In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **VERONICA AGUAYO,** Defendant and Appellant.	Case No. S254554

Fourth Appellate District Division One, Case No. SCS295489
San Diego County Superior Court, Case No. D073304
The Honorable Dwayne K. Moring, Judge

SUPPLEMENTAL REPLY BRIEF ON THE MERITS

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INTRODUCTION

In her Supplemental Brief on the Merits, appellant Veronica Aguayo raises three points. First, she maintains that Penal Code[1] section 245, subdivisions (a)(1) and (a)(4) are either different statements of the same offense, or else subdivision (a)(4) is a lesser offense of subdivision (a)(1). Second, she argues that her two convictions are based on the same course of conduct and therefore one of the convictions must be reversed. Finally, in determining whether two counts are based on different acts for purposes of section 954, appellant urges the Court to adopt a rule that avoids potential Sixth Amendment implications by limiting its consideration to facts that are established by the conviction itself. Appellant expands upon these same points in her Supplemental Reply Brief.

None of appellant's arguments have merit. As respondent has previously argued, assault with a deadly weapon or instrument under section 245, subdivision (a)(1), states a separate and distinct offense from assault by means of force likely to produce great bodily injury under section 245, subdivision (a)(4). This can best be seen by examining the structure, text, and punishment consequences of these provisions, as well as the remaining subparagraphs of section 245, subdivision (a). Appellant's Supplemental Reply Brief does not refute or address the arguments respondent has previously made as to why the two types of assault should be considered separate

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

and distinct offenses. Instead, appellant doubles down on her contention that the legislative history unambiguously reveals the Legislature intended subparagraphs (a)(1) and (a)(4) to serve as different statements of the same offense.

Appellant's approach in disregarding the text and structure of section 245, however, places accepted canons of statutory construction on their head. Appellant would have this Court conclude that it is "irrelevant" that the Legislature had previously culled out separate offenses in creating subparagraphs (a)(2) and (a)(3), and that the Legislature sought to create a single subdivision in which some subparagraphs are separate offenses, whereas others are not.

Regardless, the legislative history to which she points is anything but clear. In the end, while forced to recognize the legislative history demonstrated an intent to create "distinct" offenses, appellant paints herself into the corner of maintaining that "[t]he 'distinctiveness' referred to in the bill analysis is not the distinctiveness of section 954." (ASRB 23.)

If this Court disagrees with the conclusion that the two forms of assault are distinct and separate offenses, then it is necessary for the Court to resolve whether a defendant may be convicted of separate statements of the same offense arising out of a single continuous course of conduct. While the analysis of whether there can be separate punishment for two offenses under section 654 has often been confused with, and at times has bled into, the question of whether multiple convictions are proper under section 954, these two provisions serve entirely different

functions and must be kept independent. Accordingly, this Court should clarify that the question whether crimes occurred during a single course of conduct is limited to considerations of punishment under section 654, and has no place in evaluating whether there may be separate convictions under section 954 based on separate acts. Under section 954, separate convictions for different statements of the same offense are permissible if one crime was completed before another act began, regardless of whether they were part of a single course of conduct. A contrary rule would be inconsistent with existing sentencing practice, which permits not only multiple convictions but also consecutive sentences in cases charging multiple violations of the very same offense based on separate completed acts. No different rule should apply where the prosecution chooses to charge a different statement of the same offense rather than the exact same offense.

Here, both counts of assault arose during a single course of conduct, as the trial court appropriately found. Contrary to appellant's claims, the court's implicit determination that the two counts were based on separate acts, and therefore two different convictions were appropriate, did not violate the Sixth Amendment. The right to jury trial is preserved based on the jury's unanimous findings that the defendant was guilty of both counts. Trial courts may properly determine whether two counts involve separate acts for purposes of sentencing, and courts routinely do so. While, as noted above, such sentencing questions are distinct for purposes of statutory construction, they provide an appropriate framework for permitting trial courts to make

similar determinations regarding the permissibility of multiple convictions without violating the Sixth Amendment. In urging that the Sixth Amendment does not permit such determinations, appellant relies on a false analogy to situations in which courts go beyond the record of conviction for purposes of affixing additional penal consequences for recidivist convictions. This analogy fails because, unlike sentencing determinations made in the context of an existing case, there are clear common law limitations on a court's ability to increase punishment based on such determinations in subsequent cases.

In any event, it is not necessary for this Court to resolve the Sixth Amendment question in this case. Appellant's admissions at trial reveal she committed a minimum of two separate acts and the jury would have had no reason to distinguish between these acts when it rejected her unified defense. Contrary to appellant's assertions, these separate acts need not be established by the conviction itself; instead, as with similar claims of error based on a failure to provide a unanimity instruction, it is appropriate to look to the totality of the circumstances. Where, as here, a defendant acknowledges committing two separate acts and provides a unified defense as to those acts, which the jury rejects, this Court can conclude that she committed and was properly convicted of two separate acts beyond a reasonable doubt. The rule of lenity requires no different result.

ARGUMENT

I. ASSAULT WITH A DEADLY WEAPON OR INSTRUMENT IS A SEPARATE OFFENSE FROM ASSAULT BY MEANS OF FORCE LIKELY TO PRODUCE GREAT BODILY INJURY

As respondent previously explained in its Supplemental Brief on the Merits, the text, structure, and punishment consequences of section 245's multiple subparagraphs reveal that since the 2011 amendments, assault with a deadly weapon or instrument under subdivision (a)(1) is a separate and distinct offense from force-likely assault under subdivision (a)(4). (RSBM 17-38.) In her Supplemental Brief, appellant does not analyze or address any of these features; she simply notes that two courts (*People v. Brunton* (2018) 23 Cal.App.5th 1097, 1106-1107; *People v. Cota* (2020) 44 Cal.App.5th 720, 729, rev. granted & held pending present case, April 22, 2020, case no. S261120) have held that the two subdivisions are different statements of the same offense, whereas one court (*In re Jonathan R.* (2016) 3 Cal.App.5th 963) has held that force-likely assault is a lesser offense of deadly-weapon assault. (ASBM 6-7.) Respondent has discussed why none of the three decisions is entirely correct. (RSBM 39-42.) Under the analysis provided by this Court's decisions in *People v. Gonzalez* (2014) 60 Cal.4th 533, and *People v. White* (2017) 2 Cal.5th 349, as well as *People v. Vidana* (2016) 1 Cal.5th 632, the two assault provisions are properly considered separate offenses.

In her Supplemental Reply Brief, appellant does not directly address the text, structure, or punishment consequences of the two subdivisions in any meaningful manner. She argues that the

"inferential approach" to discerning legislative intent need not be employed where the legislative history reveals clear and unequivocal intent. (ASRBM 11.) But this assertion runs contrary to long-established canons of construction by elevating secondary sources over the text and structure of the statute itself. Properly construed, the text and structure of the amendments do not demonstrate a single crime of assault not involving a firearm. In any event, the legislative history reveals subdivision (a)(4) was intended to be "distinct" and separate from subdivision (a)(1).

A. Statutory Construction Must Begin with the Text of the Statute

In interpreting any statute, the starting point must necessarily begin with the statutory language. (*People v. Ruiz* (2018) 4 Cal.5th 1100, 1105 [statutory language is generally the most reliable indicator of intent]; *People v. Pieters* (1991) 52 Cal.3d 894, 898 ["we begin with the language of the statute"].) Only if the language is subject to more than one reasonable construction need a reviewing court turn to extrinsic sources such as legislative history. (*People v. Ruiz, supra,* 4 Cal.5th at p. 1106; *People v. Licas* (2007) 41 Cal.4th 362, 367.)

These rules are nothing new; nor are they somehow inapplicable in the context of interpreting section 954. They are the very same principles this Court applied in *Gonzalez.* (*Gonzalez, supra*, 60 Cal.4th at pp. 537-538.) And while it is true that *Gonzalez* and *White* both involved sexual offense statutes (ASRBM 11), nothing in either decision suggests the Court adopted unique rules of construction.

B. The Text and Structure of Section 245 Reveals an Intent to Create Four Separate Offenses

Appellant urges this Court to conclude that after the 2011 amendments, subparagraphs (a)(1) and (a)(4) state a single offense of assault not involving a firearm. (ASRBM 26.) But the text of subparagraph (a)(4) notably omits any reference to the absence of a firearm.

Appellant disputes that subparagraphs (a)(1) and (a)(4) have different punishment; she points out that the base term punishments are the same and that only the collateral consequences are different. (ASRBM 25.) But appellant does not contest that one offense is a serious felony while the other is not. As a result, the two offenses are treated very differently under the law.

In any event, in *Gonzalez* this Court relied on the fact that some of the subdivisions at issue provided different punishments; it was not necessary to show that the punishment was different for all subdivisions or even the specific subdivisions in question. (*Gonzalez, supra*, 60 Cal.4th at p. 539.) And in *White*, this Court looked to differing "sentencing consequences," which included sentencing enhancements for some forms of rape, but not others. (*White, supra*, 2 Cal.5th at p. 358.)

Appellant rejects respondent's consideration of subparagraphs (a)(2) and (a)(3), labelling it "irrelevant" whether the Legislature intended these provisions to be separate offenses. (ASRBM 17.) Once again, however, this argument overlooks accepted canons of construction. It is important to read "every

statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.'" (*People v. Pieters, supra*, 52 Cal.3d at p. 898.) Appellant asks this Court to conclude that even if the Legislature undertook two different amendments to create separate offenses in subparagraphs (a)(2) and (a)(3), it later intended to create a non-separate offense in subparagraph (a)(4). Appellant's approach fails to harmonize the four subparagraphs of the very same subdivision.

As in *Gonzalez*, the critical point with section 245, subdivision (a), is that each of the four subparagraphs is self-contained, setting forth all the elements of the offense with often differing punishment.

C. The Legislative History Reveals an Intent to Create "Distinct" Offenses

Appellant insists that the legislative history behind the 2011 amendments reveals an "uncontroverted indication" of legislative intent. (ASRBM 16.) Both parties agree that the overarching purpose of the amendments was to separate out the two types of assault so that the strike offense would be housed in a separate provision from the non-strike offense. But the question remains whether in doing so the Legislature intended that the newly-created subparagraph (a)(4) would operate as a different statement of the formerly combined subparagraph (a)(1). What little evidence can be gleaned from the committee reports demonstrates the Legislature believed the new (a)(4) would be "distinct"—that is, a separate offense.

Appellant argues that the bill analysis to which she points indicates that "no change was intended for any other purpose, such as how (a)(1) and (a)(4) are to interact with section 954." (ASRBM 16.) But that is not correct. The bill analysis does not mention section 954. And while it states that the bill "does not create any new felonies or expand the punishment for any existing felonies" (see Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011-2012 Reg. Sess.) as introduced Feb. 18, 2011, p. 3), there is nothing inconsistent with that statement and the notion that the Legislature intended the two felonies to be distinct and separate.

In drafting any new Penal Code provision, the Legislature must of course be concerned that it is not creating any new burden that will increase incarceration or enforcement costs. (See generally, Cal. Const., art. XIIIB, § 6, subd. (a) [Legislature may, but need not, provide subvention of funds to local governments when defining new crime or changing definition of crime].) In amending section 245 in 2011, the Legislature did not create any new felonies or increase punishment such that there would be an increased burden on localities: force-likely assault was already a crime, and making that existing crime separate and distinct from assault with a deadly weapon would not cause any new fiscal burdens. Far from expressing an "uncontroverted indication" of legislative intent that the subparagraphs would be different statements of the same offense, the bill analysis did nothing more than assuage any concerns regarding increased costs.

Appellant attempts to grapple with the statement in the very same bill analysis that the 2011 amendment would split the assault into two "distinct parts." (ASRBM 22.) According to appellant, the "'distinctiveness' referred to in the bill analysis is not the distinctiveness of section 954"; instead, the bill analysis refers to what will be made clear regarding which form of assault was committed. (ASRBM 23.)

To state appellant's argument is to reject it. If the two subparagraphs are different statements of the same offense, then they are not distinct.

D. Appellant's Construction Would Undermine the Policies Behind Separating Former Subdivision (a)(1) into Two Subparagraphs

As respondent has previously argued (RSBM 48-49), categorizing the two forms of assault as different statements of the same offense would undermine the Legislature's very purpose in separating the two offenses into distinct subdivisions. Appellant insists that prosecutors would still be required to plead the specific type of assault. (ASRBM 18-19.) She ignores, however, this Court's conclusion in *White* that "[a] jury verdict finding a defendant guilty of a single umbrella crime of rape under section 261 would not include a finding regarding which form of rape was involved." (*White*, *supra*, 2 Cal.5th at p. 358.) If the two crimes are simply different statements of the same offense, then presumably it would be sufficient to plead, as was formerly the practice, that the assault was by means of a deadly weapon or by force likely to produce great bodily injury. While some prosecutors may choose to be more specific, others may

choose instead to preserve their options depending on the evidence.

Appellant disputes respondent's position that it is important that the defendant's convictions accurately reflect her conduct. (See RSBM 50.) She argues that if a greater offense is overturned on appeal, a defendant could still be convicted of a lesser offense by operation of law. (ASRBM 20.) The problem with this argument, however, is that neither deadly-weapon nor force-likely assault is a lesser offense of the other. (RSBM 20-21.)

II. THE COURT SHOULD CLARIFY THAT A DEFENDANT MAY BE CONVICTED OF TWO SEPARATE STATEMENTS OF THE SAME OFFENSE IF EACH COUNT IS BASED ON A SEPARATE COMPLETED ACT, REGARDLESS OF WHETHER THOSE ACTS AROSE OUT OF A CONTINUOUS COURSE OF CONDUCT

The two assaults in the present case arose out of a single course of conduct involving an ongoing attack by appellant on her father. While the existence of an indivisible course of conduct is significant for purposes of determining punishment, this Court should clarify that this question plays no role in determining whether there may be separate convictions for two charges involving statements of the same offense. Instead, the appropriate rule depends on whether one offense was complete before the other began.

A. The Language in *Vidana* Regarding the Continuous Course of Conduct Rule Should Be Reevaluated

"'In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act

or course of conduct. "In California, a single act or course of conduct by a defendant can lead to convictions 'of *any number* of the offenses charged.'"'" (*People v. Correa* (2012) 54 Cal.4th 331, 337.) In the context of separate statements of the same offense, however, this Court in *Vidana* created a limitation on this general rule as applied not just to counts based on the same acts, but also to those based on a single course of conduct as well. (*People v. Vidana, supra*, 1 Cal.5th at p. 650.) The Court cited with approval the following argument of the appellant in that case:

> "The most reasonable construction of the language in section 954 is that the statute authorizes multiple convictions for different or distinct offenses, but does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct.
> (See *People v. Coyle* (2009) 178 Cal.App.4th 209, 211, 217-218, [] [defendant improperly convicted of three counts of murder for killing one person].)"

(*Ibid*.) The Court reasoned that this rule was consistent with the corollary rule that prohibits multiple convictions based on necessarily included offenses. (*Ibid*.)

Respondent respectfully disagrees with this conclusion as extended to separate acts committed within a single course of conduct. The case cited by appellant Vidana, *People v. Coyle*, *supra,* 178 Cal.App.4th 209, did not involve a continuous course of conduct at all; instead, it involved a single act of murder that was charged under different theories. (See *People v. Ashbey* (2020) 48 Cal.App.5th 373, 384 [distinguishing *Coyle*].) Moreover, for the reasons previously explained in respondent's

Answer Brief, the extension of the continuous course of conduct rule to necessarily included offenses is unsupported and should be disapproved. (ABM 49-53.) It follows *a fortiori* that the rule in such cases should not be extended to support a similar rule in the context of different statements of the same offense. In any event, such a rule would also be inconsistent with the rule permitting multiple counts based on the very same charged offense.

As respondent addressed in its Answer Brief on the Merits (ABM 49-53), the rule prohibiting multiple convictions in the context of lesser included offenses is properly limited to convictions based on the same act. The language in some cases extending this principle to lesser included offenses based on the same course of conduct improperly expanded the holding in *People v. Greer* (1947) 30 Cal.2d 589, 600, where this Court expressly recognized that a defendant could be convicted of both a greater and a lesser offense—there, contributing to the delinquency of a minor as a lesser offense of both statutory rape and lewd and lascivious conduct—"if separate acts served as the basis of each count." (*Id*. at p. 600.)

In *Vidana*, the Court had no reason to consider the extension of the prohibition against multiple convictions in the context of a continuous course of conduct. There, the defendant committed multiple acts of embezzlement in 2010 and 2011 while working as a credit agent. (*People v. Vidana, supra*, 1 Cal.5th at p. 635.) At the time he committed his crimes, the rule in *People v. Bailey* (1961) 55 Cal.2d 514, 519, generally permitted only one larceny

conviction where multiple takings were motivated by the same intent. Later, in *People v. Whitmer* (2014) 59 Cal.4th 733, 741, this Court reinterpreted the *Bailey* rule, holding that multiple counts of grand theft based on separate and distinct acts of theft are permissible, "even if committed pursuant to a single overarching scheme." Nonetheless, at the time Vidana was tried and convicted, there was no question of separating out distinct acts of theft; he was simply charged with one act of larceny and one act of embezzlement. (*People v. Vidana, supra*, 1 Cal.5th at p. 635.) Accordingly, this Court in *Vidana* had no occasion to consider whether multiple counts would be appropriate based on separate takings. Once it concluded that larceny and embezzlement were different statements of the same offense, the rule of *Bailey* prohibited multiple convictions just as it would have prevented multiple convictions for the same charge of larceny.

For the same reasons that this Court should not extend the prohibition against multiple convictions for lesser included offenses committed within a single course of conduct, so, too, should it decline a similar expansion in the context of different statements of the same offense. But even if the Court chooses to retain the course of conduct rule as applied to lesser included offenses, it does not follow, contrary to this Court's reasoning in *Vidana*, that such a requirement should apply to different statements of the same offense. As discussed further below, many cases have concluded that a defendant may be convicted of multiple counts of the very same offense, even if they arose in a

single course of conduct. The same rule should apply to different statements of the same offense, even if it does not apply to lesser included offenses.

B. The Continuous Course of Conduct Rule Is Relevant Only to Punishment

The question whether two separate acts were part of a single course of conduct confuses the multiple conviction question under section 954 with the question of multiple punishment under section 654. The "course of conduct" language finds its origins in the question of punishment for multiple counts based on separate acts under section 654. (See *Neal v. State of California* (1960) 55 Cal.2d 11, 19 ["Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor"]; *People v. Bauer* (1969) 1 Cal.3d 368, 375.)

Over the years, this Court's decisions have wrestled with the interplay between sections 654 and 954, at times reaching inconsistent or even contrary results. (See, e.g., *People v. Pearson* (1986) 42 Cal.3d 351, 359 ["This court has long struggled with the problem of permitting multiple convictions while protecting the defendant from multiple punishment"]; *People v. White, supra,* 2 Cal.5th at p. 356.)

The limitation regarding a single course of conduct is appropriate in the context of precluding multiple punishment under section 654. It is not, however, an apt consideration when determining whether multiple convictions are allowed under section 954. The two issues of multiple convictions and multiple punishment are entirely separate. (See *People v. Gonzalez,*

supra, 60 Cal.4th 533, 537 ["Section 954 ... concerns the propriety of multiple convictions, not multiple punishments, which are governed by section 654"]; *People v. Correa, supra*, 54 Cal.4th at p. 336.) As this Court recognized in *People v. White, supra*, 2 Cal.5th at page 356, the "legal landscape" that once motivated this Court to strike additional counts in order to avoid multiple punishment has now changed; commensurate with this shift, it is also appropriate to reevaluate prior decisions with a "fresh look."

While a single course of conduct may be dispositive for purposes of determining punishment under section 654 based on a defendant's singular intent, it does not resolve the question whether there may be multiple convictions under section 954 based on more than one separate act. (See generally *In re Arthur V.* (2008) 166 Cal.App.4th 61, 67 ["The potential harshness of this result—allowing multiple convictions in circumstances that might be viewed as a single crime—is mitigated by the application of section 654, which 'limits the punishment for separate offenses committed during a single transaction'"].)

In the context of determining whether there should be more than one conviction, courts (especially those cases decided post-*Whitmer*) have generally not applied a continuous-course-of-conduct limitation when multiple counts of the same offense are charged. (See, e.g., *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1519 [six calls placed on same day constituted six completed attempts to dissuade a witness even though directed towards same goal]; *People v. Washington* (1996) 50 Cal.App.4th 568, 578 [noting that a thief who reached through an open window twice

would be subject to two separate burglary convictions, although he could only be punished once]; *People v. Drake* (1996) 42 Cal.App.4th 592, 597, 595 [defendant properly convicted of five separate counts of Medi–Cal fraud based on five acts of false billing]; *People v. Neder* (1971) 16 Cal.App.3d 846, 853 ["The designation of a series of forgeries as one forgery would be a confusing fiction"]; see further cases cited below.)

There is no reason to apply a different rule where a defendant is charged with two statements of the same offense rather than two exact same offenses.

C. This Court Should Apply the Completed Act Rule to Different Statements of the Same Offense

As respondent has previously argued, the appropriate test in the context of permitting multiple charges for the same offense is determining when one count is completed. (ABM 54-56.) This Court has applied similar reasoning in cases such as *People v. Harrison* (1989) 48 Cal.3d 321 in the context of permitting multiple counts of sexual penetration committed over the course of a single ten-minute assault. Subsequent appellate decisions have applied *Harrison* not only to other situations involving multiple charges for the same offense (e.g., *People v. Johnson* (2007) 150 Cal.App.4th 1467, 1477; *People v. Trotter* (1992) 7 Cal.App.4th 363, 366-368), but one court has also specifically held that a defendant could be convicted of separate counts of assault with a deadly weapon and assault by means of force likely to produce great bodily injury based on separate acts arising out of

the same course of conduct (*People v. Kopp* (2019) 38 Cal.App.5th 47, 61-63).[2]

Appellant urges the Court to limit the reach of *Harrison.* First, she maintains that the conclusion in that case regarding the number of convictions was specific to the language of the charged sexual penetration statute, section 289. (ASBM 10.) But while it is true this Court looked to relevant language of section 289 and other sexual assault statutes in defining *when* the crime was complete (*People v. Harrison, supra,* 48 Cal.3d at pp. 327-328), the Court did not rely on any of these statutory provisions to craft the rule that a second count may be sustained *once* one count is complete. Instead, this Court relied on common sense to reach this conclusion: "It follows *logically* that a new and separate violation of section 289 is 'completed' each time a new and separate 'penetration, however slight' occurs." (*Id.* at p. 329, italics added.) The completed act rule that followed "logically" in *Harrison* was not limited in any manner to the specific statute at issue in that case. The rule applies with equal force whenever there has been a completed crime. The limitations on the number of possible convictions arise out of the substantive law concerning when an offense is complete, not out of the general provisions of section 954.

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[2] On November 13, 2019, this Court granted review of the *Kopp* decision, but limited the issues to be briefed and argued to those relating to a court's duty to consider the defendant's ability to pay fines or fees. (*People v. Kopp*, case no. S257844.)

Second, appellant argues that *Harrison* relied on the statutory purpose of punishing each sexual penetration separately, and also emphasized the Legislature's intent to punish sexual assaults harshly. (ASBM 10.) Punishment, however, is a separate question from the permissibility of multiple convictions. Of course, there cannot be multiple punishment unless there are first multiple convictions. A legislative intent to allow multiple punishment therefore presupposes an intent to allow multiple convictions. Yet, there is no suggestion in *Harrison* that the permissibility of multiple convictions is limited to those circumstances—such as in the case of sex offenses—in which multiple punishment is proper. That is, while multiple punishment requires multiple convictions, it does not follow that multiple convictions are appropriate if and only if there may be multiple punishment. Indeed, *Harrison* separately considered the permissibility of multiple convictions from the question of multiple punishment; and in addressing the first issue, the Court specifically chose to save "all sentencing questions for later" in the second portion of the decision. (*Harrison, supra*, 48 Cal.3d. at p. 333.)

Harrison may have been the first case to squarely address the propriety of multiple convictions based on the completed act rule, but other courts outside the sexual assault context have followed that lead. In *Whitmer,* for instance, where this Court affirmed 20 separate counts of grand theft, the Court reasoned that "a serial thief should not receive a 'felony discount' if the thefts are separate and distinct even if they are similar." (*People*

v. Whitmer, supra, 59 Cal.4th at pp. 740-741.) In the burglary context, one court has aptly noted that "[d]esignating a series of separate and factually distinct entries as one single entry is no less an unreasonable fiction than designating a series of forgeries one forgery or a series of penetrations a single rape." (*People v. Washington, supra*, 50 Cal.App.4th at p. 577.) Other courts have applied similar reasoning in affirming multiple convictions for everything from dissuading a witness from testifying to insurance fraud. (See *People v. Kirvin, supra*, 231 Cal.App.4th at p. 1519 [six attempts to dissuade a witness]; *People v. Zanoletti* (2009) 173 Cal.App.4th 547, 556-559 [appellant properly convicted of multiple counts of insurance fraud based on separate acts of preparing and later presenting false claims]; see also *People v. Johnson, supra,* 150 Cal.App.4th at p. 1477 [multiple convictions for domestic violence]; *People v. Trotter, supra,* 7 Cal.App.4th at 366-368 [multiple convictions of assault]; *People v. Kopp, supra,* 38 Cal.App.5th at pp. 61-63.)

Third, appellant argues that in adopting the completed act rule, the *Harrison* decision relied on *In re Hayes* (1969) 70 Cal.2d 604, which the Court later overturned in *People v. Jones* (2012) 54 Cal.4th 350, 358, 360. (ASBM 10.) This is inaccurate. As noted above, in *Harrison* this Court considered two distinct issues: (1) whether multiple convictions were permissible; and (2) whether multiple punishment was permissible under section 654 for those multiple convictions. (*People v. Harrison, supra,* 48 Cal.3d at p. 324.) The completed act rule arose in the context of addressing the first question; because the digital penetrations

were complete, the defendant could appropriately be convicted of three separate counts. (*Ibid*.) The Court relied on *Hayes* only in addressing the second question of whether multiple punishment was permissible, concluding it is the defendant's intent and objective that is dispositive, and not the temporal proximity of the acts. (*Id.* at p. 335.) Any retreat from the *Hayes* rule in *Jones* had no effect whatsoever on the first portion of the *Harrison* case regarding the completed act test and the propriety of multiple convictions.

Appellant contends that *Johnson* and *Kopp* should not be followed because they arose outside the sexual assault context, and because they were decided before *Vidana* recognized the limitation for multiple convictions under section 954. (ASBM 11) But as discussed above, there is no logical or legal basis for limiting *Harrison* to the sexual assault context. Moreover, the holding in *Vidana* was limited to different statements of the same offense; *Vidana* did not purport to proscribe different charges for the exact same offense based on separate acts, as occurred in *Harrison*.

Indeed, aside from being contrary to cases such as *Whitmer* and *Harrison*, not to mention the lower court decisions mentioned above, such a conclusion would also be in tension with this Court's decision in *People v. Correa, supra,* 54 Cal.4th at page 344. There, this Court held that section 654 does not bar multiple punishment for violations of the same provision of law. "[A] felon who possesses several firearms," reasoned the Court,

"is more culpable than one who possesses a single weapon." (*Id.* at p. 342.)[3]

The same reasoning that led this Court to conclude that multiple punishment is appropriate in *Correa* also demonstrates why multiple convictions are generally permissible for violations of the same offense based on separate acts: without multiple convictions in the first place, there cannot be multiple punishment.

This Court should reach the same conclusion as applied to the context of different statements of the same offense. There is no principled reason for applying the completed act rule to different counts for the same offense, but not applying that rule to different statements of the same offense. When two convictions are based on separate acts, it is immaterial whether the conviction is charged under the same statutory provision, or a different expression of the crime in a separate provision. If a defendant can be convicted of two counts of A, and A is the same crime as B, then logic suggests the defendant may be convicted of one count of A and one count of B. Expressed mathematically, if A+A=C; and A=B; then under the transitive property of equality it follows by simple substitution that A+B=C.

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[3] Modern decisions have recognized that multiple convictions can be based on the same acts. (See, e.g., *People v. Gonzalez, supra*, 60 Cal.4th 533; *People v. White, supr*a, 2 Cal.5th 349; *People v. Benavides* (2005) 35 Cal.4th 69, 97 ["a conviction for lewd conduct with a child can be obtained at trial and upheld on appeal by the same evidence used to show the defendant raped and sodomized the child"].)

III. IN DETERMINING WHETHER TWO OFFENSES ARE SUPPORTED BY SEPARATE ACTS, A REVIEWING COURT IS NOT LIMITED TO FACTS ESTABLISHED BY THE CONVICTION ITSELF

Appellant argues that in order to determine whether her two convictions were based on more than one act, a reviewing court would have to engage in "a form of judicial fact-finding." (ASBM 15.) Citing *Descamps v. United States* (2013) 570 U.S. 254 and *People v. Gallardo* (2017) 4 Cal.5th 120, 136, appellant asserts the 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." (ASBM 15; ASRBM 32-36.) Contrary to appellant's assertions, the Sixth Amendment does not require a jury determination regarding whether two offenses were based on the same acts. Such a determination is analogous to findings routinely made by trial courts in deciding whether to impose consecutive or concurrent sentences. Indeed, even appellant urges that a trial court should be able to determine whether crimes were committed during a continuous course of conduct. (ASRBM 26.)[4] There is no reason to reach a different conclusion as to the existence of separate acts.

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[4] Appellant maintains that the trial court should make this factual determination, and that those factual determinations should be reviewed for substantial evidence. (ASRBM 26.) In the same discussion, however, she also asserts that the determinations should be subject to de novo review. (ASRBM 26.) Respondent agrees that the determination is factual in nature, and therefore substantial evidence, rather than de novo review, is appropriate.

Appellant's reliance on cases such as *Descamps* and *Gallardo* is misplaced as those cases arose in the distinct context of a court's ability, in a subsequent proceeding, to impose additional punishment for a previous conviction. In any event, even under the authority of those decisions, a court may properly consider facts the jury surely found in rendering its verdict. Here, such facts, as discussed in Argument IV, *infra,* include appellant's admissions to having struck her father two separate times with the bicycle chain.

A. The Sixth Amendment Does Not Preclude a Court from Determining That Two Convictions Were Based on Separate Acts Under Section 954

The jury in the present case was instructed on the elements of both types of assaults, and was specially told that "[e]ach of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." (CT 85; CALCRIM No. 3515.) Thus, in returning its verdicts, the jury unanimously found that appellant committed both assaults. The question whether both of those unanimous convictions may stand under section 954 is one that may properly be made by the trial court.

Under the Sixth Amendment to the United States Constitution, '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490; see *In re Gomez* (2009) 45 Cal.4th 650, 656-657.)

The determination whether two offenses may be sustained because they are based on different facts is similar to the question whether facts not found by the jury may be used to support consecutive sentences—a question that the high court has recognized may be made by trial courts and not juries. (*Oregon v. Ice* (2009) 555 U.S. 160, 163, 169.)

In *Ice*, the high court observed that most states give trial courts unfettered discretion in deciding whether separate offenses should be sentenced consecutively or concurrently. (*Id.* at p. 163.) Oregon's sentencing statute, unlike the common law and many other states' statutes, imposed limits on trial courts' discretion by requiring the judge to make certain factual findings before a consecutive sentence could be imposed. (*Id.* at pp. 164, 170.) "[I]n light of historical practice and the authority of States over administration of their criminal justice systems," the Supreme Court held that the Sixth Amendment does not provide a right to jury determination under Oregon's choice of law. (*Id.* at p. 164.)

In reaching this holding, the court pointed out that the factfinding required under Oregon's statute was beneficial to the defendant: "Limiting judicial discretion to impose consecutive sentences serves the 'salutary objectives' of promoting sentences proportionate to the 'gravity of the offense,' [citation], and of reducing disparities in sentence length." (*Oregon v. Ice, supra,* 555 U.S. at p. 171.) It also considered that a holding applying *Apprendi* to such statutes would "be difficult for States to administer. The predicate facts for consecutive sentences

could substantially prejudice the defense at the guilt phase of a trial. As a result, bifurcated or trifurcated trials might often prove necessary." (*Id.* at p. 172.)

Identical considerations are at play in the context of allowing multiple convictions for separate offenses under section 954. In California, sentencing courts commonly determine, for instance, whether an offense involved a single act or a continuous course of conduct pursuant to section 654. (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) Such determinations as to whether to impose consecutive sentences do not infringe on the traditional, common law prerogative of juries, and do not amount to the functional equivalent of finding elements of an offense. (*People v. Capistrano* (2014) 59 Cal.4th 830, 884; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1369; *People v. Black* (2007) 41 Cal.4th 799, 821.)[5] Consequently, trial courts are not limited by jury verdicts in making such determinations. (*People v. Carter* (2019) 34 Cal.App.5th 831, 842 ["The jury did not have to make an affirmative factual finding that Carter shot Brandon to return a guilty verdict on first degree murder, and the trial court did not need such an affirmative finding by the jury to exercise its sentencing discretion under section 654"]; *People v. McCoy* (2012)

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[5] Likewise, courts also make a variety of other factual findings that do not infringe on the jury trial right under *Apprendi*. (See, e.g., *People v. Mosley* (2015) 60 Cal.4th 1044, 1049-1050 [factual findings subjecting defendant to sexual offender registration do not implicate *Apprendi*]; *People v. Blackwell* (2016) 3 Cal.App.5th 166, 186-195 [finding that juvenile was subject to term of life without possibility of parole based on irreparable corruption need not be made by jury].)

208 Cal.App.4th 1333, 1340 ["in the absence of some circumstance 'foreclosing' its sentencing discretion ..., a trial court may base its decision under section 654 on any of the facts that are in evidence at trial, without regard to the verdicts"].) Because there is no right to a jury determination of whether a defendant committed one or more acts in the context of section 654, there is also no basis for extending the Sixth Amendment right to the same determination in the context of permitting more than one conviction under section 954.

Further, appellant points to no common law tradition that extends a right to jury determination over whether two offenses that constitute different statements of the same offense were based on different acts. Indeed, this Court did not even expressly decide that there could not be separate convictions for different statements of the same offense until *Vidana*.

In certain circumstances, this Court has held a trial court has a duty to instruct that a defendant cannot be convicted of more than one alternative count. (See *People v. Allen* (1999) 21 Cal.4th 846, 851; *People v. Jaramillo* (1976) 16 Cal.3d 752, 757.) Rather than reflecting an overarching right to jury determination, such cases are based on a specific substantive proscription barring any person from being convicted of both theft and receiving the same stolen property. (See § 496, subd. (a).) A similar instructional duty extends to necessarily included offenses. (See CALCRIM No. 3517; *People v. Moran* (1970) 1 Cal.3d 755, 763.) The origins of that rule, as this Court has recognized, are "unclear." (*People v. Pearson, supra*, 42 Cal.3d at

p. 355.) Neither of those limited circumstances is at issue in the present case.

While the current language of CALCRIM No. 3516 suggests that the jury should return only one conviction for two alternative charges, there is no cited common law authority supporting this broad rule, nor does the instruction place in the jury's hands the decision whether separate statements of the same offense were based on separate acts. (See Jud. Council of Cal. Crim. Jury Instruct. (May 2020) Bench Notes to CALCRIM No. 3516.) Hence, whatever practice may exist is not grounded in a common law tradition, at least as applied broadly to different statements of the same offense.

Setting aside whether juries have traditionally addressed this issue, the question of multiple convictions under section 954 does not relate to punishment and is not similar to the determination of an element of an offense as in *Apprendi*. The Court of Appeal reached an analogous conclusion in *People v. Deegan* (2016) 247 Cal.App.4th 532. There, the defendant was convicted of two counts of assaulting a specified park ranger and a specified officer, as well as a third count of obstructing unspecified peace officers in the performance of their duties. (*Id.* at p. 540.) At sentencing, the trial court found that the defendant used violence against additional officer victims in committing the third count, and sentenced all three counts consecutively. (*Ibid.*) On appeal, the defendant argued that the trial court's finding of multiple victims to support a consecutive sentence for count 3 was barred under the Sixth Amendment and *Apprendi*. But

"*Apprendi* does not apply to determinations made by a trial court under section 654," reasoned the Court of Appeal, "because that statute entails sentencing reduction rather than a sentencing enhancement." (*Id.* at p. 547; see also *People v. Cleveland* (2001) 87 Cal.App.4th 263, 267.)

In this sense the question whether one count should be stricken under section 954 is similar to the determination under section 654 of whether to stay one of the convictions. Both situations involve a potential *reduction* in either charges or punishment after the jury has returned its unanimous verdicts, and not an *increase* in punishment as in *Apprendi*

Appellant recognizes that in *People v. Carter*, *supra*, 34 Cal.5th 831, the court held that sentencing findings made under section 654 do not implicate the Sixth Amendment, even when they are contrary to the findings of the jury, because that statutory provision does not increase punishment beyond the statutory authorization. (ASMB 16.) Nonetheless, relying on the dissenting opinion in that case, appellant urges that "'[t]o 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.'" (ASBM 16, quoting *People v. Carter, supra,* 34 Cal.App.5th at p. 854 (conc. & dis opn. of Dato, J.).) Whatever the merits of this concern may be, they do not apply here, where there is no inconsistency with the facts found by the jury.

As this Court's experience with section 654 has shown, questions relating to whether two offenses involved separate discrete acts or a continuous course of conduct can prove exceedingly difficult even for courts to analyze in any consistent manner. (See *People v. Corpening, supra,* 2 Cal.5th at p. 312 ["Precisely how to resolve whether multiple convictions are indeed based on a single physical act has often left courts with more questions than answers"].) The rules are rife with exceptions, such as those relating to separate victims of violent crime. Given the potential difficulties in administration, it is therefore entirely appropriate that such determinations be made by a court, rather than by a lay jury. (See *Oregon v. Ice, supra*, 555 U.S. at p. 172.)

B. Cases Regarding the Interpretation of Prior Convictions for Purposes of Establishing Increased Recidivist Punishment for Subsequent Crimes Are Inapposite

In *Gallardo*, the trial court found a disputed fact about the conduct underlying the defendant's prior assault conviction that had not been established by virtue of the conviction itself. Based on that finding, the trial court concluded that the defendant's prior assault constituted a serious felony that subjected him to increased punishment. (*People v. Gallardo, supra,* 4 Cal.5th at pp. 124-125.) This Court held that the trial court's factfinding violated the defendant's Sixth Amendment rights, reasoning that "[w]hile a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in

entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct 'realistically' led to the defendant's conviction." (*Id.* at p. 124.) In reaching this conclusion, the Court relied on the high court's decisions in *Descamps* and *Mathis v. United States* (2016) 579 U.S. __, [136 S.Ct. 2243], which made clear that "when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, '[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt.'" (*People v. Gallardo, supra*, 4 Cal.5th at p. 124, quoting *Descamps v. United States, supra,* 570 U.S. at p. 269.)

The question whether two offenses are subject to separate convictions under section 954 is entirely separate from the question whether there must be a jury determination of facts necessary to subject a defendant to recidivist punishment in a subsequent case. The findings of fact in *Gallardo* resulted in an *increase in punishment* within the meaning of *Apprendi*. In the 954 context, on the other hand, the jury has found both convictions to be true and there is no increase in punishment when both convictions are allowed to remain.

C. Even If the Sixth Amendment Otherwise Applies, the Determination of Whether Facts Support Two Separate Convictions Should Not Be Limited to Facts Established by the Conviction Itself

At a minimum, this Court should resist appellant's limitation that the necessary facts to support two separate counts must be "established by the conviction itself." (ASBM 15.) It

would be inconsistent to conclude that the *Chapman*[6] standard applies to alternative theory error as in *People v. Aledamat* (2019) 8 Cal.5th 1, but that an even more elevated standard is appropriate when determining whether two statements of the same offense were based on different acts. (See generally, *People v. Aledamat, supra,* 8 Cal.5th at p. 13 ["In determining this impossibility or, more generally, whether the error was harmless, the reviewing court is not limited to a review of the verdict itself"].) Regardless of whether limitations are appropriate when determining the basis for a verdict in a subsequent proceeding designed to increase punishment as in *Gallardo*, they should not apply on direct appeal of a conviction when assessing what, in essence, amounts to a claim of instructional omission—that is, a failure to instruct the jury to find more than one act before returning two convictions.

Even assuming, arguendo, that the jury should make the determination of whether two separate convictions were appropriate under section 954 because they were based on separate acts, any error in failing to require the jury to make this determination is fundamentally no different than a failure to give a unanimity instruction when a conviction could potentially be based on more than one criminal act.

Appellate courts are split on whether the erroneous failure to give a unanimity instruction must be evaluated under

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[6] *Chapman v. California* (1967) 386 U.S. 18, 24.

the *Chapman* standard or the *Watson*[7] standard. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 576-578 [discussing split of authority and applying *Chapman* standard requiring error to be harmless beyond a reasonable doubt]; *People v. Vargas* (2001) 91 Cal.App.4th 506, 561-562 [applying *Watson* standard of whether "'it is reasonably probable that a result more favorable to the appealing party would have been reached'" absent the error].)

Even under the *Chapman* standard, "[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless." (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853; see *People v. Diedrich* (1982) 31 Cal.3d 263, 283 ["This is not a case where the jury's verdict implies that it did not believe the only defense offered"].)

D. Even Under the *Gallardo* and *Descamps* Standard, a Court May Consider Facts the Jury Surely Found

Ultimately, in the present case it is not necessary for this Court to decide the precise standard of review of a court's determination whether two convictions may stand under section 954. Even under the *Descamps/Gallardo* rule, "a sentencing court may identify those facts it is 'sure the jury . . . found' in

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[7] *People v. Watson* (1956) 46 Cal.2d 818, 836.

rendering its guilty verdict, or those facts as to which the defendant waived the right of jury trial in entering a guilty plea." (*People v. Gallardo, supra*, 4 Cal.5th at p. 134, quoting *Descamps v. United States*, *supra*, 570 U.S. at p. 269.)

As addressed further below (see Argument IV, *infra*), given appellant's admissions while testifying, it may be surely said beyond a reasonable doubt that there were two separate acts.

IV. BASED ON HER ADMISSIONS AT TRIAL, APPELLANT COMMITTED AT LEAST TWO SEPARATE ACTS AND THEREFORE WAS PROPERLY CONVICTED OF TWO COUNTS OF ASSAULT

Appellant insists that she has made a "highly-detailed fact specific showing" that her two convictions were based on the same conduct. (ASBM 7-8.) Respondent disagrees. While the jury may have believed that appellant hit her father as many as 50 times with the bicycle chain and lock, not to mention an additional strike to the head with the chiminea, this much is clear: based on appellant's own admissions while testifying, the jury had no reason to disagree that she struck her father two separate times with the bicycle chain and lock near the beginning of the fight. Those two separate strikes constituted two separate assaults, even if they were part of one continuous course of conduct. Nothing in the prosecutor's argument or the charges prevented the jury from reaching this conclusion.

A. Appellant Committed at Least Two Separate Acts

In arguing that the record is unclear whether the jury found more than one act, appellant focuses on the fact that the

prosecutor argued the strikes with both the chain and the chiminea constituted the instruments of the assault by means of force likely to cause great bodily injury without distinguishing between the two instruments; further, the charging document, verdict forms, and instructions also did not distinguish between the two instruments. (ASBM 12.)

Based on Luis's testimony, the jury could have found both counts true based on multiple difficult acts—including the 50 times appellant hit her father with the bicycle chain or (as to count 3) her additional act of throwing the chiminea at his head. (2RT 164, 206–207, 240, 247.) But at a minimum, the jury would have agreed that based on her own admissions, appellant committed at least two separate assaults with the bicycle chain.

Appellant admitted she struck her father twice with the bicycle chain at the beginning of the affray. According to appellant's trial testimony, she began whipping her bike chain around over her head in self-defense, and told Luis to stay away from her. (3RT 459.) As Luis charged at appellant, the bike chain struck him on the top of his head hard enough to leave a bump. (3RT 461, 462, 491.) Luis held his head and called her a "bitch." (3RT 463.) He tried to grab her, so she hit him with the chain a second time. (3RT 464, 482.) After this second strike, Luis grabbed the chain and they began struggling over control of it. (3RT 464.)

Regarding the subsequent acts of violence, appellant claimed that it was Luis who beat her with the chain as she lay on the ground (3RT 466), and that it was he who threw the chiminea

(3RT 467); she denied ever throwing anything at her father (3RT 489-490). The jury had ample reason to reject these claims. Regardless, as for the two acts of striking her father at the inception of the affray, appellant offered a unified defense of self-defense, and the jury rejected that unified defense as revealed in its verdicts. There was no reason for the jury to distinguish between the two acts that appellant admitted while testifying; consequently, any error was harmless under any possible standard. (ABM 55, citing *People v. Webb* (2018) 25 Cal.App.5th 901, 907; *People v. Wolfe* (2003) 114 Cal.App.4th 177, 188; *People v. Curry* (2007) 158 Cal.App.4th 766, 783-784.)

Appellant asserts that the jury may have relied on the entire course of conduct to find her guilty, rather than on the sufficiency of any one act. (ASBM 13.) But she does not refute the fact the jury had no reason to dispute that she committed two separate strikes with the bicycle chain and lock. Nor does she refute the sufficiency of either of those acts to show an assault by means of force likely to produce great bodily injury. The first strike hit her father in the head where he had previously had brain surgery (2RT 230), and by her own admission it was hard enough to leave a bump (2RT 461, 462, 491). Afterwards, Luis felt dizzy, and was concerned that the blows to his head had caused internal bleeding. (2RT 230.) While appellant did not specify where she hit him the second time, Luis's T-shirt had grease marks on the stomach area where he had been hit by the chain. (2RT 183-184; trial exh. 6.) Appellant does not dispute that whipping a chain

and lock in the air and then striking a 72-year-old diabetic man in the stomach was likely to produce great bodily injury.

In *People v. Kopp, supra*, 38 Cal.App.5th at page 63, the Court of Appeal relied on the prosecutor's focus during closing argument to conclude that a count of deadly-weapon assault was based on separate acts from a charge of force-likely assault, although both assaults arose from a single encounter. Appellant attacks the *Kopp* decision, among other reasons, on the grounds that the record in that case did not "necessarily" reveal the jury concluded the two charged assaults were based on different acts. Specifically, she notes that the jury asked whether hands and feet could constitute deadly weapons. (ASBM 12.) But the Court of Appeal separately rejected the notion that the jury may have relied on kicks or punches for the deadly weapon count, noting that the prosecutor did not advance such a theory and the standardized instructions did not state that hands or feet could constitute deadly weapons. (*People v. Kopp, supra*, 38 Cal.App.5th at p. 68.) So, too, here, even if the jury's verdicts themselves do not reveal as a matter of necessity that the jury based its decision on two separate acts, the record as a whole provides an ample basis on which to conclude that the jury found two separate acts beyond a reasonable doubt based on appellant's admissions.

B. Nothing in the Prosecutor's Argument or the Charging Documents Limits a Reviewing Court's Consideration of Appellant's Admissions

While appellant correctly notes that the prosecutor relied on both the strikes with the chain and the hit with the chiminea to establish the force-likely assault in count 3, nothing in the prosecutor's argument or the charges themselves limited the jury in its ability to convict appellant based on the two admitted strikes with the chain. (Cf. *People v. Siko* (1988) 45 Cal.3d 820, 826 [where both the charging document and verdicts specified two specific sex offenses, and neither the jury instructions nor the closing argument suggested any other basis for the molestation counts, the People could not advance an alternative factual basis for those convictions based on evidence at trial]; *People v. Jones*, *supra*, 54 Cal.4th at p. 359 [amended information and prosecutor's argument established defendant's convictions were based on single act]; *People v. Bradley* (2003) 111 Cal.App.4th 765, 770 [where prosecutor tendered a single theory of guilt under which defendant entertained a single objective, trial court could not make a contrary finding].)

Here, "there was no language in the charging document or verdict forms that narrowed the court's discretion. . . ." (*People v. Carter, supra*, 34 Cal.App.5th at pp. 842-843; see also *id.* at p. 843, citing *People v. Centers* (1999) 73 Cal.App.4th 84, 100-101 [trial court could properly make factual finding that there were multiple victims where neither the information nor the verdicts specified a particular victim of the burglary].) While the

prosecutor's argument permitted the jury to base its decision on a variety of violent acts, it did not limit or foreclose the jury from relying on the two strikes that appellant admitted while testifying. Appellant thus misplaces reliance on *People v. Cota, supra*, 44 Cal.App.5th at page 729, where it was clear that prosecutor relied on a single act as the basis for both assault convictions. (ASRBM 36, 38)

V. THE RULE OF LENITY DOES COMPEL A DIFFERENT CONCLUSION

In the conclusion of her Supplemental Brief, appellant maintains for the first time that the rule of lenity compels this Court to conclude that she cannot be convicted of both counts of assault based on a single course of conduct. (ASRBM 45-46.) However, in *White*, this Court rejected a similar appeal to the rule of lenity, reasoning that the rule does not apply because the elements of the charged offense predated the Court's opinion, and "everyone agree[d] that [the defendant] cannot be punished for both offenses." (*White, supra*, 2 Cal.5th at p. 360.) That same reasoning compels an identical conclusion in the present case.

CONCLUSION

Accordingly, for the reasons stated above, section 245, subdivisions (a)(1) and (a)(4) are not different statements of the same offense and appellant may be convicted of both. Even if this Court reaches a different conclusion, however, appellant's trial testimony reveals that she committed a minimum of two separate assaults, and therefore she may be convicted of two counts.

Dated: July 15, 2020

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CERTIFICATE OF COMPLIANCE

I certify that the attached SUPPLEMENTAL REPLY BRIEF ON THE MERITS uses a 13-point Century Schoolbook font and contains 9,907 words.

Dated: July 15, 2020

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

Case Name: **People v. Veronica Aguayo**
No.: **S254554**

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On July 15, 2020, I electronically served the attached **Supplemental Reply Brief on the Merits** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on July 15, 2020, I placed a true copy thereof enclosed in a sealed envelope 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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Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

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 July 15, 2020, at San Diego, California.

Kerry Towne
Declarant

Kerry Towne
Signature

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Supreme Court of California

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