In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

GIOVANNI GONZALES,

Defendant and Appellant.

Case No. S231171

Fourth Appellate District, Division One, Case No. D067554
Imperial County Superior Court, Case No. JCF32479
The Honorable L. Brooks Anderholt, Judge

SUPPLEMENTAL BRIEF ON THE MERITS

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In supplemental briefing, appellant argues that this court's recent decision in *People v. Vidana* (2016) 1 Cal.5th 632 (*Vidana*), supports his position that Penal Code section 490a compels this court to substitute the word "larceny" in Penal Code section 459.5 for the word "theft."[1] (See Supp. BOM 10-12.) Quite the opposite is true. In *Vidana*, this court agreed with the People that section 490a "should not be read literally" as the Court of Appeal there had suggested, because "literal application of section 490a would render many statutes nonsensical" and "it does not appear [this court] ha[s] ever applied section 490a to effect a change in nomenclature or to change the language of any statute."[2] (*Vidana*, at p. 642.) Yet this is precisely what appellant is suggesting: That this court apply section 490a to change the drafters' deliberate use of the word "larceny" in section 459.5 to mean "all theft" instead. Indeed, though *Vidana* ultimately holds that "larceny" and "embezzlement" are the same offense of theft, this court was clear to note that they are still different statements of that offense and that uses of the terms "larceny" or "embezzlement" in the Penal Code serve the function of "describing" the specific "behavior proscribed by [given] statutes." (*Vidana*, at p. 641.) Applied here, the use of the word "larceny" in section 459.5 was the drafters' way of "describing the behavior proscribed by th[at] statute[]" (*ibid.*); that is, shoplifting involves larcenous theft behavior, not theft by false pretenses or any other type of theft behavior. Accordingly, this court's reasoning in *Vidana* supports respondent's position that use of the word "larceny" in section 459.5 means

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[1] In 1927, the Legislature added section 490a, which provides that "[w]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." (See ABOM 15-17.)

[2] All undesignated statutory references are to the Penal Code.

shoplifting applies only to theft by larceny—not all forms of theft. (ABOM 15-19.)

Appellant argues that *Vidana* supports his claim that "larceny" means any type of theft, since larceny and embezzlement are both theft under section 484. (Supp. BOM 10-12.) In *Vidana*, this court held that the crimes of larceny and embezzlement are different statements of the same offense, theft, and defendants cannot be convicted of both larceny and embezzlement based on the same course of conduct. (*Vidana*, *supra*, 1 Cal.5th at p. 644.) But *Vidana*'s holding that larceny and embezzlement are different statements of theft does not mean that larceny means "all theft." Though larceny is a type of theft, and embezzlement is at type of theft, that does not mean larceny is embezzlement (or any other type of theft, for that matter). Put another way, though zebras are a type of mammal, and humans are a type of mammal, zebras are not humans. In fact, *Vidana* states that larceny and embezzlement have different elements and neither is a lesser included offense of the other. (*Vidana*, at p. 642.) *Vidana*'s reasoning does not compel the conclusion that "larceny" means any form of theft—it simply holds that if a person's conduct meets the elements of both larceny and embezzlement, she may not be convicted of both offenses. Accordingly, *Vidana* supports respondent's position that "larceny" in section 459.5 means larceny.

Appellant also argues that *Vidana* supports his position that section 490a compels this court to substitute the word "larceny" in section 459.5 for the word "theft." (See BOM 8-18; Supp. BOM 10-12.) But the *Vidana* court reiterated that section 490a simply removed pleading and proof technicalities for the theft offenses, and it did not disturb the substance of the law or the elements of different theft offenses. (*Vidana*, *supra*, 1 Cal.5th at p. 640.) This court directly rejected the Court of Appeal's reasoning that section 490a "literally excis[ed] the words 'larceny' and

'embezzlement' from the legislative dictionary." (*Id.* at p. 642, internal quotations omitted.)

Additionally, the *Vidana* court reasoned that because the Legislature continues to specifically use the terms larceny and embezzlement, "literal application of section 490a would render many statutes nonsensical." (*Vidana*, *supra*, 1 Cal.5th at p. 640.) To illustrate the absurdity of a literal reading of section 490a, the *Vidana* court explained that Vehicle Code section 10502, subdivision (a), provides, in part, "The owner or legal owner of a vehicle registered under this code which has been stolen or embezzled may notify the Department of the California Highway Patrol of the theft or embezzlement, but in the event of an embezzlement ... may make the report only after having procured the issuance of a warrant for the arrest of the person charged with the embezzlement." But, under a literal reading of section 490a, Vehicle Code section 10502 would provide, "The owner or legal owner of a vehicle registered under this code which has been stolen or stolen may notify the Department of the California Highway Patrol of the theft or theft, but in the event of a theft ... may make the report only after having procured the issuance of a warrant for the arrest of the person charged with the theft." (*Ibid.*)

Similarly, here, a literal reading and application of section 490a to shoplifting would render section 459.5 "nonsensical." (*Vidana*, *supra*, 1 Cal.5th at p. 640.) As explained in respondent's answer brief on the merits, reading shoplifting to include all theft would lead to absurd results because the clause "open during business hours" is inconsistent with theft by embezzlement; section 459.5 would arbitrarily draw a distinction between employees who steal property from the commercial establishment *during* business hours and those who steal seconds *after* business hours end. In other words, if shoplifting applied to theft by embezzlement, an employee who enters the commercial establishment where she works with the intent

to steal from her employer one minute before the store is officially open would commit *burglary*, while the same employee would commit *shoplifting* if she committed the offense one minute later during business hours. (ABOM 12-13.)

Furthermore, it would be absurd to apply section 490a to shoplifting because the common understanding of shoplifting is inconsistent with theft by means other than larceny—and the text of section 459.5, as well as the voter ballot pamphlet, show shoplifting is limited to its common understanding. (ABOM 8-15, 25-28.) As the *Vidana* court stated, the Legislature specifically uses larceny in various statutes to describe the behavior proscribed by those statutes. (*Vidana*, *supra*, 1 Cal.5th at p. 641.) Here, the drafters used, and the electorate understood, the term "larceny" to describe particular behavior deemed shoplifting— the trespassory taking (or "lifting") of items offered for sale at a commercial establishment.

Accordingly, *Vidana* provides further support to respondent's argument that section 490a does not require shoplifting apply to all theft, and doing so would lead to absurd results that the voters did not intend.

Dated: September 29, 2016 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **1,321** words.

Dated: September 29, 2016

KAMALA D. HARRIS
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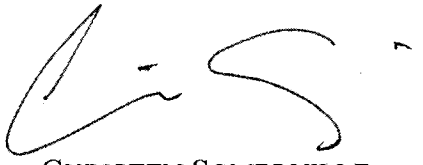

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Gonzales** No.: **S231171**

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 September 29, 2016, I served the attached **SUPPLEMENTAL 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)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **September 29, 2016** to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Richard A. Levy, Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at rlevy@richardalevy.com .

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 September 29, 2016, at San Diego, California.

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Declarant

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Signature

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