case concluded, [w]hatever the Legislature’s intent may have been with respect to the “single” or “indivisible transaction” rule, it is clear to us it did not intend by its enactment of [section 667.6(c)] to repeal or amend the prohibition of double punishment for multiple violations of the Penal Code based on the “same act or omission.” Hicks, 6 Cal. 4th at 791, 863 P.2d at 718, 25 Cal. Rptr. 2d at 473 (quoting People v. Siko, 45 Cal. 3d 820, 826, 755 P.2d 294, 297, 248 Cal. Rptr. 110, 113-14. Justice George concluded that the issue in Hicks was expressly left unresolved in Siko. Id. The court did not address this question in Siko because, in Siko, the prosecution “[d]id not seek to punish three acts once each; they [sought] to punish the same two acts twice” and this violates section 654. Id. at 791, 863 P.2d at 718, 25 Cal. Rptr. 2d at 473 (alteration in original).

\textsuperscript{62} Id.
duct. If the phrase did refer to section 654's prohibition, Justice George found it necessary to determine “whether the use of this phrase expresses a legislative intent to create an exception to section 654.”

Justice George concluded that “the only reasonable interpretation of section 667.6(c)” is that it creates an exception to section 654’s prohibition of multiple punishments.

In reaching his conclusion, Justice George made two principal arguments. First, in a brief excerpt, he compared the language of section 667.6 to that of section 1170.1. He stated that section 1170.1 is expressly subject to section 654 whereas section 667.6(c) is not expressly limited by section 654. Justice George found the lack of reference to section 654 a significant difference that implied that the legislature intended section 667.6 to create an exception to section 654.

Second, Justice George analyzed legislative history of section 667.6 to argue that the legislature intended to create an exception to section 654. He first noted that the original version of section 667.6(c) in the Senate Bill, in regard to mandating consecutive full-term sentences, included the phrase, “whether or not the crimes were committed with a single intent or objective or during a single transaction.”

He then pointed out that the Senate Committee on Judiciary concluded that the language, as initially proposed, “would mandate, in apparent disregard

63. Id.
64. Id.
65. Id. at 792, 863 P.2d at 719, 25 Cal. Rptr. 2d at 474. Later in his opinion, Justice George addresses the legal principle that holds if two reasonable interpretations can be drawn from a criminal statute, the interpretation that is most favorable to the defendant should prevail. Seemingly, he was trying to rebut this argument before even addressing it by invoking his “only reasonable interpretation” language.
66. Id. For further discussion of section 1170.1, see supra notes 14-16 and accompanying text.
67. Id. Section 1170.1 includes the express limitation, “subject to Section 654.” CAL. PENAL CODE § 1170.1(a) (West 1994). In contrast, section 667.6(c) contains no such language.
68. Hicks, 6 Cal. 4th at 792, 863 P.2d at 719, 25 Cal. Rptr. 2d at 474. However, a directly opposite conclusion than that of Justice George could be implied. See infra notes 112-14 and accompanying text.
70. Hicks, 6 Cal. 4th at 792-93, 863 P.2d at 719, 25 Cal. Rptr. 2d at 474 (emphasis added).
of Section 654, multiple punishment for sexual offenses.” 71 After explaining that the final version of section 667.6(c) eliminated the “single intent or objective” language, Justice George argued that if the legislature wanted section 654 to remain applicable in section 667.6(c)’s context, the legislature would have also deleted the language in 667.6(c) that refers to crimes that “were committed during a single transaction.” 72 Justice George concluded that the only reasonable explanation for not eliminating the “single transaction” language was that “the Legislature intended to create an exception to section 654 that would allow multiple punishment for separate criminal acts committed during an indivisible course of conduct.” 73

Much of the majority opinion consisted of arguments rebutting the defendant’s, 74 dissent’s, 75 and appellate court’s arguments. After briefly addressing and disposing of the defendant’s argument, 76 Justice George addressed Justice Mosk’s dissenting argument. The main premise of Justice Mosk’s dissent, as Justice George viewed it, was that the language used in section 667.6(c) was

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71. Id. at 792, 863 P.2d at 719, 25 Cal. Rptr. 2d at 474 (emphasis in original) (citing and quoting SENATE COMM. ON JUDICIARY, ANALYSIS OF § 13, 1979-80 CAL. REG. Sess. at 8 (as amended Mar. 5, 1979)).

72. Hicks, 6 Cal. 4th at 793, 863 P.2d at 720, 25 Cal. Rptr. 2d at 475. Justice George stated: Had the Legislature wished to ensure that the provisions of section 654 would remain applicable so as to bar multiple punishment for separate criminal acts committed during an indivisible course of conduct, it presumably would have deleted not only the reference to offenses committed “with a single intent or objective,” but also the remainder of the phrase that refers to crimes “committed during a single transaction.” 73. Id. Again, Justice George refers to his interpretation as the only reasonable interpretation. This is probably an attempt to counter the argument as discussed supra note 65.

74. The defendant’s argument, which the majority discarded rather quickly, was that the legislature retained the language, “whether or not the crimes were committed during a single transaction” in section 667.6(c) to clarify that they were rejecting an approach in the original version of the bill. Hicks, 6 Cal. 4th at 793, 863 P.2d at 720, 25 Cal. Rptr. 2d at 475. The approach in the original version mandated consecutive full-term sentences for each violation of Penal Code section 288, lewd conduct with a child, “unless such violation is committed upon one victim at the same proximate time and place as part of and in immediate conjunction with any other violation of [section 288] upon such victim for which the term is imposed.” Id. (alteration in original) (citing and quoting S. 13, 1979-80 REG. Sess. § 7, as introduced Dec. 4, 1978). The majority rejected the defendant’s argument by stating: “Defendant does not explain why the Legislature would need ‘to clarify’ that it had rejected a particular approach, when the specific language that would have enacted such an approach previously had been deleted from the bill.” Id.

75. Justice Mosk was the only dissenting judge in the Hicks opinion. Id. at 784, 863 P.2d at 715, 25 Cal. Rptr. 2d at 470.

76. See supra note 74.
used to distinguish that subsection from another subsection of the statute, section 667.6(d). The majority found that following the dissent’s interpretation, the language in question, “whether or not the crimes were committed during a single transaction”, would be mere surplusage. Justice George concluded: “Such statutory construction is to be avoided.”

Justice George next addressed the Court of Appeal’s argument, which Justice George apparently found most persuasive of the three arguments. The Court of Appeal’s argument was based on the enactment of another Penal Code section—section 667.8. Section 667.8 imposes an additional term of punishment if the defendant kidnapped his or her victim for the purpose of committing the sexual offense. The Court of Appeal observed that section 667.8 was enacted after the appellate court decision in People v. Masten, which held that consecutive sentences could not be imposed for kidnapping and rape convictions when the offenses were part of an indivisible course of conduct. The Court of Appeal deemed it significant that the legislature enacted a new section to cover the kidnapping/rape situation rather than merely amending section 667.6(c) to “make clear that full, separate and consecutive terms could be imposed” under section 667.6(c).

Justice George disagreed with the Court of Appeal’s arguments and conclusion for two reasons. First, he believed that the legislature, by

77. *Hicks*, 6 Cal. 4th at 794, 863 P.2d at 720, 25 Cal. Rptr. 2d at 475. The main difference between the two subdivisions is that subdivision (c) is discretionary whereas subdivision (d) requires full-term consecutive sentencing “if the crimes involve separate victims or involve the same victim on separate occasions.” *Id.* For further discussion of Justice Mosk’s argument, see infra notes 92-106 and accompanying text.

78. *Hicks*, 6 Cal. 4th at 794, 863 P.2d at 720, 25 Cal. Rptr. 2d at 475.

79. Justice George stated: “We acknowledge that a rational argument can be made for the conclusion reached by the Court of Appeal in the present case....” *Id.* at 795, 863 P.2d at 721, 25 Cal. Rptr. 2d at 476.


81. Section 667.8(a) states, “Except as provided in subdivision (b), any person convicted of a felony violation of Section 261, 264.1, 286, 288a, or 289 who, for the purpose of committing that sexual offense, kidnapped the victim in violation of Section 207, shall be punished by an additional term of three years.” *Id.*


83. *Id.* at 589, 187 Cal. Rptr. at 522.

enacting Penal Code section 667.8, a mandatory sentencing statute, achieved a different result than if it were to amend section 667.6(c), a discretionary sentencing statute. Because the new section contained mandatory sentencing rather than discretionary sentencing, Justice George argued, the legislature could not have achieved its goal by only amending section 667.6(c). Second, Justice George noted that section 667.8 applies to some sex offenses not covered by section 667.6(c). Based on these two observations, he concluded that the enactment of section 667.8 does not support the argument that section 654 prohibits "the imposition of consecutive full-term sentences under section 667.6(c) for separate offenses committed during an indivisible transaction." 

In concluding his analysis of the appellate court's rationale, Justice George conceded that in a case where two reasonable interpretations of a statute could be determined, the interpretation most favorable to the defendant should be invoked. However, he found that section 667.6(c) had only one reasonable interpretation. He stated that interpreting section 667.6(c) as subject to section 654 "would leave entirely without meaning the language in section 667.6(c) allowing consecutive sentences 'whether or not the crimes were committed during a single transaction.'" 

Justice George concluded his opinion with a culpability argument to justify that the majority's "interpretation of section 667.6(c) produces a just result in the present case." Justice George explained that the statute was implemented so as to allow sentencing enhancement for sexual offenders who committed multiple offenses. He stated that the

85. Id. at 795, 863 P.2d at 721, 25 Cal. Rptr. 2d at 476. Justice George stated: "Thus, the additional term mandated by section 667.8 must be imposed even if the trial court declines to impose consecutive sentences or elects instead to impose standard consecutive sentences under section 1170.1 rather than the consecutive full-term sentences authorized under section 667.6(c)." Id.

86. Id.

87. Id. at 795-96, 863 P.2d at 721, 25 Cal. Rptr. 2d at 476.

88. Id. at 796, 863 P.2d. at 722, 25 Cal. Rptr. 2d at 477. Justice George, in arguing that the language of section 667.6(c) would be without meaning, stated the general rule that "a statute should not be given a construction that results in rendering one of its provisions nugatory." Id. (citing and quoting People v. Craft, 41 Cal. 3d 554, 560, 715 P.2d 585, 588, 224 Cal. Rptr. 626, 629 (1984)).

Justice George also argued that a contrary interpretation would contradict the California Supreme Court's holding in Jones. People v. Jones, 46 Cal.3d 585, 758 P.2d 1165, 250 Cal. Rptr. 635 (1988). See supra note 51. Justice George noted that the appellate court's interpretation would limit multiple punishment to the sex offenses enumerated in section 667.6(c). He concluded that this interpretation is directly contrary to the Jones holding that the phrase "the crimes" in section 667.6(c) includes both sex and non-sex offenses. Hicks, 6 Cal. 4th at 796, 863 P.2d at 722, 25 Cal. Rptr. 2d at 477 n.9.

89. Hicks, 6 Cal. 4th at 796, 863 P.2d at 722, 25 Cal. Rptr. at 477.
statute’s increased penalties were based on the rationale that “a defendant who commits ‘a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.” 90 Applying this principle to the present case, Justice George argued that Hick’s burglary, the act of entering the bakery, “aggravated the crime by increasing the victim’s vulnerability and decreasing her chance of escape.” 91 Therefore, as the argument concluded, increased punishment for the burglary was appropriate.

B. The Dissent

Justice Mosk, the lone dissenter, began his opinion by flatly rejecting the majority’s opinion and stating: “In my view, Penal Code section 654 bars imposition of a full, consecutive term of imprisonment for defendant’s burglary conviction.” 92 Mosk first criticized the majority’s use of the canons of statutory construction. 93 He was appalled by the prosecution’s eagerness and the court’s willingness to impose an additional sentence for the burglary conviction, when the sentence would never be served as a result of Hick’s age. 94

90. Id. (citing and quoting People v. Perez, 23 Cal. 3d 545, 553, 591 P.2d 63, 68, 153 Cal. Rptr. 40, 44 (1979); People v. Latimer, 5 Cal. 4th 1203, 1211, 858 P. 2d 611, 616, 23 Cal. Rptr. 2d 144, 149 (1993)). Ironically, even though the court cited Latimer for holding the proposition that a defendant who commits multiple acts on his victim is more culpable, the California Supreme Court in Latimer did not allow punishment of a kidnapping offense that was only to facilitate the defendant’s rape of his victim in that case. Latimer, 5 Cal. 4th at 1216, 858 P.2d at 620, 23 Cal. Rptr. 2d at 153. For further discussion of the Latimer decision, see infra notes 133-46 and accompanying text.

91. Hicks, 6 Cal. 4th at 796-97, 863 P.2d at 722, 25 Cal. Rptr. 2d at 477.
92. Id. at 797, 863 P.2d at 723, 25 Cal. Rptr. 2d at 478.
93. Id. Justice Mosk stated: “The majority reach a contrary conclusion because they fail to apply standard canons of statutory construction. The result is the addition of three years to an absurd sentence of eighty years in prison.” Id.
94. Id. Justice Mosk stated: “A sentence like the one imposed here, that cannot possibly be completed in the defendant’s lifetime, makes a mockery of the law and amounts to cruel or unusual punishment.” Id. He continued: [T]here is something unseemly in the eagerness of the People to argue that an ambiguous expression of the Legislature be interpreted to provide for the absolute maximum punishment, when defendant already stands sentenced to a term he will never live long enough to complete. Furthermore, I fail to understand the willingness of the majority of this court to twist the canons of statutory construction to assure that defendant’s ghost serves an additional three years in confinement. . . . There is a point at which enough is enough. Id. at 797-98, 863 P.2d at 723, 25 Cal. Rptr. 2d at 478. Justice Mosk makes a very viable point in the commentary above. Arguably, the court viewed this case as a perfect
Justice Mosk then turned to the meaning of the statute itself. He reasoned that to infer that the language of section 667.6(c) created an exception to section 654 would make the term “single transaction” mere surplusage which should be avoided in interpreting statutes. He based this conclusion on the fact that case law preceding the enactment of section 667.6 had held that punishment of multiple sex offenses such as those listed in section 667.6 had not been subject to the limitations of section 654. He explained that the reasoning behind the holdings was that the “defendant is considered to have multiple criminal objectives when he commits multiple sex offenses during a single attack.” In other words, Justice Mosk was implying that section 667.6(c) codified the principle that each sex offense committed contains a separate intent, therefore rendering section 654 inapplicable to the sentencing of these sex offenses—not that an exception to section 654 was being created.

Justice Mosk then provided his view as to what the term “single transaction” means. Referring to legislative history, he interpreted the language in issue as a description of the type of punishments for sex offenses which are permissible, or discretionary, as compared to those which are mandatory under section 667.6(d). He explained that the original provisions of section 667.6(c) “required mandatory full opportunity to continue its extension in the area of increased punishment for sex offenders. The court, probably realizing that this case would be viewed as somewhat irrelevant and unemotional because of an insignificant three year sentence in issue, knew they could rationalize their holding with little resistance from the legislature. However, the *Hicks* decision will create anomalous applications in the future. See *infra* notes 150-51 and accompanying text.

95. *Id.* at 798, 863 P.2d at 723, 255 Cal. Rptr. 2d at 478.

96. *Id.* (citing People v. Perez, 23 Cal. 3d at 545, 553-54, 591 P.2d 63, 69, 153 Cal. Rptr. 40, 45 (1979); People v. Hicks, 63 Cal. 2d 764, 766, 408 P.2d 747, 749, 48 Cal. Rptr. 139, 141 (1965); People v. Harrison 48 Cal. 3d 321, 335-38, 768 P.2d 1078, 1086-88, 256 Cal. Rptr. 401, 409-11 (1989)).

97. *Id.*

98. *Id.* at 799, 863 P.2d at 724, 25 Cal. Rptr. 2d at 479. Section 667.6(d), in pertinent part, states:

A full, separate, and consecutive term *shall be served* for each violation of Section 220, other than an assault with intent to commit mayhem, provided that the person has been convicted previously of violating Section 220 for an offense other than an assault with intent to commit mayhem, paragraph (2), (3), or (7) of subdivision (a) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, of committing sodomy in violation of subdivision (k) of Section 286, of committing oral copulation in violation of subdivision (k) of section 288(a), or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person *if the crimes involve separate victims or involve the same victim on separate occasions.*

CAL. PENAL CODE § 667.6(d) (West 1994) (emphasis added).
consecutive sentences, providing for discretion in sentencing only when the offenses were part of a single attack." He then pointed out that the original version of the statute was amended to provide that consecutive full-term sentencing was mandatory with no exceptions. He noted that this was the point in the statute’s creation at which the majority began its analysis. Noting that the legislature was in conflict as to whether the consecutive sentences should be mandatory or discretionary, the following compromise ensued: “[T]he phrase ‘single intent and objective’ was deleted. . . , subdivision (c) . . . was amended to be permissive, and subdivision (d) was added to specify under what conditions full consecutive sentences would be mandatory.” Justice Mosk, viewed the changes in the statute during its adoption process to depict the “Legislature’s struggle to define when the sentencing court retains discretion whether to impose full, consecutive sentences, but not any intent to confront the separate and largely irrelevant problem of section 654.”

Justice Mosk concluded his opinion by arguing that at the bare minimum, section 667.6 is ambiguous on whether section 654 applies. He noted the conflicts in the lower courts as to the interpretation of section 667.6(c). These conflicts, he argued, did not lead to the majority’s conclusion that the only reasonable interpretation of section 667.6(c) is that it creates an exception to section 654. He reiterated that the legislature, when enacting the statute, had no need to be concerned with section 654’s prohibitions in regard to forcible sex offenses. In concluding that there is more than one reasonable interpretation to section 667.6(c), Justice Mosk stated: “Accordingly, we should adhere

100. Id.
101. Id.
102. Id.
103. Id. at 799-800, 863 P.2d at 724, 25 Cal. Rptr. 2d at 479.
to the basic principle of construction that ambiguity in a penal statute should be interpreted in favor of the defendant.”

V. ANALYSIS OF HICKS

Through the use of Eric Tomont Hicks and some very questionable, disingenuous statutory interpretation, the California Supreme Court has nearly completed its quest to eliminate the protection of section 654 with respect to multiple sex offense cases.

A. The Jones-Hicks Dilemma

As previously discussed, the California Supreme Court in Jones interpreted the words “the crimes” to apply to more than just those enumerated sex offenses expressly stated in section 667.6(c). This interpretation would appear to reach the exact same result that the California Supreme Court was eager to reach in Hicks—consecutive full-term sentences may be uninhibitedly imposed under section 667.6(c) if at least one of the crimes is a sexual offense listed in section 667.6(c). After all, the Jones court basically stated that a consecutive full-term sentence could be imposed for each enumerated sex offense conviction along with a full-term non-sex offense sentence. This gives the same result as Hicks, with the only difference being that Hicks involved more full-term sex offense sentences that could be added to the full term non-sex offense sentence. Therefore, if both cases have essentially the same holding, why was the Hicks decision necessary?

The answer to this question must be that the Jones court did not even contemplate a Hicks type situation, a situation involving a conflict with section 654, when interpreting section 667.6(c). Arguably, the Jones court’s holding could be read such that consecutive full-term sentences can be imposed for multiple offenses, even if only one conviction is a section 667.6(c) sex offense, only if the non-sex offenses involved a separate intent and objective. This interpretation of the Jones

106. Id. at 800, 863 P.2d at 724, 25 Cal. Rptr. 2d at 479 (citing People v. Davis, 29 Cal. 3d 814, 828, 633 P.2d 186, 193, 176 Cal. Rptr. 521, 529 (1981)).
107. People v. Jones, 46 Cal. 3d 585, 593-94, 758 P.2d 1165, 1169-70, 250 Cal. Rptr. 635, 639. The Jones majority stated: “[W]e believe the words ‘the crimes’ in subdivision (c) were meant to refer to the multiple sex or nonsex felonies otherwise required to bring section 1170.1 into play, not just multiple ESO’s.” Id. at 597, 758 P.2d at 1171, 250 Cal. Rptr. at 641 (emphasis added). For a discussion of Jones, see supra notes 32-39 and accompanying text.
108. As previously mentioned, the defendant in Jones did have a separate intent for both the robbery and the rape offenses for which he was sentenced. See supra note 39 and accompanying text.
holding is supported by language in the opinion. The Jones court stated: “[T]he court may discretionarily impose a full, consecutive sentence for each ESO conviction, irrespective of whether the violent sex crime and the other crime making section 1170.1 potentially applicable were committed ‘during a single transaction.’” Section 1170.1 is expressly limited by section 654. Therefore, in order for multiple crimes to make section 1170.1 “potentially applicable,” a separate intent and objective would be needed for each crime. This reasoning indicates that the Jones court based its holding on the assumption that the language of section 667.6(c), “whether or not the crimes were committed during a single transaction” meant something other than the Hicks indivisible transaction interpretation. However, the Jones court never provided a meaning for “indivisible transaction.”

Arguably, the Jones court did not even contemplate a situation where the non-sex offense was merely incidental to the sex offense. The court never mentioned section 654 or what might result if section 654 would apply. Also, the hypothetical fact scenario given by the court to support its position involved crimes with separate intents.

B. The Hicks Opinion Analysis

As noted in Part IV the Hicks court primarily uses two means in reaching its purpose: 1) a textual interpretation incorporating legislative history and, 2) a culpability argument. These two means will be discussed below. Also, an analysis of the Hicks opinion in light of conflicting precedent and other penal code legislation not addressed in the opinion itself will be presented.

1. Statutory Interpretation

The statutory interpretation of section 667.6(c) conducted by the Hicks majority primarily took the form of two arguments. First, the majority

109. Jones, 46 Cal. 3d at 594, 758 P.2d at 1170, 250 Cal. Rptr. at 639 (emphasis added).
110. Arguably, the court’s finding that “the crimes” extended beyond those listed in section 667.6(c) is mere dicta. It was not the essential holding of the case. If the Jones court did contemplate a Hicks type of situation, they may have not discussed the issue because it could possibly interfere with the court’s desired holding by having to refute the limitations of section 654.
111. See supra note 39.
compared the language of section 667.6(c) to that of section 1170.1, the statute expressly limited by section 654. The majority found it important that section 1170.1 contained the language, “subject to section 654” whereas section 667.6(c) contained no such language.\textsuperscript{112} This argument, though persuasive, is tenuous—especially in light of the fact that section 667.6(c) does refer to section 1170.1 and section 1170.1 refers to section 654. Section 667.6(c) specifically references the sentencing formula provided in section 1170.1 by stating: “In lieu of the term provided in Section 1170.1 . . . .”\textsuperscript{113} This alternative formula in section 667.6(c) is still subject to the same limitations of the formula of section 1170.1, namely section 654. Section 667.6(c) is only replacing the method of summing the terms for the crimes rather than replacing the theme of the sentencing statute—sentences subject to multiple punishment.

Furthermore, section 1170.1 specifically references section 667.6. Section 1170.1, regarding 667.6, states, in pertinent part, “subject to Section 654, when any person is convicted of two or more felonies . . . the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed pursuant to Section . . . 667.6 . . . .”\textsuperscript{114} This language of section 1170.1 arguably implicates a legislative intent to make 667.6(c) susceptible to section 654.

Second, the majority looked to the legislative history to determine if section 667.6(c) created an exception to section 654. The \textit{Hicks} majority stated: “The Legislature’s reason for deleting from section 667.6(c) the [language ‘single intent or objective’ from] the phrase ‘whether or not the crimes were committed with a single intent or objective or during a single transaction’ is not apparent.”\textsuperscript{115}

However, the reason may be more apparent than the \textit{Hicks} majority would like to admit. The California Supreme Court in \textit{Neal} initially framed the section 654 extended interpretation issue as follows: “Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 \textit{depends on the intent and objective of the actor}.”\textsuperscript{116} Arguably, when the legislature, in its original provisions of section 667.6(c), used the “intent or

\begin{footnotesize}
\begin{enumerate}
\item People v. Hicks, 6 Cal. 4th 784, 792, 863 P.2d 714, 719, 25 Cal. Rptr. 2d 469, 474 (1993).
\item CAL. PENAL CODE § 667.6(c) (West 1994) (emphasis added).
\item CAL. PENAL CODE § 1170.1(a) (West 1993).
\item Hicks, 6 Cal. 4th at 793, 863 P.2d at 719, 25 Cal. Rptr. 2d at 474 (emphasis added).
\end{enumerate}
\end{footnotesize}
objective” language, it was precisely referring to the “indivisible course of conduct” test set forth in Neal and intended to create an exception to this rule. The legislature, in subsequent statutory revisions, could very well have been purposely not creating an exception to section 654 by removing the “intent or objective” language from the statute. The legislature most likely removed the phrase “single intent or objective” because it realized the phrase was useless language because the courts had already held that in cases involving multiple sex crimes, all of the sex crimes have separate intents.\footnote{As previously discussed, in Perez, the California Supreme Court, held that separate intents were involved. For discussion of the Perez decision, see supra notes 20-24 and accompanying text.} Therefore, if the language remained in the statute, it would be suggesting that some multiple sex crime situations could involve only one intent and that these situations would be exempt from a section 654 prohibition.

Thus, the phrase “or during a single transaction” arguably was serving a different purpose than that of referencing section 654. By deleting the “intent or objective” language and retaining the “single transaction” language, the legislature effectuated its purpose: consecutive full-term sentences could be imposed for the sexual offenses listed in section 667.6(c) regardless of whether they were committed during only one uninterrupted transaction with the victim, because each offense has a separate intent—not because they should be excepted from section 654 in spite of a single intent or objective.

An Assembly Committee report contemporaneous to the enactment of section 667.6(c) also supports the conclusion that non-sex offenses were not intended to be included in the scope of section 667.7(c).\footnote{Assembly Committee report contemporaneous to the enactment of section 667.6(c) also supports the conclusion that non-sex offenses were not intended to be included in the scope of section 667.7(c). The Assembly Committee report stated: “SB 13 provides that a full separate term shall be served for each conviction of rape, rape in concert, sodomy, oral copulation, object rape and child molestation.” See infra notes 121-24 and accompanying text for further discussion of the Senate Committee on Judiciary Report.} The Assembly Committee report stated: “SB 13 provides that a full separate term shall be served for each conviction of rape, rape in concert, sodomy, oral copulation, object rape and child molestation.” This report specifically refers to the sex offenses that were listed in the statute. Obviously, the legislature was interested in allowing sex offense

117. As previously discussed, in Perez, the California Supreme Court, held that separate intents were involved. For discussion of the Perez decision, see supra notes 20-24 and accompanying text.

118. Id. The Hicks majority did not refer to this report, but instead referenced a Senate Committee on the Judiciary report. Senate Comm. on Judiciary, Analysis of S. 13, 1979-80 Cal. Reg. Sess., at 8 (as amended Mar. 5, 1979). This report summarized section 667.6(c) in the same manner as the Assembly Report: “This bill would . . . provide that a ‘full, separate and consecutive term’ would be served for each conviction of such an offense.” Id. (emphasis added). See infra notes 121-24 and accompanying text for further discussion of the Senate Committee on Judiciary Report.
convictions to carry consecutive full-term sentences. The report does not mention anything regarding imposing full consecutive sentences for non-sex offenses not covered by the statute. Therefore, the intent of the legislature regarding section 667.6(c) is more clearly depicted as a desire to exclusively make sex offenses carry full-term consecutive sentences. The legislative intent as to whether this statute was to apply to incidental non-sex offenses protected under section 654 is at the very least, questionable. 120

Another important fact, stressed by the Hicks appellate court, that depicts the legislative intent behind section 667.6(c) was an analytical report of the original bill by the Senate Committee on Judiciary. The Senate Committee, in its analysis, questioned whether the author of section 667.6(c) "intended to mandate, in apparent disregard of Section 654, multiple punishments for sexual offenses committed during a single transaction." 121 This analysis "focused squarely on the potential conflict between section 654's prohibition against multiple punishment and the bill's apparent disregard of that section." 122 The legislature, after examining the Committee's report, promptly amended the bill by deleting the phrase "single intent or objective." 123 This course of events further implies that the legislature was not intending to create an exception to section 654. 124 The legislature was made aware of the

120. Furthermore, as previously mentioned, this author believes that section 667.6(c) is limited to the sexual offenses listed, not to other offenses as the Jones court held. The legislature, in section 667.6(c) was only codifying the Perez holding, which held that multiple sexual criminal acts on a victim involve separate intents. Perez did not hold that non-sex offenses incidental to the sexual acts also carried separate intents or that these non-sex offenses should be punished as an exception to section 654. The legislature, in all likelihood, did not intend section 667.6(c) to carry implications beyond the holding of Perez.


122. Id. at 104, 7 Cal. Rptr. at 175.

123. Id.

124. In the final modifications to section 667.6(c) before being enacted, the legislature imposed a new subdivision, section 667.6(d). This subdivision imposes mandatory, rather than discretionary, full-term consecutive sentences "if the crimes involve separate victims or involve the same victim on separate occasions." CAL. PENAL CODE § 667.6(d) (West 1994). The phrase "separate occasions" has been defined by the legislature as an instance where "the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." Id. Moreover, whether the defendant "lost or abandoned his or her opportunity to attack" is not determinative by itself. Id. This definition sounds as if it could relate to separate intent. If it were to mean separate intent, then arguably the legislature was not codifying, in section 667.6(c), the principle that each sex offense in a series of sex offenses committed during a single transaction has a separate intent. However, the phrase "separate occasions" has not been interpreted to mean separate intents. See
conflicting interpretation it created and deleted the “single intent or objective” in order to make clear the statute’s true purpose.

2. Culpability

The court’s culpability argument was based on what it felt was the purpose behind the enactment of section 667.6(c). The court stated: “That statute was intended to allow enhanced punishment of certain sexual offenders who commit multiple offenses. [citation omitted] Such increased penalties are appropriate, because a defendant who commits a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act.”  

Obviously, one of the purposes behind this statute was to punish a defendant in correlation with his culpability. One who commits several different sexual acts, often very violent acts, is arguably more culpable than a defendant who only commits one such act.

However, the court’s culpability argument runs afoul in the present case. In essence, the court is arguing that the burglary makes Hicks more culpable than if he did not commit the burglary. Granted, Hicks would have never been able to commit the sex offenses if he did not first commit the burglary. However, extending this argument to other criminal scenarios would virtually swallow the defendant-protecting limitations set forth in section 654 case law. Following the court’s rationale, a defendant involved in a multiple crime situation not involving sex offenses would nevertheless be punished for every single crime committed which was incidental to the defendant’s main intent and which was part of an indivisible course of conduct, even though punishment for these crimes would normally be prohibited by section 654. The court conceded that the burglary was incidental and was only committed to facilitate the sexual crimes. This fact makes the culpability argument run directly contrary to the protection of section 654.

People v. Reeder, 152 Cal. App. 3d 900, 914-15, 200 Cal. Rptr. 479, 489-90 (1984) (“the test for consecutive punishment under section 667.6, subdivision (d), is not whether a single transaction is divisible [indicating separate intent] but is rather whether the offenses occurred on occasions disjoined from each other”) (emphasis added).

Having a separate intent and having the opportunity to reflect upon one’s actions are arguably two different things. Or, put in another way, a separate act in a single transaction (section 667.6(c)) is different from a separate occasion (section 667.6(d)).
The following example may be useful to exemplify the court’s flaw. The defendant in *Neal v. California*, 126 threw gasoline on his victims and then ignited the gasoline in an attempt to murder the victims. The defendant was convicted on two counts of attempted murder and one count of arson. 127 The court concluded that punishing for the arson was not allowed due to the restrictions set forth in section 654. 128 The arson was considered, by the *Neal* court, as incidental to the defendant’s main objective of murder, and therefore protected from punishment by section 654. 129 Applying the *Hicks* rationale to the *Neal* fact scenario, the additional act of arson infers that the defendant is more culpable and should be punished for both crimes.

The *Hicks* court’s culpability argument does have truth and strength to it, but in a more limited sense. Section 667.6(c) only lists sex offenses for which sentence enhancements can be invoked. The legislature, along with the precedent previously discussed, evidently believed that a defendant who commits several of these offenses on his victim is more culpable. However, for the legislature to believe that the other crimes incidental to the sex offenses make the defendant more culpable would be directly contrary to the legislature’s belief and intent behind section 654. After all, the purpose behind section 654’s protection against multiple punishment is to “insure that a defendant’s punishment will be commensurate with his culpability.” 130

Arguably, a person who commits an offense, even though the crime was part of an indivisible course of conduct in committing the main offense, is nonetheless more culpable than if he had never committed the incidental crime. For example, it is difficult to grasp the concept that a person committing bank robbery is not more culpable when he steals a car to carry out his robbery than if he had not stolen the car. But under the judicial extensions of section 654, the defendant might not be sentenced for the auto theft. 131

127. *Id.* at 15, 357 P.2d at 841, 9 Cal. Rptr. at 609.
128. *Id.* at 20, 357 P.2d at 844, 9 Cal. Rptr. at 612.
129. *Id.* Justice Traynor, writing for the majority, stated:

In the instant case the arson was the means of perpetrating the crime of attempted murder. . . . The conviction for both arson and attempted murder violated Penal Code section 654, since the arson was merely incidental to the primary objective of killing [the victims]. Petitioner, therefore can only be punished for the more serious offense, which is attempted murder.

131. However, in this scenario, a prosecutor would probably succeed in proving a separate intent for the auto theft—significantly easier than proving a separate intent for
In spite of the argument above, the culpability argument regarding section 667.6(c) is still tenuous in its application. For instance, when invoking the majority rationale in Hicks, a person who rapes a woman out on the street and then burglarizes a home is no more culpable than a person who breaks into a home solely to commit a rape. Arguably, the defendant in the former scenario is much more culpable. “[A] person’s criminal culpability requires a showing that he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.” 132 In the former scenario, the defendant is acting purposely as to both the rape and the burglary. He has a specific intent and objective to rape the victim, and he also has a specific intent and objective to burglarize a house. In the latter scenario the person is acting purposely in regard to the rape but, arguably, is acting less than purposely in regard to the burglary.

3. Precedent

Just over two months before the Hicks decision was handed down, the California Supreme Court decided People v. Latimer. 133 In Latimer, the defendant kidnapped his victim for the purpose of taking her out to the desert to rape her. He brutally raped her twice. The trial court imposed sentences for both of the rapes and for the kidnapping. 134

On appeal, the California Supreme Court specifically refused to overrule the Neal decision. 135 The court, following the Neal extension of the burglary in Hicks. The defendant, deciding he wants to rob the bank, decides he needs a car to achieve this main purpose. Therefore, he decides he has to steal a car, committing another crime to achieve this purpose. Even though he knows a separate crime needs to be committed before achieving the robbery, he disjunctively decides to steal the car. In a Hicks type fact scenario, the sex offender could be strolling by a store, look in a window and see a woman, and walk in for the sole purpose of raping the woman. All he knows is that he wants to rape the woman and all he has to do to achieve this is to walk into the store with little to no thought as to whether he is committing a crime.

132. BLACK’S LAW DICTIONARY 379 (6th ed. 1990) (citing MODEL PENAL CODE § 2.02(1)).
133. 5 Cal. 4th 1203, 858 P.2d 611, 23 Cal. Rptr. 2d 144 (1993).
134. Id. at 1206, 858 P.2d at 613, 23 Cal. Rptr. 2d at 146. The defendant was sentenced for six years for each rape conviction, five years for an infliction of great bodily injury conviction, and for a consecutive term of one year, eight months for the kidnapping conviction. The kidnapping term was one-third of the middle term that could be imposed for kidnapping. Id.
135. Id. at 1205, 858 P.2d at 612, 23 Cal. Rptr. 2d at 145.
of section 654, specifically held, "'Since the kidnapping was for the purpose of committing the sexual offenses and [defendant] has been punished for each of the sexual offenses,' section 654 bars execution of sentence on the kidnapping count.'"\textsuperscript{136} The court, even though criticizing the \textit{Neal} rule, stated:

The \textit{Neal} rule . . . is far more pervasive; it has influenced so much subsequent legislation that stare decisis mandates adherence to it. It can effectively be overruled only in a comprehensive fashion, which is beyond the ability of this court. The remedy for any inadequacies in the current law must be left to the Legislature.\textsuperscript{137}

The \textit{Latimer} court held that when making decisions involving the \textit{Neal} rule, the court should be cautious in rendering decisions that conflict with the \textit{Neal} rule—the precise conflict that occurred in \textit{Hicks}. The \textit{Latimer} majority stated that the rationale behind their holding was based on the legislature's reliance on the \textit{Neal} rule.\textsuperscript{138}

The court presented one instance applicable to the facts in \textit{Latimer} in which the legislature relied on the \textit{Neal} rule. The court quoted Penal Code section 667.8: "[A]ny person convicted of a felony violation of [rape] who, for the purpose of committing that sexual offense, kidnapped the victim in violation of Section 207, shall be punished by an additional term of three years."\textsuperscript{139} In other words, if the defendant kidnaps his victim to commit one of the enumerated sex offenses listed in section 667.8, an enhancement of three years will be imposed. However, section 667.8 was not invoked by the \textit{Latimer} court because it "was neither pled nor proven" by the prosecution.\textsuperscript{140}

\begin{itemize}
  \item \textsuperscript{136} Id. at 1216, 858 P.2d at 620, 23 Cal. Rptr. 2d at 153 (alteration in original) (citing and quoting People v. Flores, 193 Cal. App. 3d 915, 921-22, 238 Cal. Rptr 656, 659 (1987)).
  \item \textsuperscript{137} Id., 858 P.2d at 619, 23 Cal. Rptr. 2d at 153. Even though the court refused to overrule \textit{Neal}, they did clarify that the \textit{Latimer} holding was not intended to limit those cases "finding consecutive, and therefore separate, intents, and those finding different, if simultaneous, intents." Id. at 1216, 858 P.2d at 620, 23 Cal. Rptr. 2d at 153.
  \item \textsuperscript{138} The majority in \textit{Latimer} noted that the legislature had not exactly relied on the \textit{Neal} rule but then stated: "[T]he result for present purposes is the same as if there had been legislative reliance. The Legislature has enacted substantial legislation reflecting its acceptance of the \textit{Neal} rule." Id. at 1214, 858 P.2d at 618, 23 Cal. Rptr. 2d at 151.
  \item \textsuperscript{139} Id. at 1215, 858 P.2d at 619, 23 Cal. Rptr. 2d at 152.
  \item \textsuperscript{140} Id. Moreover, \textit{Latimer} did not address section 667.6(c). Section 667.6(c) was most likely not raised by the prosecution. For further discussion of section 667.8, see
\end{itemize}
Latimer implicates major weaknesses in the Hicks decision. First, the Latimer court recognized the pervasiveness of and the deference that should be given to the Neal rule. The Hicks majority apparently disregarded this principle in analyzing section 667.6(c). As mentioned earlier, the Hicks majority stated: “The Legislature’s reason for deleting from section 667.6(c) . . . the phrase ‘whether or not the crimes were committed with a single intent or objective’ . . . is not apparent.” Even though the legislature’s reasoning was “not apparent,” the Hicks majority nonetheless had little difficulty in finding that section 667.6(c) created an exception to section 654 and, therefore, the Neal rule. The Hicks majority, if following the principles set forth in their Latimer decision, should have deferred to the Neal interpretation of section 654 and should not have found an exception created by section 667.6(c).

Even though the Hicks court declined to find that section 667.6(c) did not create an exception to section 654, the Hicks court should have at least concluded that the statute was ambiguous as to whether an exception was created and interpreted the statute in favor of the defendant. The court, by doing this, would have been acting in an appropriate manner by leaving the exception issue to the legislature. As the Latimer court stated: “On a more general front, what other statutes and legislative decisions may have been influenced by the Neal rule, and in what ways? These are questions the Legislature, not this court, is best equipped to answer.”

Second, and more specifically, the Latimer decision essentially acknowledges the legislative reliance on the Neal rule in enacting

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142. “When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted.” People v. Jones, 46 Cal. 3d 585, 599, 758 P.2d 1165, 1173, 250 Cal. Rptr. 635, 643 (1988) (citing People v. Davis, 29 Cal. 3d 814, 828, 633 P.2d 186, 193, 176 Cal. Rptr. 521, 528 (1981). The Hicks court was mindful of this interpretation but concluded that only one reasonable interpretation existed. Hicks, 6 Cal. 4th at 795-96, 863 P.2d at 722, 25 Cal. Rptr. 2d at 477. For a discussion of the Hicks rationale regarding this issue, see supra notes 87-88 and accompanying text.
143. Latimer, 5 Cal. 4th at 1216, 858 P.2d at 619, 23 Cal. Rptr. 2d at 152.
statutes. As mentioned above, the court points to section 667.8 to show the legislature’s reliance. The court stated:

[T]he Legislature was apparently aware that under the prevailing interpretation of section 654, consecutive sentences for a sexual offense and kidnapping would be impermissible if the sole purpose of the kidnapping was to facilitate the sexual offense. It accepted that interpretation . . . and enacted the three-year enhancement of section 667.8 to remedy the problem.

Arguably, the legislature had the Neal rule in mind when enacting and reviewing the other penal code sections relating to sex offense sentencing, namely section 667.6(c). If this is the case, the legislature would not have omitted the language “single intent or objective” of the original version of section 667.6(c), the explicit terminology used in the Neal rule, if it intended to create an exception to section 654.

4. California Penal Code Section 667.8

The Latimer court’s reference to California Penal Code section 667.8 brings to mind other weaknesses regarding the Hicks interpretation of section 667.6(c). One flaw in the court’s interpretation of section 667.6(c) is apparent when looking at the language used in section 667.8. How is it so simple for the Hicks court to find that the ambiguous wording of section 667.6(c) creates an exception to section 654, when the legislature, in section 667.8, has specifically created, in clear and concise terms, exceptions to section 654 for certain non-sex offenses incidental to sex crimes?

The answer to this question is simple—the Hicks court incorrectly interpreted section 667.6(c). As previously noted, Penal Code section 667.8 states, in pertinent part, “[A]ny person convicted of a felony violation of Section 261 [rape], 264.1 [Rape/penetration by a foreign object with force or violence], 286 [sodomy], 288a [oral copulation], or 289 [penetration by foreign object] who, for the purpose of committing that sexual offense, kidnapped the victim in violation of Section 207,

144. The Latimer court states: Here, the Legislature has not exactly relied on the Neal rule, since it had the power to overrule it. It has also never expressly endorsed it. Rather, it has essentially accepted it, perhaps out of a belief that courts are best suited to analyze double-punishment questions. But the result for present purposes is the same as if there had been legislative reliance. Id. at 1214, 858 P.2d at 618, 23 Cal. Rptr. 2d at 151 (emphasis added).

145. Id. at 1215, 858 P.2d at 619, 23 Cal. Rptr. 2d at 152.

146. Latimer reinforces the author’s argument set forth in Part V(B)(1) entitled “Statutory Interpretation” regarding why the legislature may have deleted the phrase “single intent or objective.” See supra notes 112-15 and accompanying text.
shall be punished by an additional term of three years." The legislature, in this statute, has referred to the *Neal* interpretation of section 654 through its language “for the purpose of committing that sexual offense” and has therefore created an exception to section 654. Arguably, the legislature would have been more specific in section 667.6(c), possibly invoking language similar to that of section 667.8, if it actually intended to create an exception to section 654 regarding non-sex offenses. Justice George, in his *Hicks* opinion, neglected to acknowledge the significant implications that section 667.8 has on the interpretation of section 667.6(c).

A second weakness is that a defendant could theoretically be sentenced under both section 667.6(c) and section 667.8. Granted, section 654 could possibly restrict the sentencing to only one sentence being imposed. However, following the *Hicks* interpretation of section 667.6(c) and the *Latimer* interpretation of section 667.8, both of these sections are outside the scope of section 654. This leaves the sentencing judge with a dilemma. When a judge is sentencing a defendant, he is required to impose at least a three year kidnapping term under section 667.8. If the judge, in his or her discretion, determines that a full-term should be imposed for the kidnapping under section 667.6(c), what should be the total sentence? Can the judge only impose a term equivalent to what a full-term would be minus the three year mandated term or can the judge just add the full-term from section 667.6(c) to the three-year term of section 667.8? If the judge can only impose the

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147. *CAL. PENAL CODE* § 667.8(a) (West 1993) (emphasis added). Subdivision (b) of section 667.8 contains similar language but applies to children under the age of 14 who are kidnapped for the purpose of the sex offense. The sentence enhancement under these circumstances is nine years. *Id.* § 667.8(b).

148. In *People v. Hernandez*, 46 Cal. 3d 194, 757 P.2d 1013, 249 Cal. Rptr. 850 (1988), the California Supreme Court stated: “[T]he additional term to be imposed under section 667.8 was originally designed to eliminate the partial sentence reduction that might be gained by application of . . . the prohibition against multiple punishment contained in section 654 (if the kidnapping and sex offense were part of one indivisible course of conduct).” *Id.* at 203, 757 P.2d at 1017, 249 Cal. Rptr. at 854.

149. Justice George, in *Hicks*, does refer to section 667.8 when addressing the appellate court’s rationale in prohibiting the burglary sentence. *See infra* note 151. However, he does not acknowledge that the language used in section 667.8 may indicate an interpretation of section 667.6(c) contrary to that of the *Hicks* majority.

150. For example, as in the *Latimer* case, a defendant was charged on two counts of rape and one count of kidnapping. He was sentenced for the upper term of eight years on each rape count. *See CAL. PENAL CODE* § 264 (West 1993 & Supp. 1994). The
difference between the discretionary full-term and the three year mandated term, why does section 667.6(c) not include limiting language to this effect? Attempting to find consistent answers to these inquiries depicts the inconsistencies of the *Hicks* decision.151

VI. EFFECTS OF *HICKS*

The *Hicks* decision has one obvious effect on the criminal justice system: courts will be permitted to impose full, consecutive sentences on sex offenders that never have been allowed in the past. If the general public were surveyed as to the reaction to this result, most likely a large percentage would be elated to see criminal sex offenders spend more time in prison.152

However, two other effects of *Hicks* are more troubling in spite of the strong abhorrence toward sex offenders. First, as discussed in Part V, *Hicks* could create several anomalous situations in the future. As discussed above, how section 667.8, concerning kidnapping, will interact

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full term of a kidnapping count also carries a sentence of eight years. See CAL. PENAL CODE § 208 (West 1993 & Supp. 1994). The judge, governed by sections 667.6(c) and 667.8, would have to determine which of the following sentences would be allowed:

1) Imposing an enhanced sentence of three years, according to section 667.8, with an additional full, consecutive term, invoking section 667.6(c), but then subtracting the enhancement, leaving a total of five years. Notice this sentencing choice runs contrary to the language of section 667.6(c) which allows a “full, separate, and consecutive term” because it is not a full eight-year consecutive term, but only a five-year consecutive term.

2) Imposing a three-year enhancement under section 667.8 and imposing an eight-year consecutive full-term under section 667.6(c). This would normally encounter section 654 limitations. However, section 654’s prohibitions in this area are uncertain in light of *Hicks*.

3) Choosing only one of the statutes and imposing that term. However, would the judge have a choice? After all, the judge is required under section 667.8 to impose a three-year enhancement.

The *Hicks* majority claimed to be hearing the case to clear up the sentencing conflicts among the lower courts. However, as the above problem illustrates, in essence, the court’s holding and rationale have created more conflicts.

151. Justice George, in his *Hicks* opinion, did briefly address this dual sentencing interpretation that may create inconsistencies. First, he stated that the court had no opinion as to whether the legislature intended to allow cumulative sentencing by utilizing both sections 667.6(c) and 667.8. Justice George then stated that if the legislature did not intend to allow sentencing under both statutes, the court “[c]ould effectuate such a legislative intent simply by holding that a defendant could not receive both a section 667.8 enhancement and consecutive full-term sentences under section 667.6(c) based upon the same offenses.” *Hicks*, 6 Cal. 4th at 795, 863 P.2d at 721, 25 Cal. Rptr. 2d at 476 n.8. This would appear to clear up the inconsistencies by invoking section 654 to prohibit both sentencing statutes to be invoked simultaneously.

152. In 1990, the probability of a defendant receiving a prison term for a rape conviction was only 53%. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 1990, at 15 (1993).
with section 667.6(c) is one such situation. Also, on a more general level, the section 667.8/section 667.6(c) situation is creating more inconsistencies and confusion in the sentencing procedure the courts are to follow—an area the criminal justice system is attempting to streamline. Another anomalous situation could arise where a defendant commits multiple incidental non-sex offenses in pursuing one sex offense, such as rape. Following the Hicks decision, consecutive full-term sentences for all of the crimes would be imposed. Multiple sentencing in this situation may significantly diverge from the making statutes’ purposes of making sentences commensurate with the defendant’s culpability.

A second troubling effect of the Hicks decision, the court’s disregard for established statutory rules of construction and its use of legislative type powers, could infiltrate areas beyond the sex offender sentencing realm. The judiciary has limits in what it can do in interpreting statutes. A court’s duty is to reasonably interpret the legislative intent in a statute. As previously discussed, if, in a penal code statute, two reasonable interpretations can be drawn from the statute, the interpretation most favorable to the defendant should be invoked. As the prior analysis of the Hicks decision indicates—if giving the benefit of the doubt to the court—two reasonable interpretations can nonetheless be

153. See supra notes 149-50 and accompanying text.
155. Consider the following: A defendant entered the victim’s house, took the victim to the garage and put the victim in her car, and then drove off with the victim so he could rape her. The defendant then leaves the scene by foot. Under this hypothetical, the defendant could probably be convicted of burglary, robbery, kidnapping, and rape. In light of Hicks, even though the burglary, robbery, and kidnapping were all committed for the purpose of committing one sexual offense, the rape, the defendant could nonetheless be given consecutive full-term sentences for all three crimes, in addition to a full-term sentence for the rape.

If, on the other hand, the defendant committed the burglary, robbery, and the kidnapping for the sole purpose of a non-sexual, physical assault, the defendant would most likely only be sentenced for the physical assault because of section 654’s limitations.
156. “The quest for legislative intent is not unbounded: ‘It still remains true, as it always has, that there can be no intent in a statute not expressed in its words, and there can be no intent upon the part of the framers of such a statute which does not find expression in words.’” City of Sacramento v. Pub. Employees Retirement Sys., 27 Cal. Rptr. 2d 545, 548 (1994) (citing and quoting Ex parte Goodrich, 160 Cal. 410, 416-17, 117 P. 451, 454 (1911)).
drawn from section 667.6(c). The court disregarded this principle to reach its desired conclusion. This is an abuse of judicial power that, if the court can commit without criticism, may inspire the court to carry this abuse into other criminal statutory interpretations. If one were not to give the Hicks court the benefit of the doubt and conclude that the court's interpretation is directly contrary to what the legislature intended, the court has then stepped over the line and infringed on powers specifically reserved for the legislature.\textsuperscript{157} The court is replacing the legislature's intent with its own desired interpretation.\textsuperscript{158} This type of action erodes the distinction between those roles reserved for the judiciary and those reserved for the legislature.

VII. CONCLUSION

The Hicks decision, to many, is probably seen as a step in the right direction in the punishment of sex offenders. Many people, particularly the victims, probably feel a sex offender can never be put away long enough. This Note's position is not that sex offenders should never receive increased sentences for their incidental crimes. Rather, the statutory sentencing scheme, created by the powers vested in the legislature, should be adhered to by the court, rather than deviated from to create a scheme that the court deems fit. In other words, the legislature should make the decision to increase sentences, or, more specifically, to create an exception to section 654 via section 667.6(c).

The Hicks court abused its powers and created precedent for a future wave of longer sentences in criminal sex offense cases.\textsuperscript{159} Hicks was the perfect case for the California Supreme Court with which to make the transition. After all, Eric Tomont Hicks already had an uncontested eighty year sentence to serve. The three year burglary sentence was basically insignificant when compared with the full sentence. The only

\textsuperscript{157} The California Code of Civil Procedure states: In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all. CAL. CODE CIV. PROC. § 1858 (West 1993 & Supp. 1994).

\textsuperscript{158} The Hicks majority may argue that because the legislature has not responded to this holding, the court reached a conclusion consistent with the legislature. However, as the Latimer court stated: "We have recognized that legislative inaction alone does not necessarily imply legislative approval." Latimer, 5 Cal. 4th at 1213, 858 P.2d at 618, 23 Cal. Rptr. 2d at 151.

\textsuperscript{159} The California Supreme Court's Jones decision is another foundational case for imposing longer sentences. People v. Jones, 46 Cal. 3d, 585, 758 P.2d 1165, 250 Cal. Rptr. 636 (1988).
reasonable conclusion that can be drawn from the California Supreme Court’s decision to use its judicial resources to tack on another three years to Hicks’ sentence is that the court was achieving the broader purpose of creating a harsher punishment for sex offenders of the future. Justice Mosk summed up the Hicks majority’s opinion most accurately: “A sentence like the one imposed here, that cannot possibly be completed in the defendant’s lifetime, makes a mockery of the law...”

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160. *Hicks*, because of the numerous crimes committed and the manner in which they were committed, was the perfect case for the California Supreme Court to achieve this purpose. As the trial court judge imposing the sentences stated: “As far as I’m concerned, this is one of the most egregious cases.” People v. Hicks, 18 Cal. App. 4th 88, 99, 7 Cal. Rptr. 2d 166, 172 (1992) (subsequently depublished).
