IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>PLAINTIFF AND RESPONDENT,<br><br>V.<br><br>VERONICA AGUAYO,<br><br>DEFENDANT AND APPELLANT. | CASE NO. S254554 |

On Review of a Partially Published Decision of
the Court of Appeal, Fourth Appellate District, Division One

# APPELLANT'S CLOSING BRIEF ON THE MERITS

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**MISCELLANEOUS**

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# MS. AGUAYO'S CLOSING BRIEF

## INTRODUCTION

Penal Code section 954[1] permits multiple convictions subject to two exceptions: lesser included offenses (LIO) of other greater offenses, and merely different statements of the same offense. The latter exception is based on this Court's interpretation of section 954 in *People v. Vidana* (2016) 1 Cal.5th 632 (*Vidana*).

The state has changed its position many times during this appellate litigation. It has abandoned its theory advanced in the Court of Appeal, the

[1] All undesignated section references are to the Penal Code. References to (a)(1), (a)(2), (a)(3), and (a)(4) are to subdivisions of section 245. ADW refers to assault with a deadly weapon described in (a)(1); FLPGBI refers to force likely to produce great bodily injury described in (a)(4).

cutting a single hair of a sleeping victim would not constitute FLPGBI, but has also opted not to defend the appellate court's holding based on the use of two different instruments. (*People v. Aguayo* (2019) 31 Cal.App.5th 758, 768.) The state now appears to have settled on the (a)(1) and (a)(4) convictions being separate acts, based on its interpretation of Ms. Aguayo's testimony, which the jury "would have found," concluding both convictions are authorized by section 954.

The state has taken two positions. First, the state asserts that the Legislature intended to treat (a)(1) and (a)(4) as different offenses by separating them into subparagraphs, defined by unique elements and punished differently. Second, the state claims that even if the subdivisions state a single offense, Ms. Aguayo committed two separate acts.

In responding to the Sixth Amendment problems that arise from a finding that section 954 allows both convictions here, the state asserts that the trial court implicitly found two separate assaults were committed during a single course of conduct. The state then posits that analogizing the Sixth Amendment problem to the use of prior convictions yields a false analogy because separate acts need not be established by the convictions themselves. The state's arguments are not persuasive.

## ARGUMENT

### I. The Legislative History Reveals the Legislature's Intent: that (a)(1) and (a)(4) Are Alternative Statements of the Same Offense

The state, in its supplemental reply, posited that (a)(1) and (a)(4) are separate and distinct offenses based on their structure, text, and punishments, and that Ms. Aguayo's preference for relying on the expressed legislative intent contained within the legislative history stands the canons of statutory construction on its head. (RSRB pp. 11-12.) The state also posits that to interpret sections (a)(1), (a)(4), and section 954, this Court should first look to the language of the statute and only if the statutes are subject to more than one reasonable interpretation may extrinsic sources be consulted. (RSRB p. 16.) Case law establishes, however, that extrinsic sources also may be considered if there is any ambiguity remaining after the preliminary textual analysis. (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 189.)

The statutes themselves, (a)(1) and (a)(4), do not plainly state whether, for purposes of section 954, (a)(4) is: (1) an LIO of (a)(1), (2) is a different statement of the same offense, or (3) a completely different crime; accordingly, this Court is free to consult the legislative history of section 245. This ambiguity is cured by what the legislative history reveals about its intent.

The overarching goal of any court in interpreting and applying a

statute is to ascertain the Legislature's intent in order to effectuate the purpose of the law. "The legislative history of the statute and the wider historical circumstances of its enactment are proper to consider to ascertain the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)

Here, the Legislative intent is clear and unequivocal. The legislation separated (a)(4) from (a)(1) for the purpose of separating a strike from a non-strike prior. (AOBM pp. 26-28, 64-65; ASRB PP. 15-16.) Nonetheless, exalting form over substance, the state asserts that this Court should use the indirect inferential approach to determining Legislative intent, even when the statute's own legislative history provides express evidence of the Legislature's intent. While a word search of respondent's supplemental reply will discern multiple references to the "distinct" subdivisions created, one will search in vain for any reference to "merely splits an ambiguous code section" (see ASRB p. 16, citing history) or only "technical, nonsubstantive changes" (Legis. Counsel's Dig., Assem. Bill No. 1026 (2011–2012 Reg. Sess.).

Here the Legislature had a singular purpose in separating (a)(4) from (a)(1), and it did so without any opposition. It makes no sense for this Court to rely on proxy variables derived from the inferential approach when the undisputed direct legislative history is before the Court. (ASRB PP. 15-16.)

Nonetheless, the state continues to rely on *People v. Gonzalez* (2014) 60 Cal.4th 533 (*Gonzalez*), and *People v. White* (2017) 2 Cal.5th 349 (*White*). But this Court found it unnecessary to consider extrinsic aids in *White* and *Gonzalez* because the statutes were not ambiguous. Moreover, the state's assertion, that sex offenses do not require the adoption of unique rules of statutory construction, does not respond to any point Ms. Aguayo argued. Ms. Aguayo had argued that *Gonzalez* and *White* were unique because the text and structure of those statutes reflected the seriousness with which society views each individual unconsented act, and therefore deemed each individual act of penetration to represent a "unit of prosecution."[2] (ASRB p. 11.) Section 288a, subdivision (a), defined what conduct constitutes the act of oral copulation, while subdivisions (b)-(k) define various ways the act may be criminal. Each subdivision sets forth the elements of a crime and specific punishment, not all of which are the same. Based on these factors, this Court concluded that each subdivision describes an independent offense. (*Gonzalez, supra*, 60 Cal.4th at p. 539.) As Ms. Aguayo has repeatedly observed, the state has failed to show that the text and structure of (a)(1) and (a)(4) are similar to those at issue in *Gonzalez* or *White*, where the use of extrinsic aids was unnecessary and this Court did not

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[2] Further, one may question the difference between a "unit of prosecution" in sex offense cases and a unit of prosecution in assault cases (see, *post,* p. 15).

even reach the section 954 issue.

The state claimed that under Ms. Aguayo's interpretation of section 245, a single event could violate all four subdivisions of section 245. Ms. Aguayo pointed out that (a)(1) and (a)(4) exclude assaults committed with a firearms. Without recognizing this limitation in (a)(1), the state replied that (a)(4) does not contain the firearm exclusion language. While this was likely a drafting error that occurred during the separation into two subdivisions, the case law had already established this when this Court limited (a)(4) FLPGBI to assaults with body parts, and held that it excludes the use of anything extrinsic to the body. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1037.) At the same time, this part of *Aguilar* also explains why striking two blows with the bike chain/lock could not be the basis for both an (a)(1) and an (a)(4) conviction.

## II. In Order to Convict Ms. Aguayo for Separate Convictions Under (a)(1) and (a)(4) Based on the Same Course of Conduct, the Verdict Itself Must Show the Jury Convicted Ms. Aguayo of Separate Acts

Ms. Aguayo identified the Sixth Amendment problem in her limited supplemental brief and expanded that analysis in her supplemental reply brief. (ASB pp. 15-16; ASRB pp. 32-45.) The basis for the claim is that convicting Ms. Aguayo twice for the same conduct exceeds the maximum punishment for one conviction. It is Ms. Aguayo's position that when

section 954 is properly applied to vacate a second conviction based on the same conduct, no Sixth Amendment issue arises and the relevant findings may be based on judicially found facts and reviewed under the substantial evidence rule. But when a trial court fails to vacate a second conviction based on the same course of conduct as the first conviction, the Sixth Amendment is implicated unless the facts supporting a second separate conviction were found by the jury beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.)

The state addressed this claim in its supplemental reply brief by arguing the Penal Code section 954 issue is similar to a consecutive sentencing choice. (RSB pp. 33-49.) The analogy is inapt; because a consecutive sentencing choice does not exceed the statutorily authorized penalty, it is not a violation of *Apprendi*, does not implicate the Sixth Amendment, and judicial fact-finding is permissible.

The state has also side-stepped the standard of review to be applied to a section 954 determination and has cited *People v. Gallardo* (2017) 4 Cal.5th 120 and *Descamps v. United States* (2013) 570 U.S. 254 in support of its claim the sentencing court may consider those facts "the jury surely found." (RSB pp. 43-44.)

In *Gallardo,* this Court recognized its role as "limited to identifying those facts that were established by virtue of the conviction itself–that is,

facts the jury was necessarily required to find to render a guilty verdict. . . ." At the same time this Court rejected "what-the-jury-most-likely-found" standard, which appears to be closer to "what-the-jury-surely-found" standard advocated by the state, than it is to the "what-the-jury-necessarily found" standard adopted in *Gallardo*. (RSB p. 34.)

What the jury necessarily found here does not support two separate convictions based on two separate acts. The prosecutor did not plead it that way, or argue it that way to the jury. The jury instructions and the verdict forms used did not show what the jury necessarily found by virtue of the verdict rendered. (ASRB pp. 40-45.) There is no rationale for why the jury (or this Court) should treat the facts so differently than advocated at trial (cf. *People v. Cruz* (1964) 61 Cal.2d 861, 868; *People v. Nelson* (1960) 185 Cal.App.2d 578, 582).

## III. This Court Should Not Eliminate the Course of Conduct Option from Its Interpretation of Section 954, But Should Identify the Factors Relevant to Finding a Course of Conduct

In its supplemental reply, the state for the first time argued that this Court should "reevaluate" its recent decision in *Vidana*, *supra*, 1 Cal.5th 632. (RSB pp. 21-25.) This reevaluation should, according to the state, result in excluding the "course of conduct" test used in determining punishment, from the section 954 determination regarding the number of convictions that is proper. For the latter purpose, according to the state, the

only requirement would be that one offense was complete before the other offense was begun. (RSB p. 21.)

Taking the state's position to its inevitable conclusion, a prosecutor could have charged Ms. Aguayo with fifty counts of (a)(1), and the jury could have convicted her of 50 counts of (a)(1), based on her father's testimony. This would have produced 50 strike convictions from 50 "units of prosecution," the absurdity of which demonstrates that this is surely not what the Legislature intended.

Determining the number of counts of which a defendant can be convicted, based on whether there are separate acts or one course of conduct, is a reasonable means by which to prevent a prosecutor from "overcharging" and to insulate a jury from the inevitable challenge of deciding thinly parsed conduct into multiple verdicts.

While the course of conduct test this Court articulated in *Vidana* need not be reevaluated, this is an opportunity for this Court to explain how the facts relevant to a course-of-conduct claim should be evaluated. And in that regard, Ms. Aguayo submits that here, the length of the altercation is the circumstance most relevant to the determination of whether this was one course of conduct. In the preliminary examination Mr. Aguayo described the altercation as lasting two to three minutes. (P.X.R.T. pp. 17, 29-30.)

But the starting point for discussion should be the appropriate unit of

prosecution.[3] Multiplicity/multipliciousness are terms commonly used in other jurisdictions, though not so California, and encompass various concepts. One principle in play here is the "unit of prosecution" and *is* known in our state. (See, e.g., *People v. Whitmer* (2014) 59 Cal.4th 733, 744 (Liu, J., conc.) ["The proper unit of prosecution is a question of legislative intent that arises when interpreting any criminal statute. (See *Sanabria v. United States* (1978) 437 U.S. 54, 70 ['Whether a particular course of conduct involves one or more distinct "offenses" under the statute depends on . . . congressional choice']; see generally Note, *Counting Offenses* (2009) 58 DUKE L.J. 709.)

One federal appellate court has considered whether assault is an offense to which the course-of-conduct analysis applies. For this purpose, the court viewed the issue as one that should be determined by legislative intent. In finding that Congress had not specified its intent with clarity, the court relied on the rule of lenity and concluded assault to be a course-of-conduct offense. (*United States v. Chipps* (8th Cir. 2005) 410 F.3d 438, 449.)

If this Court finds the issue to be one of legislative intent and also finds that the legislative intent unclear for purposes of employing a course-

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[3] The state cites *People v. Harrison* (1989) 48 Cal.3d 321 numerous times. At best, *Harrison* is a sex offense case for which each penetration is the unit of prosecution, "penetration however slight."

of-conduct analysis under section 954, it should, like the Eighth Circuit, invoke the rule of lenity, and find that (a)(1) and (a)(4) assaults are course-of-conduct crimes. The assaults in *Chipps* were "simple" assaults. Here, where the legislative amendment was "technical" and "nonsubstantive," the "unit of prosecution" for (a)(1)/(a)(4) should likewise be subject the rule of lenity.

## IV. Together, the Applications of Judicial Restraint and the Rule of Lenity Lead to the Inescapable Conclusion That (A)(1) and (A)(4) Are Exceptions to the Multiple Convictions Section 954 Otherwise Allows

The state asserts that Ms. Aguayo raised for the first time, in her conclusion to her supplemental reply brief, that the rule of lenity should be applied to this Court's interpretation of (a)(1) and (a)(4). (RSB p. 49.)

The state is mistaken.

Ms. Aguayo argued, at the outset, that the rule of lenity should be applied to any ambiguity in section 245. (AOBOM p. 24.) She also urged that same rule of statutory construction be applied to (a)(1) and (a)(4), for purposes of resolving the section 954 issue. (ASRB pp. 45-46.).

The state relies on *White's* rejection of the rule of lenity, finding it does not apply because the elements charged predated the Court's opinion and everyone agreed that the defendant could not be punished for both offenses. (RSB p. 49.) The state is again mistaken. The statute involved in

*White* did not define a crime or a punishment, and it was for this reason that this Court held that the rule of lenity did not apply. (*White, supra,* 2 Cal.5th at p. 360.)

Here, (a)(1) and (a)(4) each define a crime and the same punishment so the rule of lenity does apply. Moreover, viewing (a)(1) and (a)(4) as different statements of the same offense is a reasonable interpretation of the statutes. The appellate courts in *People v. Cota* (2020) 44 Cal.App.5th 720, and *People v. Brunton* (2018) 23 Cal.App.5th 1097, so adopted that interpretation.

The determination that (a)(1) and (a)(4) are simply different statements of the same offense, and therefore are an exception to the multiple convictions permitted under section 954, is also a proper exercise of judicial restraint. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178.) By deciding the issue in Ms. Aguayo's favor on a state statutory ground, this Court will avoid having to decide whether imposing two convictions violates Ms. Aguayo's right to a jury determination beyond a reasonable doubt under the Sixth Amendment. Working in tandem, the rule of lenity and the principles of judicial restraint inevitably lead to the conclusion that the multiple convictions under (a)(1) and (a)(4) are different statements of the same offense from which only one conviction can survive.

## Conclusion

Based on the foregoing, this Court should find that (a)(1) and (a)(4) are different statements of the same offense, or that (a)(4) is an LIO of (a)(1), and that in either case, they are an exception to the multiple convictions allowed under section 954.

Dated: August 2, 2020

*/s/ Linnéa M. Johnson*

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I, Linnéa M. Johnson, appointed counsel for Ms. Aguayo, certify pursuant to rule 8.520(d)(2) of the California Rules of Court, that I prepared this Supplemental Brief on the Merits on behalf of my client, as requested by this Court, and that the word count for this brief is 2,759 words, less than the 2,800 word limit imposed by this Court in its Order of July 20, 2020.

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Dated: August 2, 2020

*/s/ Linnéa M. Johnson*
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Attorney for Appellant

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/s/ *Linnéa M. Johnson*

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