IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT, V. VERONICA AGUAYO, 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 SUPPLEMENTAL BRIEF ON THE MERITS

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BY APPOINTMENT OF THE
CALIFORNIA SUPREME COURT
UNDER THE APPELLATE DEFENDERS,
INC. INDEPENDENT CASE SYSTEM

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ADDITIONAL QUESTIONS POSED BY THIS COURT

In its order of April 22, 2020, this Court directed the parties to address the following questions in supplemental briefing:

Are Penal Code section 245, subdivisions (a)(1) and (a)(4) merely different statements of the same offense for purposes of section 954? If so, must one of defendant's convictions be vacated?

ARGUMENT

I. If This Court Does Not Find (a)(4) to be an LIO of (a)(1), Then the Convictions of Both Offenses Still Violates section 954 Because (a)(1) and (a)(4) Are Different Statements of the Same Offense

The second exception to the multiple convictions permitted under section 954 applies to different statements of the same offense. (*People v.*

Vidana (2016) 1 Cal.5th 632, 650 (*Vidana*).) Whether this Court concludes that (a)(4) is an LIO of (a)(1) or a different statement of the same offense, it must decide whether the convictions arose out of the same act or course of conduct.

Post-*Vidana* there is a split between the appellate courts on which of the section 954 exceptions applies to convictions under (a)(1) and (a)(4). *People v. Brunton* (2018) 23 Cal.App.5th 1097, 1107 (*Brunton*) and *People v. Cota* (2020) 44 Cal.App.5th 720, 722 (*Cota*) hold that (a)(1) and (a)(4) are different statements of the same offense based on the same conduct. *In re Jonathan R.* (2016), 3 Cal.App.5th 963, 973-974 holds that (a)(1) and (a)(4) became separate offenses after the 2011 revision of section 245, and that the LIO exception to multiple convictions under section 954 applies.

Under the *Brunton-Cota* view, when (a)(1) and (a)(4) are based on a single act, they are simply different statements of the same offense, so the defendant may not be convicted of both. (*Brunton, supra,* 23 Cal.App.5th at p. 1107.) In *Brunton*, the court remanded to the trial court to strike one of the duplicative convictions. (*Id*. at p. 1100.) But the appellate court here found that the (a)(1) and (a)(4) convictions "are based" on multiple acts employing different objects (the bike chain and lock and the chiminea) thereby providing separate bases for the jury to have convicted Ms. Aguayo of (a)(1) and (a)(4) based on separate acts. (*People v. Aguayo* (2019) 31

Cal.App.5th 758, 768.)

This same speculation was made and rejected in *Cota*. The basis for rejecting the finding applies with equal force here: "In theory yes, but that is not how the prosecutor argued the case to the jury." (*Cota*, *supra,* 44 Cal.App.5th at p. 729.) There is no basis in the record on which to find that the jury convicted Ms. Aguayo of (a)(1) based on the use of the bike chain and lock, and of (a)(4) based on the use of the chiminea, or that the trial court made a conflicting finding.

The other view, espoused in *Jonathan R.*, is based on the separation of what was formerly one subdivision with two alternative ways of violating it. In the 2011 revision of section 245, these two alternatives were separated into (a)(1) and (a)(4), with (a)(4) being determined to be an LIO of (a)(1). (*Jonathan R.*, *supra*, 3 Cal.App.5th at p. 975.)

Accordingly, under the *Jonathan R*. reasoning, finding (a)(4) and (a)(1) to be separate offenses is necessary in order to find (a)(4) to be an LIO of (a)(1). Under the LIO exception, or the exception for different statements of the same offense under section 954, (a)(4) must be based on the same act or course of conduct as (a)(1).

II. One of Ms. Aguayo's Convictions Must Be Vacated Because They Are Based on the Same Conduct

In her opening brief on the merits, Ms. Aguayo made a highly

detailed fact-specific showing that the (a)(1) and (a)(4) convictions were based on the same conduct. This showing was based on the amended information, evidence presented at trial, the closing arguments at trial, and specific findings made by the trial court both before and after trial. It was also based on the jury instructions and verdict forms. (AOBM pp. 56-59.)

If a course-of-conduct finding under section 954 is reviewed as a section 654 course-of-conduct finding would be, then the trial court's finding here is a factual one that will not be disturbed on appeal if it is supported by substantial evidence in the record. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731.) (1 R.T. p. 106-107; 5 R.T. pp. 694-695.) Before trial the prosecutor conceded that the court's pretrial section 654 finding was correct. (1 C.T. p. 106.) This Court should accept that concession. (*People v. Buchanan* (2016) 248 Cal.App.4th 603, 607.)

The were no witnesses to the assault–only the two participants--Ms. Aguayo and her father who agreed that she was angry with him for getting her cell phone wet, and that they argued. (2 R.T. pp. 261, 3 R.T. pp. 395, 452-453.) In the altercation that took place during the argument, described in the preliminary examination as taking two to three minutes, Mr. Aguayo claimed that his daughter struck him 50 times, including three times in the back and 15 times on the chest and arms. (P.X.R.T. p. 16; 2 R.T. pp. 160-161, 240, 245; 3 R.T. p. 396.)

The state contends that because Ms. Aguayo admitted striking her father twice with the bike chain and lock, this constitutes substantial evidence supporting its assertion that these were two separate acts, the first of which was completed before the second act was committed. The state seeks to have this Court apply the substantial evidence rule to a finding that the jury, the trial court or the appellate court made. Instead of showing that substantial evidence does not support the trial court's implied course-of-conduct factual finding, the state cites intermediate appellate decisions applying the sufficiency-of-the-evidence standard of review. (RBM p. 55.) The state followed its citations with the statement: "Given her testimony and admissions, it can be said under any possible standard that the two separate acts supported the two separate counts." (RBM p. 55.)

But the issue is not what standard should be applied; instead, the issue is to what finding should that standard be applied.

This Court should apply this rule to the findings the trial court actually made. First, before trial, when the court determined section 654 would apply to all three counts, the prosecutor confirmed this was correct. (1 R.T. p. 106.) After trial, the probation report recommended that the (a)(4) sentence be stayed under section 654. (1 C.T. p. 105.) At sentencing, the trial court followed the recommendation and its earlier pre-trial finding and stayed the (a)(4) sentence under section 654. The prosecutor did not

object. (5 R.T. pp. 694-695.) In applying the substantial evidence test, this Court should not disturb the trial court's finding if it determines the section 654 test applies to the "course of conduct" finding under section 954.

The state relies primarily on this Court's decision in *People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*) to support its parsing of Ms. Aguayo's course of conduct. However, as to separate convictions, this Court's *Harrison* decision was specific to the language of the statute, based on the plain meaning of the statute, consistent with the interpretation of "sister statutes" using "materially similar language." This Court also found the statutory purpose of punishing each penetration was unique to sex offenses. (*Id.* at pp. 327-328.)

> The Legislature, by devising a distinctly harsh sentencing scheme, has emphasized the seriousness with which society views each separate unconsented sexual act, even when all are committed on a single occasion. (See, e.g., § 667.6, subd. (c).)

(*Harrison*, *supra*, 48 Cal.3d at p. 330.)

In adopting the "completed act" rule in *Harrison*, this Court relied on *In re Hayes* (1969) 70 Cal.2d 604, which it subsequently overruled. (*People v. Jones* (2012) 54 Cal.4th 350, 358, 360 (*Jones*). The state also relies on appellate decisions applying *Harrison's* completed-act rule in other contexts, without showing that each context applied a statutory scheme

similar to section 263. (See *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477 (*Johnson*), applying *Harrison* to corporal injury on a cohabitant during a course of conduct; see also RMB p. 52.) Ms. Aguayo urges this Court to disapprove *Johnson's* reliance on *Harrison* outside the sex offenses statutory scheme, or a similarly structured one, and to recognize that *Johnson* was decided before *Vidana* recognized the exception to the multiple convictions otherwise permitted under section 954.

The state also relies on *People v. Kopp* (2019) 38 Cal.App.5th 47 (*Kopp*), review granted November 13, 2019, S257844. There are three reasons why this Court should not default to the reasoning in *Kopp*. First, the decision in *Kopp* was also based on the pre-*Vidana* opinion in *Johnson*. Second, as previously explained, *Johnson* is distinguishable from *Harrison* based on the statutes involved. Third, the *Kopp* decision concluded that the (a)(1) offense was based on the use of a knife, while the (a)(4) offense was based on hands and feet, kicking and punching, "based on the record" before it. (*Kopp*, 38 Cal.App.5th at p. 63.) While the record arguably showed that a properly instructed jury would have made this determination, that conclusion is undercut by the jury instructions given. The jury explicitly asked the trial court whether hands and feet could be deadly weapons. While the appellate court recognized that this Court's decision in *People v. Aguilar* (1997) 1 Cal.4th 1023, 1037, established that hands and

feet are not deadly weapons as a matter of law, it did not include that in the version of CALCRIM No. 875 given, and to which the jury was referred as the court's sole answer to its question. The record in *Kopp* therefore did not show that the jury necessarily made this finding. Moreover, upholding the (a)(4) conviction based on what the jury "likely would have found" instead of what the jury actually did find, would violate the defendant's Sixth Amendment right to a jury trial.

If there are Sixth Amendment implications to this determination, this Court should determine on this record what the jury necessarily found as the factual basis for the (a)(4) verdict. But the (a)(4) verdict form was non-specific. The prosecutor's summation relied on Ms. Aguayo's hitting her father with the bicycle chain and with the chiminea, and Mr. Aguayo testified he was struck on the head with both objects. (2 R.T. pp. 159, 165.) In her closing summation, the prosecution relied on both instruments as used to inflict the assault. (4 R.T. pp. 641, 648.) Both before and after the trial, the court found (a)(1) and (a)(4) were based on the same course of conduct. (5 R.T. pp. 694-695.) Here, the state's claim that the jury found two separate acts of Ms. Aguayo striking her father finds no support in the charging document, in the jury verdict forms, in the jury instructions, in the prosecution's opening statements, or in the prosecutor's opening and closing summations. These factors in the record do, however, support Ms.

Aguayo's claim, and the trial court's finding, that the (a)(4) conviction was based on the same facts as the (a)(1) conviction. The contact with these objects appears to have been the only force the Ms. Aguayo applied. Moreover, in her closing summation, the prosecutor relied on both the bicycle chain/lock and the chiminea as the instruments of the aggravated assault. (R.T. pp. 641-648.)

The (a)(4) charge in the amended information did not identify the force used and neither did the jury instructions. This left the jury free to base its (a)(4) aggravated assault on the entire altercation, using either or both instruments, as the prosecution presented to the jury in its summation. (AOBM pp. 58-59.)

The state has parsed the record so finely as to eliminate the "course of conduct" portion of the *Vidana* exception explicitly included in section 954. It has also applied the substantial evidence to its asserted claim and not to the implied findings the trial court made.

The state has recognized that convicting a defendant of both a greater and lesser offense would be to convict twice of the lesser. (RBM p. 50.) The same logic applies to multiple convictions based on a course of conduct when the convictions are alternative statements of the same offense. (*Vidana*, 1 Cal.5th at p. 650.) Accordingly, post-*Jones*, this Court found in *Vidana* that the course of conduct exception to the multiple

convictions authorization in section 954 survives. (*Vidana, supra*, 1 Cal.5th at p. 650.)

The state urges this Court to reject what it has characterized as Ms. Aguayo's claim that the facts necessary to support two separate counts must be revealed by the jury's verdict under *People v. Aledamat* (2019) 8 Cal.5th 1, 13.) This mischaracterizes Ms. Aguayo's position, which is that the verdict forms, which are part of the record here, do not support the state's claim. Other than the fact that 50 blows were struck, there is nothing in the record to show that the jury found the (a)(1) and (a)(4) offenses were based on multiple separate acts, or that the trial court's "course-of-conduct" finding was not supported by substantial evidence. The sum total of what the state has shown is: "[B]ased on appellant's admission of two separate strikes with the chain, the jury would have concluded that two separate aggravated assaults occurred." (RBM p. 55.)

If providing a back-up count as insurance was not the intent of the prosecution, then it failed to convey it in its opening statement and in its summations, its failure to request pinpoint instructions for the jury, and special findings in the verdict forms. (*Vidana*, 1 Cal. 5th at p. 649.) Without a showing that the trial court's course-of-conduct factual finding was not supported by substantial evidence, this finding should not be disturbed.

III. Under Principles of Judicial Restraint, This Court Should Craft Its Holding to Avoid the Sixth Amendment Issue

This Court did not have occasion to discuss in *Vidana* how a reviewing court should make the determination of whether the jury's verdicts were based on alternative statements of the same offense, or separate acts. Ms. Aguayo urges this Court to apply the substantial evidence rule to the implied course-of-conduct factual finding the trial court made in staying (a)(4) punishment under section 654. To find that the (a)(1) and (a)(4) convictions under the appellate court's finding that Ms. Aguayo struck her father with a bike chain and lock and chiminea, respectively, or under the state's claim that Ms. Aguayo struck her father twice with the bike chain and lock in two separate acts during the course of conduct, this Court would have to engage in a form of judicial fact-finding. Whether the (a)(4) conviction is viewed as imposing additional punishment beyond the statutory maximum for (a)(1) because (a)(4) is based on the same course of conduct as (a)(1), or because the jury did not make all the findings necessary to sustain the conviction under section 987, this Court must limit itself to finding those facts that were established by the conviction itself to avoid violating the Sixth Amendment to the U.S. Constitution. (*Descamps v. United States* (2013) 570 U.S. 254; *People v. Gallardo* (2017) 4 Cal.5th 120, 136.)

One appellate court has held that a trial court's section 654 findings do not implicate the Sixth Amendment, even when they are inconsistent with the facts the jury necessarily found in its verdict because it does not increase the punishment beyond the statutory authorization. (*People v. Carter* (2019) 34 Cal.App.5th 831, 846 (*Carter*).) However, the dissent expressed a concern that would apply to a trial court's 954 determination that two convictions are alternative statements of the same offense:

> To allow a sentencing judge to impose multiple punishments by finding facts on a preponderance-of-the-evidence standard that are inconsistent with the "facts reflected in the jury verdict" would raise serious Sixth Amendment concerns.

(*Carter, supra*, 34 Cal.App.5th at p. 854 (conc. & dis. opn. of Dato, J.)

This Court should find the (a)(1) and (a)(4) verdicts to be different statements of the same offense under the reasoning of *Cota* and Brunton and should uphold the trial court's implied finding, supported by substantial evidence, that the two convictions were based on the same course of conduct. Deciding these issues on statutory grounds avoids the Sixth Amendment issues and adheres to the principles of judicial restraint. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190.)

Conclusion

For the foregoing reasons, Ms. Aguayo requests that this Court vacate one of Ms. Aguayo's convictions as an exception to section 954.

Dated: May 22, 2020

/s/ Linnéa M. Johnson

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Dated: May 22, 2020

/s/ Linnéa M. Johnson
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Re: *The People v. Aguayo,* Case No. S254554

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I certify that the foregoing is true and correct. Executed on **May 22, 2020**, at Auburn, California.

/s/ *Linnéa M. Johnson*

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Supreme Court of California

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