In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JUANITA VIDANA,

Defendant and Appellant.

Case No. S224546

Fourth Appellate District, Division Three, Case No. G050399
Riverside County Superior Court, Case No. RIF1105527
The Honorable Edward D. Webster, Judge

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Larceny and embezzlement have always been, and continue to be, "different offenses" within the meaning of Penal Code section 954.[1] Focusing almost exclusively on the 1927 amendments to the Penal Code, appellant maintains that larceny and embezzlement are but a single offense. Yet for the many reasons respondent set forth in its Opening Brief—most of which appellant either has ignored or addressed only cursorily—the 1927 amendments did not merge these different offenses into one crime.

First, even after 1927, as appellant concedes, larceny and embezzlement continue to have distinct elements, and neither offense is included in the other. The two crimes—though undoubtedly related—exist in different chapters of the Penal Code, which provide the statutory elements, defenses, and punishments for each. And while the punishments, enhancements, and statutes of limitations for larceny and embezzlement mostly overlap, there are times when they diverge. These many differences between larceny and embezzlement—all of which continue today—show that larceny and embezzlement, while both theft crimes, are two different offenses.

Second, this court has repeatedly acknowledged that the 1927 amendments were part of a *procedural* overhaul of the Penal Code, which effected a change in nomenclature of the various theft crimes but did not change their *substantive* differences. These are not empty distinctions. Indeed, just a couple of years ago, this court relied on these substantive differences—rejecting the argument that the 1927 amendments merged the various theft crimes into one offense—in concluding that the felonious-taking element for purposes of robbery can be satisfied by larceny alone and by no other theft crime. If larceny and embezzlement were the same

[1] All further code references are to the Penal Code.

offense, as appellant argues, then either should satisfy the felonious taking requirement of robbery. But this court has already concluded that is not so.

Third, the Legislature could not have meant the 1927 amendments to have the sweeping reach appellant advocates because the Legislature continues to treat larceny and embezzlement as different offenses long after those amendments, and such a broad application of the amendments would lead to other absurd and legally incorrect results.

Finally, and in the alternative, if this court concludes that larceny and embezzlement are not "different offenses," they are at the very least "different statements of the same offense." Appellant asserts that larceny and embezzlement are, in fact, "different statements of the same offense," and even concedes that section 954 permitted the People to *charge* appellant with both, but she argues that she could only be *convicted* of one or the other. Appellant's interpretation of section 954 is incorrect. The plain language of that provision—especially viewed in light of its historical development—permits separate convictions for each different statement of the same offense. Section 954's permitting multiple convictions for different statements of the same offense also serves important purposes, is consistent with the rest of California's penal scheme, and does not infringe upon the rights of defendants. Any contrary reading of section 954 would contradict that provision's purpose and cause unnecessary confusion and litigation.

ARGUMENT

I. APPELLANT'S SEPARATE CONVICTIONS FOR LARCENY AND EMBEZZLEMENT BASED ON THE SAME THEFT WERE PROPER BECAUSE LARCENY AND EMBEZZLEMENT ARE DIFFERENT OFFENSES

Larceny and embezzlement have always been "different offenses" within the meaning of section 954. Appellant argues that this changed

following the 1927 amendments to the Penal Code. As discussed at length in the Opening Brief, this argument is incorrect for three basic reasons: First, applying this court's analysis in *People v. Gonzalez* (2014) 60 Cal.4th 533, 539 (*Gonzalez*) to this case, larceny and embezzlement are different offenses even after 1927. Second, this court has held many times that the 1927 amendments did not change the substance of any offense and has consistently rejected any contrary interpretation. Third, it is clear the Legislature did not mean the 1927 amendments to have the sweeping reach appellant advocates because the Legislature itself continues to treat larceny and embezzlement as different offenses long after those amendments, and because such a broad application of the amendments would lead to other absurd and legally incorrect results. As explained below, appellant has not successfully rebutted these arguments.

A. Employing the Methodology This Court Set Forth in *Gonzalez*, Larceny and Embezzlement Are Different Offenses, and Appellant Has Not Shown Otherwise

As respondent explained in the Opening Brief (OBM[2] 13–19), employing the analytical method this court set forth in *Gonzalez*, *supra*, 60 Cal.4th at p. 539, larceny and embezzlement are different offenses. First, larceny and embezzlement "differ in their necessary elements," and "neither offense is included within the other." (See *Gonzalez*, at p. 539.) Second, larceny and embezzlement are "self-contained" in different sections and chapters of the Penal Code, with each "set[ting] forth all the elements of a crime" and "each prescrib[ing] a specific punishment[.]" (See *ibid.*) Third, the punishments for larceny and embezzlement are not always the same. (See *ibid.*) Fourth, larceny and embezzlement have

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[2] Throughout this reply brief, respondent's Opening Brief on the Merits is abbreviated "OBM," and appellant's Answer Brief on the Merits is abbreviated "ABM."

sometimes divergent enhancements and statutes of limitations. Appellant's attempts to counter respondent's application of *Gonzalez* are not compelling.

First, appellant admits that larceny and embezzlement have distinct elements and that neither is necessarily included in the other. (ABM 12.) Nonetheless, she argues that *Gonzalez* "did not hold that those factors alone mandate a finding of separate offenses" (ABM 11–12) and that different elements are just like the different "conditions or circumstances" this court relied upon in *People v. Craig* (1941) 17 Cal.2d 453 (*Craig*) in finding a single rape offense in section 261 (ABM 12–13). Neither contention survives scrutiny. The fact that the two oral copulation provisions in *Gonzalez* differed in their necessary elements was a main component of this court's conclusion that they were different offenses for purposes of Penal Code section 954. Indeed, this court's different-elements-different-offenses analysis is consistent with the United States Supreme Court's long-established analysis from *Blockburger v. United States* (1932) 284 U.S. 299, 304, which affirmed that where a defendant's conduct violates two penal provisions, "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." And, as for *Craig*, appellant's concession that larceny and embezzlement have different necessary elements undermines her suggestion that they are just different "conditions or circumstances": As this court pointed out in *Gonzalez*, *Craig* itself distinguished between different "conditions or circumstances" and different elements, "acknowledg[ing] that ''[a] defendant may be convicted of two separate offenses arising out of the same transaction when each offense is stated in a separate count and when the two offenses differ in their necessary elements and one is not included within the other.''" (*Gonzalez*, *supra*, 60 Cal.4th at p. 539, quoting *Craig*, at p. 457, italics omitted.) Contrary to appellant's

suggestion, that larceny and embezzlement have different elements is an essential factor demonstrating they are different offenses.

Second, appellant labels as "disingenuous" respondent's statement that larceny and embezzlement are self-contained in separate chapters because those crimes are also articulated together in section 484. (ABM 14–16.) Yet respondent acknowledged that "section 484 now also contains an articulation of the offense of embezzlement, and sections 489 and 490 contain most of the substance of the embezzlement punishments." (OBM 23–24.) Nonetheless, these combined theft sections still contain only an incomplete description of embezzlement; by contrast, the embezzlement chapter continues to contain all the statutory articulations of the crime of embezzlement and related definitions (§§ 503–508, 510), information relating to the elements and defenses specific to embezzlement (§§ 509, 511–513), and the full gamut of punishment for embezzlement (§§ 514, 515). Thus, these embezzlement-specific sections contain information about embezzlement's elements, defenses, and punishments that the other theft sections do not, and the law of embezzlement is not contained anywhere else in the Penal Code. Not only has appellant not rebutted these points, she has not answered the obvious question: If the Legislature meant to eliminate embezzlement as a distinct crime, why has it not repealed the separate embezzlement chapter from the Penal Code?

Third, appellant acknowledges that larceny and embezzlement carry different punishments in certain circumstances but dismisses those differences as "minor exceptions" and fails to rebut the point beyond that. (ABM 16–17, see also OBM 16–17 [discussing the difference in punishments].) In *Gonzalez*, although the punishments for the two subdivisions at issue in that case were exactly the same, this court noted that "[n]ot all of the[] punishments [we]re the same" across the various section 288a subdivisions, which indicated that each subdivision described

a separate offense. (*Gonzalez*, *supra*, 60 Cal.4th at p. 539.) Appellant has given no reason why this same analysis should not apply here. Indeed, the difference in punishment shows that larceny and embezzlement are different crimes—as were the crimes in *Gonzalez*—because the Legislature has decided to treat them differently by punishing the theft of the same property in certain circumstances one way when the property is stolen by larceny and another when it is embezzled.

Fourth, appellant brushes aside respondent's argument that the embezzlement-specific "aggravated white collar crime enhancement" from 1996 shows that the Legislature treats larceny and embezzlement as distinct crimes. (ABM 18–20; see also OBM 17–18, 25–26.) Specifically, she argues that "the purpose of the enhancement" is not to "render" larceny and embezzlement different offenses (ABM 18–19) and goes on to note that there is a different enhancement (namely, section 12022.6) that applies to all thefts, a fact she asserts "further dilute[s]" respondent's argument (ABM 19–20). These points fail. Respondent never argued that the purpose of the enhancement was to *render* a distinction between larceny and embezzlement; respondent argued that the Legislature's creation of a theft enhancement that applies to embezzlement but not to larceny *reflects* a recognition that they are different crimes. This argument remains unrebutted. And the existence of a separate and unrelated theft enhancement that applies to all thefts—one that is, notably, imposed in addition to and separate from the "aggravated white collar crime enhancement" respondent raised (see § 186.11, subd. (b)(2))—does not in any way "dilute[]" respondent's point that the existence of the embezzlement-specific "aggravated white collar crime enhancement" shows that the Legislature considers embezzlement to be a different crime from larceny. Simply put, if an enhancement can apply to embezzlement

but cannot apply to larceny then embezzlement and larceny cannot be the same crime.

Finally, appellant notes that *Gonzalez* does not mention differences in defenses or enhancements in its analysis and, as a result, she suggests that they are unimportant. (See ABM 18, fn. 5 & ABM 19; OBM 14–19.) The same could be said of respondent's point regarding differences in the statutes of limitations (OBM 18), which appellant did not address. This criticism reflects an overly narrow view of the *Gonzalez* analysis. The court in *Gonzalez* sought to determine whether the Legislature intended the two provisions at issue in that case to be different offenses. (*Gonzalez*, *supra*, 60 Cal.4th at pp. 537–538.) It did this by looking at the differences between them—in that case, in addition to the elements, it was also the self-contained nature of the provisions and the potential differences in punishment. (*Id.* at p. 539.) Here, respondent has simply pointed to *additional* differences—i.e., defenses, enhancements, and statutes of limitations—as *more* evidence that the Legislature views larceny and embezzlement as different offenses. Consistent with the logic of *Gonzalez*, it stands to reason that the Legislature treats larceny and embezzlement differently because they are different.

B. Appellant's Argument That the 1927 Amendments Merged Larceny and Embezzlement into a Single Offense Is Inconsistent with This Court's Precedent, and She Has Not Attempted to Reconcile This Inconsistency

Appellant's view that the 1927 amendments to the Penal Code changed larceny and embezzlement into a one crime conflicts with this court's precedent. As respondent demonstrated (OBM 21–23), this court has explained many times since 1927—and as recently as just a few years ago—that "the essence of [the amendments] [was] simply to effect a change in nomenclature without disturbing the substance of any law." (*People v.*

Myers (1929) 206 Cal. 480, 485; see also *People v. Williams* (2013) 57 Cal.4th 776, 789 (*Williams*), quoting and citing *Myers* for that proposition.) Indeed, the purpose of the amendments was merely to remove some of the procedural distinctions between these offenses—i.e., "the technicalities that existed in the pleading and proof of these crimes at common law" (*People v. Ashley* (1954) 42 Cal.2d 246, 258)—while maintaining all the substantive differences between them. (*People v. Davis* (1998) 19 Cal.4th 301, 304.) Appellant has offered no reason why this court should deviate from its well established precedent, nor has she even attempted to square her arguments with that precedent.

Perhaps most notably absent from appellant's Answer Brief is any attempt to reconcile her position with this court's decision in *Williams*. As respondent argued in its Opening Brief (OBM 21–22), this court's recent decision in *Williams*, *supra*, 57 Cal.4th 776, further shows how firm the historical distinctions between the various theft offenses have remained even after the 1927 amendments. At issue in that case was the element of robbery that requires the "felonious taking of personal property of another[.]" (*Williams*, *supra*, 57 Cal.4th at p. 779; see also § 211.) Because "felonious taking" was synonymous with "larceny" at common law, a broad application of the 1927 amendments—the type of application appellant seeks here—would mean that any type of theft would now meet robbery's "felonious taking" requirement. (*Williams*, at pp. 786–787 & pp. 796–797 (dis. opn. of Baxter, J.).) But the court rejected this application of the 1927 amendments, emphasizing its more-than-80-year history of reaffirming that the 1927 amendments did not change the nature of the theft offenses or, for that matter, the "substance of any law." (*Williams*, at p. 789; citing *Myers*, *supra*, 206 Cal. at p. 485.) In holding that only larceny—and no other theft crime, such as embezzlement or theft by false pretenses—could be the basis for robbery, this court necessarily

recognized that larceny, theft by false pretenses, and embezzlement continue to be different offenses.

Finally, appellant suggests that because theft can be charged generally as an "unlawful taking" and juries need not reach a unanimous verdicts on which type of theft was committed, this means theft is a single crime. (ABM 9–10, 23.) This is not so. As part of the 1927 amendments, which sought to reduce pleading and proof anomalies, the Legislature carved out an exception for theft in section 952, explaining that "[i]n charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." (§ 952; see also *People v. Nor Woods* (1951) 37 Cal.2d 584.) As appellant notes (ABM 9), this was done "not only for the purpose of simplifying procedure, but also to relieve . . . the prosecution of charging in advance, at its peril, an offense which the evidence, because of such fine distinctions, might show not to exist although the guilt of the defendant be manifest." (*People v. Fewkes* (1931) 214 Cal. 142, 149 (*Fewkes*).) That it is "sufficient" (§ 952) to charge theft generally in order to "relieve . . . the prosecution" from making a more specific charging decision "at its peril," does not mean that the prosecution *must* charge and seek conviction of only a single theft crime where more than one applies. (See *Fewkes*, *supra*, 214 Cal. at p. 149.) If the prosecution elects to accept the risk of charging the specific theft crimes it believes it can prove—as the prosecution did here—it does so at the risk of forfeiting the benefits of this simplified pleading-and-proof procedure in favor of the chance to seek more specific convictions. Appellant has not given any reason to view section 952 contrary to its intended purpose and, instead, as a limitation on the prosecution's choices on how to pursue its case.

C. Appellant Makes No Effort to Refute Respondent's Additional Evidence That the 1927 Amendments Did Not Convert Larceny and Embezzlement into a Single Offense

Although appellant acknowledges respondent's arguments that the Legislature continues to treat larceny and embezzlement as distinct offenses long after the 1927 amendments (OBM 23–27) and that the Legislature could not have intended the Court of Appeal's broad application of the 1927 amendments because it would lead to other absurd and legally incorrect results (OBM 27–29), she makes no effort to refute them. (See ABM 22–23.) Respondent will not repeat these arguments here except to point out that they matter because they demonstrate that appellant's position cannot be correct: If larceny and embezzlement are a single theft crime consolidated into a single provision of the Penal Code since 1927, as appellant contends, it would make no sense after that point for the Legislature to separately maintain and amend the embezzlement chapter of the Penal Code (OBM 24–25), to prescribe different statutes of limitations to certain embezzlement crimes but not the larceny equivalents (OBM 25), to use the terms "larceny or embezzlement"—and even "the crimes of theft or embezzlement"—rather than just "theft" when discussing those offenses in new legislative enactments (OBM 26), or to create a special punishment enhancement that applies to embezzlement but not to larceny (OBM 25–26). Yet it has done so. And, finally, not only has this court already rejected a broad application of section 490a, as discussed above, that section cannot be applied broadly anyway because doing so would lead to absurd and legally incorrect results. (See OBM 27–29; see also *People v. Hannon* (1971) 5 Cal.3d 330, 335 ["a literal interpretation of a statute is not necessarily controlling and will be rejected if it leads to an absurdity"], citing *People v. Darling* (1964) 230 Cal.App.2d 615, 620.)

II. ALTERNATIVELY, APPELLANT'S SEPARATE CONVICTIONS FOR LARCENY AND EMBEZZLEMENT BASED ON THE SAME THEFT WERE PROPER BECAUSE LARCENY AND EMBEZZLEMENT ARE—AT THE VERY LEAST—DIFFERENT STATEMENTS OF THE SAME OFFENSE

As shown above, and in the Opening Brief, larceny and embezzlement are different offenses. But if this court were to determine that larceny and embezzlement are not different offenses, respondent alternatively argues that section 954 still permits the dual conviction in this case because larceny and embezzlement are—at the very least—"different statements of the same offense." (OBM 29–30, citing § 954; see also *People v. Lofink* (1988) 206 Cal.App.3d 161, 166 (*Lofink*) [section 954 expressly allows prosecutors to charge and convict of multiple counts where the counts are different statements of the same offense].) Appellant asserts that larceny and embezzlement are, in fact, "different statements of the same offense," and even concedes that section 954 permitted the People to *charge* appellant with both, but she argues that she could only be *convicted* of one or the other. (ABM 25–29.) Appellant's interpretation of section 954 is incorrect. The plain language of that provision—especially viewed in light of its historical development—permits separate convictions for each different statement of the same offense. In addition, section 954's permitting multiple convictions for different statements of the same offense serves important purposes and, especially taken in combination with the rest of California's penal scheme, does not infringe upon the rights of defendants. Moreover, reading section 954 as appellant suggests would contradict that provision's purpose and would cause unnecessary confusion and litigation. Finally, none of the Court of Appeal cases upon which appellant relies directly advances her interpretation of section 954. As explained below, section 954 permits the prosecution to charge different statements of the same offense and to seek conviction on each charge.

A. The Plain Language of Penal Code Section 954 Permits Separate Convictions for Different Statements of the Same Offense

Section 954 permits the prosecution to charge a defendant in separate counts on three bases: (1) "two or more different offenses connected together in their commission[]"; (2) "different statements of the same offense"; or (3) "two or more different offenses of the same class of crimes or offenses[.]" It goes on to provide that "[t]he prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged." A clear reading of section 954 is that it permits the prosecution to charge in separate counts on any of these three bases, it does not require the prosecution ever to elect between counts, and that a jury may convict on any of the counts as charged.

That this is the most natural reading of section 954 is shown by the fact that this court has read it this way. In *People v. Ortega* (1998) 19 Cal.4th 686 (*Ortega*), the court summarized section 954 as follows: "Section 954 states that, '[a]n accusatory pleading may charge . . . different statements of the same offense' and 'the defendant may be convicted of any number of the offenses charged.'" (*Ortega*, at p. 692, ellipses original.) The implication is that multiple convictions are permissible where the multiple counts are based on different statements of the same offense.

Similarly, in *Pearson*, this court considered whether a defendant could be convicted of lewd conduct on a child (§ 288, subd. (a)) and sodomy (§ 286, subd. (c)) for the same singular act of sodomy. (*People v. Pearson* (1986) 42 Cal.3d 351, 354–355.) The court recited section 954 as follows:

> Section 954 sets forth the general rule that defendants may be charged with and convicted of multiple offenses based on a single act or an indivisible course of conduct. It provides in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission or

> *different statements of the same offense* . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . ."

(*Pearson*, at p. 354, italics original.) The court went on to conclude that the defendant was properly charged with both crimes because, "such charges clearly constitute 'different statements of the same offense' and thus are authorized under section 954." (*Ibid.*) And finally, the *Pearson* court, reading section 954 in the manner proposed by respondent, stated, "It also appears the court was authorized to convict defendant of both offenses for each act; the statute clearly provides that the defendant may be convicted of 'any number of the offenses charged.'" (*Ibid.*)

Appellant reads section 954 as requiring each separate conviction to be based on a "different offense." (ABM 26–28.) Yet nothing in section 954 mandates this. While section 954 says that "the defendant may be convicted of any number of the offenses charged," this does not mean that each separate conviction must be anchored to a distinct offense. In other words, section 954 does not contain a limitation on the number of permissible *convictions*; rather it describes today—as it always has—the permissible number of *offenses* for which a defendant may be convicted. This distinction, while subtle, is the key to making sense of section 954.

For example, consider an information that contained three counts, two of which described "different statements of the same offense" of X and one of which described a "different offense" of Y. Nothing in section 954 would prevent convictions on all three counts because that provision simply states that a defendant "may be convicted of any number of the offenses charged" without setting a limitation on the number of total convictions the defendant could receive. In other words, a defendant who is convicted of those three counts still stands convicted of only the "offenses charged," which are two. Section 954 does not say—as appellant advocates (AOB

26–27)—that each conviction has to be based on a different offense, but simply that a defendant may be charged with and convicted of multiple offenses. Simply put, multiple convictions for different statements of the same offense in no way contravenes section 954's pronouncement that a defendant may be convicted of "any number of the offenses charged."

The historical development of section 954 further shows this to be correct. In contrast to today's version, the original version of section 954 provided: "The indictment must charge but one offense, and in one form only, except that when the offense may be committed by the use of different means, the indictment may allege the means in the alternative." (§ 954 (1872).) This was a preservation of a common law rule disfavoring the joinder of multiple offenses in a single indictment because of the risk of undue prejudice to a defendant. (See *Pointer v. United States* (1894) 151 U.S. 396, 401 ["'In cases of felony, no more than one distinct offense or criminal transaction at one time should regularly be charged upon the prisoner in one indictment, because, if that should be shown to the court before plea, they will quash the indictment, lest it should confound the prisoner in his defense, or prejudice him in his challenge to the jury; for he might object to a juryman's trying one of the charges, though he might have no reason so to do in the other; and if they do not discover it until afterwards, they may compel the prosecutor to elect on which charge he will proceed'"], citations omitted; see also *People v. Bailey* (1863) 23 Cal. 577, 579 (*Bailey*) [quoting section 954's predecessor version, section 241 of the Criminal Practice Act, as follows: "The indictment shall charge but one offense, but it may set forth that offense in different forms under different counts"].) The rule was about the number of different offenses that could be included in a single indictment; it was not about the number of counts for which a defendant could stand convicted. The number of counts in the indictment was inconsequential, and it was up to the

prosecution whether it wished to allege the permissible sole offense in a single count or in different ways in multiple counts. (*People v. Frank* (1865) 28 Cal. 507, 513 ["Hence an indictment which charges all the acts enumerated in the statute, with reference to the same instrument, charges but one offense, and the pleader may therefore at his option charge them all in the same count, or each in separate counts, and in either form the indictment will be good"].) Indeed, where multiple counts in an indictment all alleged versions of the same offense—as opposed to different offenses—the indictment was proper, and the prosecution was permitted to proceed to trial on all counts. (See *Bailey*, at p. 580 ["Whether the indictment intended to state but one act of embezzlement, under different counts, varying the amount and time, or whether it intended to set forth two separate and distinct acts of embezzlement, does not appear. If the former be the case, then a demurrer would not lie. If the latter, then the prosecuting attorney should be required at the trial to elect upon which charge he will proceed, and he will then be confined to that"].) The earliest versions of section 954 preserved this pleading-and-proof system. (See § 954, in 1872, 1874, and 1880.)

In 1905, section 954 was amended to permit for the first time joinder of different offenses in a single indictment or information, and provided that "[t]he prosecution [was] not required to elect between different offenses or counts set forth in the indictment or information, but the defendant [could] be convicted of but one of the offenses charged." (§ 954 (1905).) Thus, while section 954 now provided more liberal joinder of different offenses in a single information, it still maintained the rule that a defendant could only be convicted of one of the offenses in that information. Again, a plain reading of this provision reveals that the limitation set forth was on the number of different *offenses* for which a defendant could be convicted not on the number of *counts* or *charges* for

which conviction could be had. In other words, in 1905—just as now—section 954 would permit multiple convictions for "different statements of the same offense" because they still amounted to a "convict[ion] of but one of the offenses charged." (§ 954 (1905).)[3]

In 1915, section 954 was amended to nearly the form it takes today, materially altering it from permitting that a defendant be "convicted of *but one* offense charged" (§ 954 (1905), italics added) to permitting that a defendant be convicted of "*any number of* offenses charged" (§ 954 (1915), italics added.) The historical purpose of section 954—to govern the rules of joinder—shows that it still did not describe the number of *convictions* a defendant might receive, but rather the number of *offenses* of which a defendant could be convicted in a single charging document: Before 1915, it was "but one offense charged," and since then, it is "any number of offenses charged." Today, just as in the days predating the Penal Code, nothing in section 954 prevents a defendant from being convicted of multiple counts reflecting "different statements of the same offense."

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[3] Notably, this version was short-lived, lasting only a decade. It appears prosecutors did not take advantage of the 1905 amendments with great frequency; as one court observed years after the amendment, "In concluding this opinion we deem the occasion opportune to call attention to the provisions of section 954 of the Penal Code, as amended in 1905 (St.1905, p. 772). This section is clearly intended to permit the charging of different offenses in different counts of the same indictment or information, where different offenses all relate to the same act, transaction, or event. The section as it is now written has been the law of this state since 1905, and yet no case has yet been before this court where the prosecuting officer has availed himself of its provisions." (*People v. Miles* (1912) 19 Cal.App. 223, 228.) It is possible that prosecutors did not avail themselves of this rule because there was little incentive to combine different offenses in a single information if the defendant still would receive only conviction for one of the different offenses, even if based on different acts or omissions.

For these reasons, read in light of its purpose and historical evolution, section 954 does not place a limitation on the number of charges or counts that can result in conviction. This explains why it is of no consequence that section 954 provides that "[t]he prosecution is not required to elect between the *different offenses or counts*" and then goes on to say that "the defendant may be convicted of any number of the *offenses* charged" without mentioning "counts" again. The number of charges or counts resulting in conviction does not matter; all that has ever mattered—although no longer today in light of the 1915 amendment—is the number of "*offenses charged*" for which a defendant may be convicted arising from a single accusatory pleading. Moreover, had the Legislature intended to create a new limitation on what counts in the information could lead to conviction and what counts could not, it would have said so. Yet to view section 954 this way, one has to presume that the Legislature sought to convey such a significant change by just omitting the words "or counts" at the end of the phrase "a defendant may be convicted of any number of offenses charged." It is unlikely the Legislature would create such a stark limitation simply by inconspicuously omitting the word "counts" from the phrase "offenses or counts." To do so, the Legislature instead would have written something along the lines of: 'the defendant may be convicted of only any number of the *different* offenses charged *and not different statements of the same offense*' or 'the defendant may be convicted of only any number of the offenses charged *and of no other counts*' or 'the defendant may be convicted of *only* ~~any number of~~ the *different* offenses charged.' That the Legislature did not draft section 954 in any of these ways suggests it did not mean to convey what appellant contends.

Finally, it bears noting that the historical evolution of section 954 gives context to the word "but" in the sentence, "The prosecution is not required to elect between the different offenses or counts set forth in the

accusatory pleading, *but* the defendant may be convicted of any number of the offenses charged[.]" (Italics added.) No matter how one reads this provision, the use of the word "but" is clumsy; indeed, this court has avoided it by quoting around it and inserting the word "and" in its place. (See, e.g., *Ortega*, *supra*, 19 Cal.4th at p. 692 ["Section 954 states that, '[a]n accusatory pleading may charge . . . different statements of the same offense' and 'the defendant may be convicted of any number of the offenses charged'"].) The "but" worked well when it first appeared in the 1905 version of section 954 because it served the contrastive function of explaining that a defendant could be charged with different offenses and multiple counts "but" still could be convicted of "but one offense." (§ 954.) Yet when the Legislature implemented the dramatic substantive shift that expanded section 954 from permitting convictions on "but one offense" to permitting convictions on "any number of offenses," it did so by simply exchanging those few words alone, while leaving the rest of the sentence materially intact.[4] The use of "but" in today's version of section 954 is somewhat out of place given that the rest of the sentence now contains expansive language ("any number of offenses") instead of limiting language ("but one offense"). And reading the "but" as drawing a contrast between what can be charged and what can result in conviction does not comport with the Legislature's clear goal of relaxing joinder prohibitions to permit multiple charges and convictions deriving from a single accusatory pleading. (See *People v. Knowles* (1950) 35 Cal.2d 175 ["[a]n insistence upon judicial regard for the words of a statute does not imply that they are like words in a dictionary, to be read with no ranging of the mind" but instead the goal is to ascertain "what purpose did the Legislature seek to

[4] The only other alteration was the grammatical change of the word "can" to "may."

express as it strung those words into a statute" and to do so a court may look to "the history of the statute"]; see also *Baker v. Workers' Comp. Appeals Bd.* (2011) 52 Cal.4th 434, 442 [the court "begin[s] with the text of the statute as the best indicator of legislative intent, but [it] may reject a literal construction that is contrary to the legislative intent apparent in the statute . . ."], citations and quotations omitted; *In re Haines* (1925) 195 Cal. 605, 613 ["[i]n the interpretation of statutes, courts are not bound by grammatical rules, and may ascertain the meaning of words by the context"].) Notably, although keeping the word "but" was perhaps not the best grammatical construction, the Legislature may have chosen to leave it in place because it is nonetheless consistent with section 954's present meaning if one reads "but" with its denotation of "but rather." (See, e.g., Bible (King James Version) Matthew 6:13 ["And lead us not into temptation, but deliver us from evil"].) Read this way, section 954 makes perfect sense: The prosecution need not elect between the offenses or counts on which to proceed, but rather may seek conviction for all offenses, regardless of whether the offenses are each pled in one count or multiple.

B. Penal Code Section 954's Permitting Multiple Convictions for Different Statements of the Same Offense Serves Important Purposes and, Especially in Light of California's Penal Scheme, Does Not Infringe upon Defendants' Rights

When viewed in the greater context of California's penal scheme, section 954's permitting multiple convictions for different statements of the same offense serves important purposes without infringing upon the rights of defendants. (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 ["statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme"]; *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Associates, Ltd.* (1988) 484 U.S. 365, 371 [a "provision that may seem ambiguous in isolation is often clarified by the

remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law"].) As a starting point, even where section 954 permits multiple *convictions*, section 654 forbids multiple *punishments* for the same act or omission. (*Gonzalez*, *supra*, 60 Cal.4th at p. 537 ["Section 954 thus concerns the propriety of multiple convictions, not multiple punishments, which are governed by section 654"].) Not only are there no *direct* penal consequences, appellant has not identified—and respondent has not found—any *collateral* penal consequences that might arise from multiple convictions for different statements of the same offense. (Cf. *People v. Vargas* (2014) 59 Cal.4th 635, 645 [sentencing court could only apply one strike prior conviction in a subsequent case where defendant had earlier received two strike prior convictions for two different crimes based on her commission of a single act].)

While a defendant will only be punished once for each act or omission, regardless of whether he or she receives one conviction or multiple, the existence of multiple convictions serves important purposes in the state's interest. First, the stayed conviction remains available should collateral review render invalid the conviction for which a defendant is actually sentenced. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1128–1129 [stay procedure "preserv[es] the possibility of imposition of the stayed portion should a reversal on appeal reduce the unstayed portion of the sentence."]; see also *People v. Niles* (1964) 227 Cal.App.2d 749, 756 ["if [the trial court] dismisses the count carrying the lesser penalty, and the conviction on the remaining count should be reversed on appeal, the defendant would stand with no conviction at all . . . [which would] risk [] letting a defendant escape altogether"].) Second, multiple convictions most accurately reflect the full scope of a defendant's illegal conduct. (See *Commonwealth v. Desmarteau* (1860) 82 Mass. 1, 12 [16 Gray 1]

(*Desmarteau*) ["various counts are introduced to meet more accurately the precise circumstances of the transaction" and conviction can be had on any or all counts].) As there is no additional penal consequence to appellant, it furthers justice to have an accurate record of appellant's convictable conduct. (See *In re Wright* (1967) 65 Cal.2d 650, 656 [stay procedure "protect[s] the rights of both the state and the defendant"].)

Indeed, the significance of a defendant's receipt of multiple convictions for the same conduct in a given penal system should be considered in light of how punishment is imposed in that system. Because our Legislature through section 654 already has made a blanket determination that defendants cannot be punished more than once for a single act or omission, the number of convictions a defendant receives for a single act or omission in a given case is of significantly diminished importance. (See *People v. Eid* (2014) 59 Cal.4th 650, 660 [defendants not entitled to notice of "the number of convictions they faced"]; cf. *Craig*, *supra*, 17 Cal.2d 453 [case that predates today's routine usage of section 654 to stay multiple punishments and thus treated multiple convictions as synonymous with multiple punishments].)[5]

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[5] It bears noting that California law goes well beyond what the federal Constitution requires. While the double jeopardy clause protects against the imposition of multiple criminal punishments for the same offense (*North Carolina v. Pearce* (1969) 395 U.S. 711, 717), it does so only "when such occurs in successive proceedings." (*Hudson v. United States* (1997) 522 U.S. 93, 99, citing *Missouri v. Hunter* (1983) 459 U.S. 359, 368–69 (*Hunter*).) Thus, if a legislature wishes to punish the same conduct under two provisions constituting the same offense, it may do so. (*Hunter*, at pp. 368–369 ["Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger*, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial"].)

Indeed, where—as in California—a defendant will not receive additional punishment for multiple convictions, courts have recognized the possibility of multiple convictions for separate counts articulating different modes or methods of committing the same offense. (See, e.g., *Anderson v. United States* (1898) 170 U.S. 481, 500, citing *Desmarteau, supra*, 82 Mass. at pp. 11–12, favorably ["It was held [in *Desmarteau*] that all the counts were in proper legal form, and related to a single offense, and that, as a conviction on any one required the same judgment and the same sentence as a conviction on all"]; *State v. Talbott* (1939) 199 Wash. 431, 437–438 [91 P.2d 1020, 1022] ["The two counts do not charge different offenses, but merely charge the same offense in different ways, and the evidence in the case was amply sufficient to convict on either or both theories"]; *State v. Nahoum* (1931) 172 La. 83, 109 [133 So. 370, 379] ["Where the same offense is charged in different ways in separate counts of the information and the jury convicts on both counts, as in the case at bar, the conviction is of one crime only, and the court, necessarily, can impose but one sentence"]; *In re Walsh* (1893) 37 Neb. 454 [55 N.W. 1075, 1078] ["Where the different counts in an information charge the same offense, in case of a conviction on each count the rule is to render a single sentence upon all the counts for the one entire offense"]; *Republic of Hawai'i v. Tsunikichi* (1898) 11 Haw. 341, 346 [jury was presented with killing with "premeditation" or with "extreme atrocity and cruelty" and it "was left to them to find either or both"]); *Davis v. State* (Okla.Crim.App. 1928) 267 P. 674, 675 ["Where the same offense is stated in different counts in an information, and a separate verdict is returned upon each count fixing the punishment equally upon each count . . . the judgment will be modified by striking out the punishment assessed under one count so as to make but one punishment for the crime charged"].)

By way of contrast, in jurisdictions where convictions automatically trigger punishment, courts do not permit multiple convictions for different modes of committing the same offense where the legislature clearly did not intend multiple punishments. For example, in *Ball v. United States* (1985) 470 U.S. 856 (*Ball*), the United States Supreme Court explained that, applying *Blockburger*, Congress did not intend that a defendant be separately punished for receipt of a firearm and possession of the same firearm. (*Ball*, at pp. 861–864.) Turning to remedy, the high court—without a staying mechanism akin to how California courts implement section 654—had to choose between permitting concurrent punishments or vacating one of the convictions. Just as this court had observed decades earlier in *Wright*, the *Ball* court concluded that even a concurrent sentence was punishment. (*Ball*, at pp. 864–865; see also *Wright*, *supra*, 65 Cal.2d at p. 655 ["multiple sentences . . . , whether consecutive or concurrent, impose excessive punishment beyond the power of the sentencing court . . .].) Accordingly, the *Ball* court vacated both the conviction and the sentence. (*Ball*, at p. 865.)

But unlike in the federal system, the vacating of a duplicative conviction is unnecessary in California because section 654 has eliminated the potential problems with imposing multiple convictions stemming from a single act or omission. (See *United States v. Palafox* (9th Cir. 1985) 764 F.2d 558, 563–564 (en banc) [borrowing California's section 654 procedure in a federal case because it "avoids both the punitive collateral effects of multiple convictions as well as the direct effects of multiple sentences" that troubled the *Ball* court].) It is perhaps for this same reason that whereas section 954 expressly sanctions the charging in separate counts of "different statements of the same offense," the federal rules discourage it. (See Fed. Rules Crim.Proc., rule 7, 28 U.S.C.A., Notes to Subdivision (c)(1) ["The provision . . . that it may be alleged in a single count that the means by

which the defendant committed the offense are unknown, or that he committed it by one or more specified means, is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways"].)

In sum, section 954's permitting multiple convictions for "different statements of the same offense" makes sense in light of California's overall penal scheme, which strikes the balance of furthering the state's interest in accurately accounting for the multiple criminal dimensions of a defendant's singular conduct, while protecting the defendant from multiple punishments for that conduct.

C. Appellant's Proposed Interpretation of Penal Code Section 954 Contradicts That Provision's Express Purpose and Would Cause Unnecessary Confusion and Litigation

Appellant's proposed interpretation of section 954 would also contradict the statute's express purpose and cause unnecessary confusion and litigation. The purpose of section 954 is to govern "the form of the information" (*People v. Brooks* (1985) 166 Cal.App.3d 24, 29) and to permit joinder of different offenses so as to prevent "repetition of evidence and save[] time and expense to the state as well as to the defendant" (*People v. Scott* (1944) 24 Cal.2d 774, 779). "[A]n information plays a limited but important role: It tells a defendant what kinds of offenses he is charged with (usually by reference to a statute violated), and it states the number of offenses (convictions) that can result from the prosecution." (*People v. Butte* (2004) 117 Cal.App.4th 956, 959, internal quotations omitted.) Section 954 is supposed to make the procedure behind charging a defendant more straightforward. The broad permissibility in the charges and counts puts the defendant on notice of the crimes he or she faces. Reading the statute in the manner proposed by appellant would defeat this purpose and introduce into the pleading stages of criminal trials

unnecessary confusion about which charges can result in convictions and which cannot. This could raise a whole new subset of claims regarding whether a defendant was on notice that he faced convictions for *all* of the charges or convictions for only *some* of the charges. Appellant's proposed approach would also create a tangled mess of unnecessary litigation about what constitutes a "different offense," as opposed to what is merely a "different statement of the same offense." This case is a good example of the arguments that courts would have to sift through to make such determinations.

In addition, it is counterproductive to section 954's purpose to permit the prosecution to proceed on "different statements of the same offense" in different counts—as all agree section 954 does—but not to permit the jury's convictions on those various counts to stand. This case illustrates that point well. While appellant lauds the Court of Appeal for "properly" striking the larceny conviction (ABM 29), this judicial nullification of the jury verdict is problematic for two reasons.

First, it was arbitrary. The court gave no basis for striking the larceny conviction and not the embezzlement conviction. And, as a policy matter, what basis could a court ever have for choosing? That is, if the prosecution is permitted to proceed on different statements of the same offense because both statements are equally valid, then there is no justification for nullifying one of the two sets of jury findings over the other.

Second, it contravenes well established jurisprudence counseling against judicial intervention in jury verdicts. In fact, reading section 954 as permitting the Court of Appeal to nullify one of the two jury verdicts, as it did here, would build into criminal proceedings a routine whereby courts will be called upon frequently to invalidate jury verdicts. Jury verdicts, in general, should not be lightly disregarded: "[W]ith few exceptions, once the jury has heard the evidence and the case has been submitted, the

litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes; through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality." (*People v. Palmer* (2001) 24 Cal.4th 856, 863, citing *United States v. Powell* (1984) 469 U.S. 57, 66–67.) Courts are generally cautious about interfering with the jury verdict and do so only under particular circumstances. The standards of review on appeal demonstrate this. (See, e.g., *People v. Watson* (1956) 46 Cal.2d 818 [requiring a showing of a miscarriage of justice before a court will overturn a verdict on state law grounds]; *People v. Johnson* (1980) 26 Cal.3d 557, 578 [all inferences are drawn in favor of the jury's verdict].) In that same vein, when a jury finds true multiple enhancements, but where those enhancements may not be imposed because they are prohibited by law or exceed the limitations on multiple enhancements, a sentencing court must stay them rather than strike or dismiss them. (Cal. Rules of Court, rule 4.447.) The public's confidence in the jury system depends, in part, on the sanctity of the verdict and its staying power. Accordingly, jury verdict nullification should be a limited exception, not a routinely applied rule as appellant appears to advocate.

Finally, appellant also notes that a "judicially created exception to section 954 prohibits multiple convictions that are based on necessarily included offenses" and argues that it "logically follows" that the same rule would apply to dual convictions for different statements of the same offense. (AMB 28.) It is unclear why that "logically follows," and appellant does not explain it further. Indeed, if larceny and embezzlement are "different statements of the same offense" (and not "different offenses") despite having different elements, as appellant contends, then that is a key distinction between these different statements of the same offense and lesser included offenses in general: A greater offense includes all the *same*

elements of a lesser offense, whereas larceny and embezzlement have *different* elements that a separate conviction would capture. This court therefore should decline appellant's tacit invitation to create a new judicial exception to section 954. Indeed, other than that one judicially created exception to section 954—the reasons for which this court has described as "unclear" (*Pearson*, *supra*, 42 Cal.4th at p. 355)—the only other exception was legislatively created. (See § 496 ["A principal in the actual theft of the property may be convicted pursuant to this section. However, no person may be convicted both pursuant to this section and of the theft of the same property"].)

D. None of the Court of Appeal Cases upon Which Appellant Relies Directly Supports Her Interpretation of Penal Code Section 954

Appellant cites four Court of Appeal cases, which she suggests support her position that a defendant can be charged with different statements of the same offense but only convicted of one offense. (See ABM 28–29.) As explained here, these cases do not assist her.

Two of the cases—*People v. Muhammad* (2007) 157 Cal.App.4th 484 (*Muhammad*) and *People v. Smith* (2012) 209 Cal.App.4th 910 (*Smith*)—had nothing to do with different statements of the same offense. *Muhammad* was about whether the various subdivisions in the stalking statute were different *offenses* or merely different *penalty provisions* for a single offense. (*Muhammad*, at p. 494.) And *Smith* did not even mention section 954 because it was about whether a break in the victims' observation of the defendant's indecent exposure meant that he committed the same indecent exposure offense more than once. (*Smith*, at pp. 916–917.)

Appellant's reliance on *People v. Coyle* (2009) 178 Cal.App.4th 209 (*Coyle*) is also misplaced. In *Coyle*, the defendant killed a person and was

convicted of (1) murder with a true finding of the special circumstance that the murder was committed during the commission or attempted commission of a burglary; (2) murder with a true finding of the special circumstance that the murder was committed during the commission or attempted commission of a robbery; and (3) second degree murder. (*Id.* at p. 211.) The court accepted respondent's concession that defendant was improperly convicted of three separate counts of murder, because the three counts "simply alleged alternative theories of the offense." (*Id.* at p. 217.) The only dispute was whether the appropriate remedy for the error was to consolidate the judgment to reflect one count of murder with two special circumstances, and the court determined that it was. (*Ibid.*)

Coyle is not helpful to appellant's position for two reasons.

First, based on the People's concession in that case, the court accepted without further analysis that the defendant could be convicted of only one offense and not on each of the "alternative theories of the offense" in that particular case. Because of the concession, the issue was limited to the remedy; and beyond that, that case provides only dicta on issues involving multiple convictions, to the extent it says anything about them at all.

Second, and most importantly, *Coyle* was not about "different offenses" or even "different statements of the same offense." (Cf. § 954.) In *Coyle*, counts 1 and 2 were both for first degree murder under section 187 and each alleged, not different statements of that offense, but rather different special circumstances for penalty purposes under section 190.2. The court and the parties in *Coyle* were correct to identify error because special circumstances do not define different offenses (or even different statements of the same offense) under section 954; instead they are a set of circumstances that permit giving particular punishments—death penalty or life imprisonment—for the offense of first degree murder. Count 3 in *Coyle* was for second degree murder, the conviction for which was

improper, not because it was a different statement of the same offense, but because second degree murder was a lesser included offense of the first degree murder in that case.

The last case upon which appellant relies is *People v. Ryan* (2006) 138 Cal.App.4th 360 (*Ryan*). While the Court of Appeal in that case appeared to view section 954 in the way appellant here does, it never expressly held so. In fact, it sought to distinguish the cases, like *Lofink*, *supra*, 206 Cal.App.3d 161, which have held that a defendant may receive multiple convictions for "different statements of the same offense." (*Ryan*, at pp. 368–369.) In any event, the *Ryan* court's apparent view that different statements of the same offense cannot result in different convictions appears to be based on a cursory view of section 954's phrase "the defendant may be convicted of any number of the offenses charged," which, as explained above in response to appellant's similar argument, does not dictate that result.

In sum, none of the Court of Appeal's cases appellant cites weighs in heavily on the question of whether a defendant can receive multiple convictions for different statements of the same offense. This court therefore does not need to address them. Even to the extent they might be read as holding that a defendant cannot receive multiple convictions for different statements of the same offense, such a reading should be avoided, as it would force them into conflict with this court's interpretation of section 954 in *Ortega*, *supra*, 19 Cal.4th 686 and *Pearson*, *supra*, 42 Cal.4th 351, and, as explained above, would result in an incorrect statement of the law.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this court reinstate appellant's larceny conviction and affirm the remainder of the judgment.

Dated: January 21, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 8,954 words.

Dated: January 21, 2016

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **The People v. Vidana**
No.: **S224546**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 22, 2016, I served the attached **REPLY BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and furthermore, I declare in compliance with California Rules of Court, rules 2.251(i)(1) and 8.71(f)(1), I electronically served a copy of the above document on January 22, 2016, on Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and on Appellant's attorney Valerie G. Wass via the registered electronic service address wass100445@gmail.com by 5:00 p.m. on the close of business day. The Office of the Attorney General's electronic service address is ADIEService@doj.ca.gov.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 22, 2016, at San Diego, California.

Tammy Larson
Declarant

Signature

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