SUPREME COURT COPY

SUPREME COURT NO. S180181

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MELISSA KAY MURPHY, Defendant and Petitioner.	) No. E046742) Super.Ct.No. FSB060016

On Appeal from the Superior Court of California,
County of San Bernadino,
The Honorable Bryan F. Foster, Judge Presiding.

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO, AFFIRMING JUDGMENT OF CONVICTION

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By appointment of the Court of Appeal under the Appellate Defenders, Inc. assisted case program.

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v.	
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TO THE HONORABLE CHIEF JUSTICE, RONALD M. GEORGE, AND TO THE HONORABLE ASSOICATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Defendant and Petitioner Melissa Kay Murphy petitions for review following the published decision of the Court of Appeal, Fourth Appellate District, Division Two (per Miller) filed on December 28, 2009. A copy of the Opinion is attached to the appendix of this petition as Exhibit "A."

A petition for rehearing was filed on January 13, 2010, and denied on January 22, 2010.

ISSUES PRESENTED

1. Whether, under the doctrine of *pro tanto* repeal, Vehicle Code sections 20 and 10501, operate as exceptions, not alternatives, to Penal Code section 115 where a defendant is accused of filing a false stolen vehicle report.

2. Whether the trial court committed prejudicial error and violated petitioner's federal constitutional rights to due process and a jury trial by failing to instruct the jury with all the legal principles that were required to assess whether petitioner made a *false or fraudulent claim for payment* under an insurance policy (Penal Code section 550, subd. (a)(4)) as opposed to a *false statement* in support of a claim (Penal Code section 550, subd. (b)(1).

GROUNDS FOR REVIEW

Issue 1: Review is necessary to secure uniformity of decision and to settle important questions of law. (Cal.Rules of Court, rule 8.500(b)(1).)

Issue 2: Review is necessary to settle an important question of law. (Cal.Rules of Court, rule 8.500(b)(1).)

STATEMENT OF THE CASE AND FACTS

For purposes of this petition only, petitioner adopts the statements of the case and facts set forth in the Opinion with one specific exception. The Opinion states that petitioner contends that Penal Code section 115 was repealed *pro tanto* by Vehicle Code section 31 and that this argument was forfeited. (Opinion at pp. 7-8.) This is incorrect. Petitioner contends that Penal Code section 115 was repealed *pro tanto* by Vehicle Code sections 20 and 10501, and that although Penal Code section 148.5 and Vehicle Code section 31 do not rise to the level of *pro tanto* repeal, they are powerful indicators in terms of the statutory scheme as a whole that the legislature did not intend to punish the conduct petitioner was charged with as a felony. (Reply, at pp. 3-4; Petition for Rehearing, at pp. 1-2.) Other points of disagreement about the record or relevant facts that were omitted in the decision will be discussed to the extent appropriate in the Argument section below.

ARGUMENT

I.
OVERVIEW.

Petitioner requested review of two independent issues. First, petitioner was charged with filing a false instrument with a public office in violation of Penal Code section 115, which is a felony. The specific allegation underlying the charge, however, was that she filed a false stolen vehicle report with the California Highway Patrol. Two criminal statutes, both of which were enacted after section 115, prohibit the filing of false reports with state law enforcement agencies, but make violation of the offenses a misdemeanor. Under the doctrine of *pro tanto* repeal, it was improper to charge petitioner with committing a felony in violation of the more general statute. Instead, she should have been charged with committing one of the more specific misdemeanor offenses. As a consequence, judgment on the first count should have been reversed.

Second, petitioner was charged with making a false or fraudulent claim for payment under an insurance policy for the loss of a motor vehicle. The provisions of the particular insurance policy, however, covered petitioner in such a way that the prosecution was required to prove that she was driving the motor vehicle in question while unlawfully under the influence of alcohol in order to prove that she was not entitled to the payment she claimed. As set forth below, the trial court failed to instruct the jury on the legal requirements for determining whether a person is unlawfully driving under the influence. This was prejudicial error that should have resulted in a reversal of the second count.

II.
PETITIONER WAS IMPROPERLY CONVICTED OF VIOLATING PENAL CODE SECTION 115, A FELONY, BECAUSE UNDER THE DOCTRINE OF *PRO TANTO* REPEAL, THE OFFENSE CHARGED IN THE INSTANT CASE WAS PUNISHABLE ONLY AS A MISDEMEANOR PURSUANT TO MORE SPECIFIC, MORE RECENTLY ENACTED STATUTES.

THE COURT SHOULD GRANT REVIEW, BECAUSE THE OPINION RELIES ON AN INCORRECT DEFINITION OF "FALSE INSTRUMENT" AND *REVERSES* THE SPECIFICITY REQUIREMENT THAT IS USED TO DETERMINE WHETHER A LATER–ENACTED STATUTE HAS REPEALED AN EARLIER-ENACTED STATUTE *PRO TANTO*; THE OPINION THEREBY CREATES A CLEAR CONFLICT WITH OTHERWISE SETTELED LAW.

Issue 1: Whether, under the doctrine of *pro tanto* repeal, Vehicle Code sections 20 and 10501 of the Vehicle Code, operate as exceptions, not alternatives, to Penal Code section 115 where a defendant is accused of filing a false stolen vehicle report.

As set forth in the Opinion, petitioner was charged in count 1 with filing a false instrument in a public office in California, a violation of section 115 and a felony. (1CT 12-13; § 115.) However, two more recently enacted statutes — Vehicle Code section 20 and Vehicle Code section 10501 — define and address the more specific offenses of (1) filing a false document with the California Highway Patrol, and (2) filing a false report of vehicle theft with a California law enforcement agency. (Veh. Code, §§ 20, 10501.) Both of the more specific offenses are punishable as misdemeanors. (Veh. Code, §§ 40000.5, 40000.9.) As a consequence, under the doctrine of *pro tanto* repeal, petitioner was improperly charged

with violating section 115 and judgment against her on count 1 should have been reversed.

A. Under The Doctrine Of *Pro Tanto* Repeal, A Specific Statute Is Treated As An Exception, Not An Alternative, To An Earlier, More General Statute.

The doctrine of *pro tanto* repeal is well settled. (*People v. Wood* (1958) 161 Cal.App.2d 24, 29.) "[W]here the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute . . . ." (*In re Williamson* (1954) 43 Cal.2d 651, 654 (*Williamson*).) In other words, "an earlier and more general statute [is] superseded or repealed *pro tanto* by a later and more specific statute which is clearly applicable to the factual situation involved." (*Wood, supra,* 161 Cal.App.2d at p. 29.) The rule "serves as an aid to judicial interpretation when two statutes conflict." (*People v. Jenkins* (1980) 28 Cal.3d 494, 505.) "The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply." (*People v. Watson* (1981) 30 Cal.3d 290, 295-296.)

"Absent contrary legislative intent, 'the *Williamson* preemption rule is applicable (1) when each element of the general statute corresponds to an element on the face of the special statute, or (2) when it appears that a violation of the special statute will necessarily or commonly result in a violation of the general statute." (*People v. Powers* (2004) 117 Cal.App.4th 291, 299, quoting *People v. Watson, supra,* 30 Cal.3d at pp.

295-296.) Under both tests, section 115 was repealed *pro tanto* with respect to the factual situation in the instant case by at least two more recent statutes.

B. Section 115 Was Repealed *Pro Tanto* By Vehicle Code Section 20 With Respect To The Factual Situation At Issue In The Instant Case.

Section 115 was enacted in 1872. (*People v. Wood*, *supra,* 161 Cal.App.2d at p. 27.) Section 115 makes it a felony to knowingly file *any* false instrument in *any* State public office:

> Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this State, which instrument, if genuine, might be filed, or registered, or recorded under any law of this State or of the United States, is guilty of [a] felony.

(§ 115.)

Section 20 of the Vehicle Code was enacted 41 years later in 1913. (Historical and Statutory Notes, Veh. Code, § 20, West's Online Annotated California Codes, Thomson Reuters, 2010 [noting that Vehicle Code section 20 was enacted in 1959, but derives from an earlier statute enacted in 1913].) Vehicle Code section 20 is punishable as a misdemeanor pursuant to Vehicle Code section 40000.9, and it is indisputably more specific than section 115. Like section 115, Vehicle Code section 20 addresses the filing of *any* false document, but unlike section 115, it addresses the filing of a false document with a specific public office, namely *the Department of the California Highway Patrol*:

> It is unlawful to . . . knowingly make any false statement or knowingly conceal any material fact. . . in any document filed with . . . the Department of the California Highway Patrol.

(Veh. Code, § 20.)

An element-by-element comparison of the two statutes under the test set out in *Williamson, supra,* demonstrates that each element of section 115 corresponds to an identical or more specific element of Vehicle Code section 20. The elements of a violation of section 115 are as follows:

1. The defendant caused a false instrument to be filed;

2. The filing was with a public office in California; and

3. When the defendant caused the instrument to be filed, she knew that it was false.

(§ 115; CALCRIM 1945.) The first and third elements of a violation of Vehicle Code section 20 are essentially indistinguishable from the first and third elements of section 115: (1) the defendant made a false statement or knowingly concealed a material fact in a document to be filed, and (3) the statement was made knowingly. (Compare § 115, Veh. Code, § 20.) The second element of a violation of Vehicle Code section 20 addresses a more specific situation than the second element in section 115. Section 115 prohibits filing with a public office in California, whereas Vehicle Code section 20 prohibits filing with a specific public office in California, namely the California Highway Patrol. (Compare § 115, Veh. Code, § 20.) Vehicle Code section 20 is accordingly a *pro tanto* repeal of section 115 under the first test – the element-by-element comparison — set out in *Williamson.* (*Powers, supra,* 117 Cal.App.4th at p. 299.)

The two statutes also satisfy the second *Williamson* test" "a violation of special statute will necessarily or commonly result in a violation of general statute." (*Powers, supra,* 117 Cal.App.4th at p. 299.) The filing of a false document with California Highway Patrol will always constitute the filing of a false instrument with a public office in California.

Under the doctrine of *pro tanto* repeal, section 20 of the Vehicle Code therefore operates as an exception to section 115, not an alternative, where, as here, a defendant is alleged to have filed a false document with the CHP. As set forth above, while filing a false instrument with a public office is generally considered to be a felony, the Legislature has effectively carved out an exception to the general rule and decided that filing a false document with the CHP is punishable only as a misdemeanor. Petitioner was therefore improperly charged with violating section 115, and judgment against her on count 1 should have been reversed.

C. Section 115 Was Also Repealed *Pro Tanto* By Vehicle Code Section 10501 With Respect To The Factual Situation At Issue In The Instant Case.

Section 10501 of the Vehicle Code was enacted in 1935. (Historical and Statutory Notes, Veh. Code, § 10501, West's Online Annotated California Codes, Thomson Reuters, 2010.) It is punishable as a misdemeanor pursuant to Vehicle Code section 40000.9, and provides as follows:

> It is unlawful for any person to make or file a false or fraudulent report of theft of a vehicle required to be registered under this code with any law enforcement agency with intent to deceive.

(Veh.Code, § 10501.)

Vehicle Code section 10501 is even more specific than Vehicle Code section 20 when compared with section 115. (Compare § 115, Veh. Code, §§ 20, 10501.) A false report of the theft of a vehicle is a specific type of false instrument. A law enforcement agency is a specific type of public office. And "with intent to deceive" is a higher state of culpability than "knowingly," which always involves knowledge on the part of the individual committing the offense. Vehicle Code section 10501 accordingly also operates as an exception, not an alternative, to section 115 under the doctrine of *pro tanto* repeal. Judgment against petitioner on count 1 accordingly should have been reversed for this additional reason.

D. The Analysis In The Opinion Relies On An Incorrect Definition Of "False Instrument."

The first reason given by the Opinion for holding that Vehicle Code sections 20 and 10501 do not operate as a *pro tanto* repeal of Penal Code section 115 is a purported distinction between the filing of a "false instrument" and a "document containing false statements." (Opinion at pp. 9, 11.) The Court of Appeal's holding on this issue is in direct conflict with *People v. Parks* (1992) 7 Cal.App.4th 883, 886-887.

"Modern cases have interpreted the term "instrument" expansively, including any type of document that is filed or recorded with a public agency that, if acted upon as genuine, would have the effect of deceiving someone." (CALCRIM 1945, citing *Parks, supra,* 7 Cal.App.4th at pp. 886-887.) "Thus the courts have held that "instrument" includes a modified restraining order, false bail bonds, and falsified probation work referrals."

(CALCRIM 1945 [citations omitted].) In addition, the case law holds that the meaning of "false instrument" is that it contains false statements. (*Powers, supra,* 117 Cal.App.4th at p. 297.) Indeed, if the distinction made in the Opinion between a "false instrument" and false statements in a document were valid, which is not the case, then the police report at issue here would not qualify as a "false instrument" and petitioner would have a claim for reversal on the grounds of insufficient evidence.

E. The Opinion *Reverses* The Specificity Requirement That Is Used To Determine Whether A Later-Enacted Statute Has Repealed An Earlier-Enacted Statute *Pro Tanto.*

The second reason given by the Opinion for holding that Vehicle Code sections 20 and 10501 do not operate as a *pro tanto* repeal of Penal Code section 115 was that the elements "do not correspond." (Opinion at p. 10, 12.) The Court of Appeal's determination of whether the elements "correspond" *reverses* the test that should have been applied with respect to several key elements. As a consequence, the Opinion is in conflict with every case that applies this test. (*E.g.*, *Jenkins, surpa,* 28 Cal.3d at pp. 501-505.)

In particular, the Opinion does not address *People v. Wood, supra,* 161 CalApp.2d 24, which held that Penal Code section 115 was preempted by former section 131, subdivision (d) of the Vehicle Code, which is a predecessor of the two statutes at issue here. The carve-out presented by Vehicle Code section 10501 is indistinguishable in any meaningful way from the carve-out that was found in *Wood*, yet the Opinion does not distinguish the reasoning in that case.

The correct rule is that the doctrine of *pro tanto* repeal applies where the elements of the more modern statute are *more specific*. (*Wood, supra,* 161 Cal.App.2d at p. 29.) The following chart compares the elements of Penal Code section 115 and Vehicle Code section 20 side by side as a starting point for discussion:

Element	**PC 115**	**VC 20**
1	Procuring [causing] or offering a false instrument to be filed.	Making a false statement or knowingly concealing a material fact in a document that is filed.
2	In a public office.	In the department of Motor Vehicles or the Department of the California Highway Patrol.
3	Knowingly.	Knowingly.

As set forth in the previous section, the modern case law does not distinguish between a "false instrument" and a document containing false statements that is filed with a public agency. If it did, the police report in this case could not have been characterized as a false instrument. As a consequence, the Opinion's characterization of the CHP form as "fraudulent" is not correct. (Opinion at p. 11.) The CHP form was a genuine form No. 180 which contained a false statement. (RT 71-73.)

The rest of the Opinion's analysis indicates that the elements of Vehicle Code section 20 are *more specific* than the elements of Penal Code section 115, but then incorrectly holds that they fail the test. According to the Court's analysis, Vehicle Code section 20 has a materiality requirement and Penal Code section 115 does not. (Opinion at p. 10.) Vehicle Code section 20 applies where a document is filed, while Penal Code section 115 applies where a document is filed or offered to be filed.[1] (Opinion at p. 10.) And Vehicle Code section 20 requires filing with the DMV or CHP, while Penal Code section 115 applies to any public office. These are all instances where the elements of Vehicle Code section 20 are *more specific* than those of Penal Code section 115. The Opinion accordingly should have held that the doctrine of *pro tanto* repeal applies.

Compounding the error, the Opinion's statement that "defendant procured or offered the fraudulent CHP form No. 180 for filing by the deputy; she did not file the document herself" is a distinction that makes no sense as a practical matter or pursuant to the language of the statutes. Vehicle Code section 20 applies to "any document filed ... with the Department of the California Highway Patrol" and does not require that the defendant be the person who personally files it. (Veh.Code, §20.) Nothing about this language would have precluded petitioner from being prosecuted on the grounds that she gave the CHP form to an officer in the field who filed it with the CHP instead of filing it directly with an officer at a CHP station. The statute on its face applies to "any document that is filed ...."

---

[1] "Procuring" means "causing." (CALCRIM 1945.) It has not been limited by the case law to mean using someone else to effectuate the filing.

(*Ibid.*) In fact, the reality is that documents filed with a public agency are always given to a public official for filing, not personally filed by the individual.

The correct analysis thus indicates that Vehicle Code section 20 is the more specific statute with respect to each element with the exception of the distinction between "false instrument" and "document containing a material false statement," which is a distinction that is not supported by the modern interpretation of "false instrument" as the term in used in Penal Code section 115.

Turning to the comparison of the elements of Penal Code section 115 and Vehicle Code section 10501, the following chart sets them out side by side:

Element	**PC 115**	**VC 10501**
1	Procuring [causing] or offering a false instrument to be filed.	Filing a false report of theft of a vehicle.
2	In a public office.	In any law enforcement agency.
3	Knowingly.	With intent to deceive.

Here again, the Opinion *reverses* the specificity requirement for finding that a later statute has repealed an earlier one *pro tanto*. The Opinion cites to *People v. Geibel,* (1949) 93 Cal.App.2d 147, 168-169, for the proposition that '[t]he crime of violating section 115 of the Penal Code is sufficiently proven when it is shown that the accused intentionally

committed the forbidden act." (Opinion at p. 13.) This is *less specific* than the state of mind required by Vehicle Code section 10501, which is "with intent to deceive."

The Opinion's distinction between the fact that Penal Code section 115 applies to a "false instrument," "which if genuine, might be filed, or registered, or recorded under any law of this State or of the United States," whereas Vehicle Code section 10501 applies to a false report of the theft of a motor vehicle is another example where Vehicle Code section 10501 is *more specific*. Numerous statutes previously cited by petitioner permit the filing of stolen vehicle reports "under the laws of this State." (*E.g.*, Veh.Code, § 10504; Veh.Code, §§ 2407-2408; Veh.Code, § 10500; Pen.Code, § 11108.) A stolen vehicle report is therefore a specific type of instrument which can be filed pursuant to California law. Indeed, if it were not, then petitioner would have been wrongly convicted on the grounds that there was insufficient evidence that the police report in this case was the type of document that could be filed under any law of this State. The doctrine of *pro tanto* repeal accordingly applies with respect to Vehicle Code section 10501 as well under the correct application of the specificity test.

F. The Legislative Scheme As A Whole Is Further Evidence That The Doctrine Of *Pro Tanto* Repeal Applies.

At least four statutes cover the *specific* conduct — a false report to the police — that was at issue at the underlying trial. The four statutes *all* provide that such conduct is either a misdemeanor or an infraction.

Vehicle Code section 10501 provides that:

> It is unlawful for any person to make or file a false or fraudulent report of theft of a vehicle required to be registered under this code *with any law enforcement agency* with intent to deceive.

(Veh. Code, § 10501 [emphasis added].) Vehicle Code section 40000.9 makes a first offense violation of Vehicle Code section 10501 *a misdemeanor*. (Veh. Code, § 40000.9; see Veh. Code, § 10501, subd. (b).)

Vehicle Code section 20 provides that:

> It is unlawful . . . to knowingly conceal any material fact in any document filed with the Department of Motor Vehicles or the Department of the California Highway Patrol.

(Veh. Code, § 20.) Vehicle Code section 40000.9 makes the violation of Vehicle Code section 20 *a misdemeanor*. (Veh. Code, § 40000.9.)

Penal Code section 148.5 provides that:

> Every person who reports to any peace officer listed in Section 830.1 or 830.2, or subdivision (a) of Section 830.33 . . . that a felony or misdemeanor has been committed, knowing the report to be false, *is guilty of a misdemeanor*. . .

(§ 148.5, subd. (a) [emphasis added].)

Vehicle Code section 31 provides that:

> No person shall give, either orally or in writing, information to a peace officer while in the performance of his duties under the provisions of this code when such person knows that the information is false.

(Veh. Code, § 31.) Vehicle Code section 40000.1 makes the violation of Vehicle Code section 31 *an infraction*. (Veh. Code, § 40000.1.)

Instead of charging petitioner with any one or even several of these statutes, the prosecution ignored the clear intent of the Legislature that a first-offense, false report of a stolen vehicle to a peace officer is *not* punishable as a felony, and instead charged petitioner with the generic crime of filing a false instrument in a public office. (1CT 13.) The doctrine of implied repeal does not allow this:

> The doctrine that a specific statute precludes any prosecution under a general statute is a rule designed to ascertain and carry out legislative intent. The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply. Indeed, in most instances, an overlap of provisions is determinative of the issue of legislative intent and 'requires us to give effect to the special provision alone in the face of the dual applicability of the general provision ... and the special provision . . . .'

(*Jenkins, supra,* 28 Cal. 3d at pp. 505-506, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 481.) The statutory scheme as a whole — which involves no less than four specific statues, all of which categorize false police reports as misdemeanor or infraction offenses — is thus a further, "powerful indication" that Legislature did not intend to punish the conduct petitioner was charged with committing as a felony.

G. This Court Should Grant Review.

The Opinion's analysis thus relies on an incorrect definition of 'fraudulent instrument" and *reverses* the analysis of which statute is more specific. It is therefore in conflict with settled law. It also ignores the statutory scheme as a whole, which indicates that the Legislature intended the type of false report petitioner was charged with making should not be

charged as a felony. The Court should grant review to correct the confusion that has been created in the case law by the misapplication of the element-by-element specificity test in the Opinion, or remand to the Court of Appeal with instructions to modify its opinion. (Cal. Rules of Court, rule 8.500, subd. (b), 8.528, subd. (d).)

III.
THE TRIAL COURT COMMITTED PREJUDICIAL ERROR, BECAUSE IT FAILED TO INSTRUCT THE JURY WITH ALL OF THE LEGAL PRINCIPLES THAT WERE REQUIRED TO ASSESS WHETHER PETITIONER MADE A FALSE OR FRAUDULENT CLAIM FOR PAYMENT TO WGI.

PETITIONER'S CONVICTION ACCORDINGLY VIOLATED HER FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A JURY TRIAL.

Issue 2: Whether the trial court committed prejudicial error and violated petitioner's federal constitutional rights to due process and a jury trial by failing to instruct the jury with all the legal principles that were required to assess whether petitioner made a false or fraudulent claim for payment under an insurance policy.

Section 550 of the Penal Code identifies and prohibits certain specific acts when they are performed in the context of making a claim for benefits under an insurance policy. (§ 550.) Petitioner was specifically charged in count 2 with making a *false or fraudulent claim for payment* in violation of section 550, subdivision (a)(4). (1CT12-13.)[2] In order to prevail on count 2, the prosecution was accordingly required to prove that

[2] By contrast, petitioner was charged in count 3 with violating subdivision (b)(1), which prohibits the presentation of a statement containing false or misleading information concerning a material fact in support of a claim. (1CT 12-13.)

petitioner made a claim for payment under the WGI policy to which she was not entitled. (See § 550, subd. (a)(4); CALCRIM 2000; *People v. Blick* (2007) 153 Cal.App.4th 759, 772-773 ["The clear import of section 550 is to criminalize the making of false or fraudulent claims the ultimate objective of which is to obtain benefits to which the offender is not entitled"].)

The trial court committed prejudicial error in the instant case, because it failed to provide the jury with sufficient instructions to determine whether the claim made by petitioner to WGI was a false or fraudulent claim for payment, *i.e.*, a claim for payment to which petitioner was not entitled. As set forth below, this is because under the plain language of the insurance policy, petitioner was entitled to be paid by WGI for the damage to her vehicle regardless of whether she was driving or a thief was driving at the time of the collision. The only way petitioner was not entitled to be paid by WGI under the facts of this case was if she was *unlawfully* driving under the influence of alcohol at the time of the accident. The jury accordingly needed to know the legal requirements for finding that a person is unlawfully driving under the influence of alcohol in order to determine whether petitioner was entitled to be paid under the policy. The jury was not given the required instruction. As a consequence, the jury had no guidance for assessing whether petitioner's request to WGI for payment was false or fraudulent, and judgment against petitioner on count 2 must be reversed.

A. Basis For Error: The Trial Court Failed To Instruct The Jury On The Legal Requirements For Determining Whether A Person Is Driving Under The Influence Of Alcohol.

Under the plain language of the WGI policy, petitioner was insured for damage and loss caused by *both* theft and accidental collision. Part V of the policy — entitled "Automobile Physical Damage Coverage" — specifically states that WGI will pay for "loss" regardless of whether it is caused by collision or some other cause:

> The Company will pay for loss . . . to a covered automobile under:
>
> 1. Coverage E, COMPREHENSIVE, from any cause except collision. For the purpose of this coverage, breakage of glass and loss caused by . . . theft or larceny, . . . shall not be deemed loss caused by collision;
>
> 2. Coverage F, COLLISION, caused by collision.

(1CT 194 [emphasis omitted]) As a consequence, petitioner was not only entitled to recover damages under the WGI policy if *a thief* was driving when the collision occurred, she was also indisputably entitled to recover damages under the policy if *she* was driving when the collision occurred. The plain language of the policy clearly covers both situations.

The fact that petitioner was covered regardless of who was driving at the time of the collision means that it was not enough for the jury to find that she lied about her car being stolen to conclude that she made a fraudulent claim for payment. Petitioner was covered for collision damage if she was driving. What the jury needed to find was not only that petitioner was driving, *but also* that she was precluded from collecting

under the policy due to an exclusion or other contractual provision. Otherwise petitioner did not make a false or fraudulent claim for payment.

The relevant contract provision is therefore Section V.C.11 of the WGI policy, which contains an exclusion for driving under the influence of alcohol. By its own terms, however, the exclusion applies only where the driver of the vehicle is driving *unlawfully* under the influence of alcohol:

> This insurance does not apply: [¶]
>
> 11. to loss which occurs whle the driver of the vehicle was driving *unlawfully* under the influence of drugs or alcohol and coverage shall be suspended until the issue of driving under the influence is adjudicated.

(1CT 195 [emphasis changed from the original].)

Here, the trial court failed to instruct the jury on the legal requirements for determining whether a person is driving under the influence. (1CT 80-127; 1RT 205-221.) The jury was accordingly left in the dark as to the legal requirements for determining whether petitioner subject to the DUI exclusion and therefore not entitled to payment under the policy.

The requirements are not self-evident. In particular, the jury should have been made aware of the legal definition of "under the influence":

> A person is *under the influence* if, as a result of drinking an alcoholic beverage, her mental or physical abilities are so impaired that she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances.

(CALCRIM 2110, citing *People v. Schoonover* (1970) 5 Cal.App.3d 101, 105-107; Veh. Code, § 23152, subd. (a).) Also of particular significance in the instant case, the jury should have been made aware that the manner in

which a person drives is insufficient by itself to establish that the person is under the influence:

> The manner in which a person drives is not enough by itself to establish whether the person is or is not under the influence of an alcoholic beverage. However, it is a factor to be considered in light of all the surrounding circumstances, in deciding whether the person was under the influence.

(CALCRIM 2110, citing *People v. Weathington* (1991) 231 Cal.App.3d 69, 84; Veh. Code, § 23152, subd. (a).)

B. Standard Of Review.

Instructional error is a pure question of law subject to *de novo* review. (E.g. *People v. Alvarez* (1996) 14 Cal.4th 155, 217.)

C. There Was No Forfeiture.

Defense counsel did not object to the trial court's failure to instruct the jury on the elements of driving under the influence. There was no forfeiture or invited error, however.

"A court must instruct sua sponte on general principles of law that are closely and openly connected with the facts presented at trial." (*People v. MacArthur* (2006) 142 Cal.App.4th 275, 280, citing *People v. Brown* (2003) 31 Cal.4th 518, 559.) "That obligation includes instructions on all of the elements of a charged offense." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) This is because an accused has a fundamental right under the state and federal constitutions to have a jury decide each element of an offense beyond a reasonable doubt. (U.S. Const., Amends. V, VI, XIV; Cal. Const., art. I, § 15; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-477 [120 S.Ct. 2348, 147 L.Ed.2d 435]; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368 ["Lest there remain any doubt

about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged"]; *People v. Flores* (2007) 153 Cal.App.4th 1088, 1092.)

Proof that petitioner made a false claim for payment to which she was not entitled is a required element of insurance fraud under section 550, subdivision (a)(4). (§ 550, subd. (a)(4); CALCRIM 2000; *Blick, supra,* 153 Cal.App.4th at pp. 772-773.) As has already been discussed, proof that petitioner was not entitled to payment under the WGI policy therefore required a proof that she was *unlawfully* driving under the influence. The trial court accordingly had a *sua sponte* duty to provide adequate instruction on the legal requirements for finding a person guilty of driving under the influence of alcohol, and its failure to do so resulted in the jury not having enough information to decide a required element beyond a reasonable doubt, and consequently, a violation of petitioner's substantial constitutional rights. (*Cummings, supra,* 4 Cal.4th at p. 1311.) As a result, there was no forfeiture or invited error. (§1259, subd. (b)[3]; *Blick, supra,* 153 Cal.App.4th at p. 775, fn. 8 ["We may review instructional error, even in the absence of an objection, where the substantial rights of the accused are affected"], citing *People v. Flood* (1998) 18 Cal.4th 470, 482, fn.7,

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[3] Section 1259 provides: "The appellate court may . . . review any instruction given, ... even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby."

criticized on another ground in *People v. McCall* (2004) 32 Cal.4th 175, 187, fn.14; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

D. The Trial Court's Failure To Instruct Was Reversible Error, Because The Jury Was Required To Find That Petitioner Was *Unlawfully* Driving Under The Influence In Order To Find That She Made A False Or Fraudulent Claim, Which Is An Essential Element Of The Charged Crime.

"Under established law, instructional error relieving the prosecution of the burden of proving beyond a reasonable doubt each element of the charged offense violates the defendant's rights under both the United States and California Constitutions." (*People v. Flood, supra,* 18 Cal.4th at pp. 479-480.) A defendant has the right under the state constitution to have the jury determine every material issue presented by the evidence. (*Id.* at p. 481, citing Cal. Const., art. I, § 15.) In addition, the accused is protected by the Due Process Clause of the United States Constitution against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. (*Ibid.*, citing U.S. Const., Amends. V, XIV; *Apprendi, supra,* 530 U.S. at pp. 476-477, citing U.S. Const., Amend. VI; *In re Winship, supra,* 397 U.S. at p. 364; *People v. Flores, supra,* 153 Cal.App.4th at p. 1092.) The trial court judge is accordingly required to make certain that the jury is adequately instructed on the law governing all the elements of the case submitted to it to the extent necessary to enable the jury to perform its function and for a proper determination in conformity with applicable law. (*People v. Sanchez*

(1950) 35 Cal.2d 522, 528; *People v. Enriquez* (1996) 42 Cal.App.4th 661, 665.)

Here, the trial court failed to instruct the jury on the legal requirements for determining that a person is guilty of driving under the influence of alcohol. As discussed above, the jury needed this information in order to determine whether petitioner's claim for payment was false or fraudulent. The trial court's failure to instruct thus eliminated the jury's ability to make a proper determination of an essential element beyond a reasonable doubt in accordance with applicable law. This was reversible error and a violation of petitioner's state and federal constitutional rights under *Flood, supra,* 18 Cal.4th 470, and the other state and federal authorities cited *ante*. (pp. 23-24.)

E. The Error Was Prejudicial, Because It Cannot Be Said Beyond A Reasonable Doubt That The Trial Court's Failure To Instruct Did Not Contribute To the Jury's Verdict.

The *Chapman* harmless error standard applies where an instruction improperly describes or omits an element of a charged offense. (*Neder v. United States* (1999) 527 U.S. 1, 9-12 [119 S.Ct. 1827, 144 L.Ed.2d 35]; *Flood, supra,* 18 Cal.4th at p. 504, citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705] [hereinafter "*Chapman*"].) Under the *Chapman* standard, the conviction must be reversed unless it "appears beyond a reasonable doubt that the error did not contribute to the jury's verdict." (*Chapman, supra,* at p. 24.) "To say that an error did not contribute to the verdict is . . . to find that error unimportant

in relation to everything else the jury considered on the issue in question, as revealed in the record." (*People v. Mayfield* (1997) 14 Cal.4th 668, 774.)

Here, as set forth above, WGI was required to pay petitioner for the collision damage to her vehicle unless she was *unlawfully* driving under the influence of alcohol at the time of the collision. The record was not at all definitive on this issue.

Barbato testified that petitioner had only one or two beers over the course of more than two hours. (1RT 148.) Detective Smith confirmed that Barbato told him essentially the same thing. (1RT 181 ["I just remember that she said that [petitioner] had two drinks and that she had a few also"].) And although Investigator Smith testified that Barbato told him that she was worried that petitioner would be charged with DUI, Deputy Staviski was trained to recognize the signs of being under the influence of alcohol. (1RT 83-84, 183.) Staviski, however, did not remember smelling alcohol on petitioner the night of the accident. (1RT 85.) He was also clear that he did not notice any other signs or symptoms that would indicate that petitioner was under the influence of alcohol when he interviewed her and then drove with her back to the scene of the accident:

> Q: Did you notice any of the signs and symptoms that you might have heard about in your training, either at the academy or out in the field that would have indicated her being under the influence; such as, slurred speech, or that—you're shaking your head no.
>
> A: No, I didn't see anything—or that I recall that would indicate her.

Q: So she wasn't slurring her speech?

A: No.

Q: And she wasn't — was she off balance, having trouble walking or moving around?

A: No, not that I — not that I remember.

(1RT 85-86.)

In fact, Investigator Smith essentially conceded that the police did not have any physical evidence that petitioner was intoxicated at the tiem of Barbato's interview:

Q: Did you — did you inquire further of [Barbato], about [petitioner's] level of intoxication that she observed that night?

A: Well, I did tell her during the interview that she should rest assured that she had nothing to worry about [petitioner] being arrested for DUI, because time had passed and there's no way that I could get a blood alcohol content or anything else for [petitioner]. I said the whole driving under the influence is over. She could rest assured that I was not going to arrest [petitioner] for driving under the influence.

(1RT 191-192.)

The testimony that petitioner was speeding and lost control of the vehicle is not definitive either. While consistent with driving under the influence of alcohol, it is also consistent with Smith's testimony that Barbato told him petitioner was visibly upset, that the roads in the area are windy, and that it was a cold night and the roads were wet and icy. (1RT 181-183.)

The bottom line is that the evidence of intoxication was far from overwhelming. It is accordingly impossible to conclude beyond a reasonable doubt that the jury would have concluded that they had enough evidence to convict petitioner if they had been told that the legal definition of "under the influence" means that a person's "mental or physical abilities are so impaired that she is no longer able to drive a vehicle with the caution of a sober person, using ordinary care, under similar circumstances." (CALCRIM 2110, citing *Schoonover, supra,* 5 Cal.App.3d at pp. 105-107.) This is especially true where jurors may be incidentally familiar with the entirely different, more easily satisfied definition of "under the influence" in the context of Health and Safety Code section 11550, which prohibits the use of controlled substances. (*Enriquez, supra,* 42 Cal.App.4th at pp. 665-666 ["'[B]eing under the influence within the meaning of Health and Safety Code section 11550 merely requires that the person be under the influence in any detectable manner"].)

In sum, given the lack of hard evidence that petitioner was actually intoxicated, it cannot be said beyond a reasonable doubt that the trial court's instructional error did not contribute to the jury's verdict. The trial court's failure to instruct on the legal requirements for finding a person guilty of driving under the influence was therefore prejudicial under the *Chapman* standard.

F. The Analysis In The Opinion Is Incorrect.

To be clear, petitioner was charged in count 3 with violating section 550, subdivision (b)(1). (1CT 1.) Subdivision (b)(1) makes it unlawful to

make *false statements* about material facts to an insurance company *in support of a claim*:

> It is unlawful to . . .
>
> Present or cause to be presented any written or oral statement as part of, or in support of or opposition to, a claim for payment or other benefit pursuant to an insurance policy, knowing that the statement contains any false or misleading information concerning any material fact

(§ 550, subd. (b)(1).) *Petitioner did not challenge the judgment against her for making a false statement in support of a claim.*

By contrast, the code section petitioner was charged with violating in count 2 makes it unlawful to make a *false claim for payment*:

> It is unlawful to . . . [¶¶]
>
> Knowingly present a false or fraudulent claim for the payment of a loss for theft, destruction, damage, or conversion of a motor vehicle, a motor vehicle part, or contents of a motor vehicle.

(§ 550, subd. (a)(4).) One of the essential elements that is required to establish a violation of section 550, subdivision (a)(4), is accordingly that the claim for payment was in fact false, i.e. that the defendant was not entitled to payment for the loss. This is required by the plain language of the statute, which prohibits *presenting a false claim for payment*, not making a false statement in support of a claim, which is the subject of subdivision (b)(1).

The requirement that the claim for payment actually be a claim for benefits to which the defendant is not entitled is thus firmly grounded in the language of the statute. In addition, the existence of this requirement is

supported as a matter of inference by the case law which defines and analyzes the additional required element that the defendant submit the claim with intent to defraud. Those cases hold that "[t]he clear import of section 550 is to criminalize the making of false or fraudulent claims the ultimate objective of which is to obtain benefits *to which the offender is not entitled.*" (*Blick, supra,* 153 Cal.App.4th at pp. 772-773 [emphasis added].)

The Opinion held that a separate provision in the insurance policy made the jury's determination of whether she was intoxicated irrelevant. (Opinion at p. 15.) Petitioner contends that the existence of this other provision does not change the need for the jury to have determined whether she was intoxicated in order to determine whether she made a false claim for payment as opposed to a false statement in support of a claim.

The problem with Opinion's analysis is that it ignores the distinction between making a false claim for payment and making a false statement in support of a claim. Section M of the insurance policy addresses false statements made in support of a claim, not false claims:

> PART VI. CONDITIONS (APPLICABLE TO ALL COVERAGES) [¶¶]
>
> M. MISREPRESENTATION AND FRAUD
>
> . . . . The Company will not provide coverage under this policy to any person who has knowingly concealed or misrepresented any material fact or circumstance, or engaged in fraudulent conduct in connection with the presentation or settlement of a claim.

(1CT 197, 199.) A claim that is not paid under Section M is therefore not paid because the person failed to comply with a condition of the contract by

making a false statement, not because the person made a false claim for payment. The person's conduct therefore falls under the provisions of section 550, subdivision (b)(1), not subdivision (a)(4).

This distinction is easier to see in the context of one of the other conditions in the policy. Part VI, Section K, provides that coverage under the policy is void "if the insured fails to cooperate with the Company." (1CT 199 [emphasis removed].) This provision is invoked if an insured is in a collision, for example, and presents a claim for covered damages, but then fails to cooperate with the insurance company in the defense of a subsequent lawsuit. Under Section K, the insurance company is entitled to refuse to pay the claim based on the insured's failure to cooperate, because cooperation is a required *condition* for payment. The insurance company's ability to deny the insured's claim on the grounds that the insured did not comply with a condition of the contract does not mean that the insured is guilty of making a false claim for payment, however.

This is because the fact that the insurance company can refuse payment because the insured failed to cooperate does not change the nature of the insured's original claim for payment from one that was legitimate to one that was false. Whether the original claim was legitimate or false depends on the circumstances of the accident itself, the insured's knowledge of those circumstances, and whether the insured made a claim for benefits he was not entitled to with specific intent to defraud. (§ 550, subd. (a)(4).) It does not depend on the manner in which the insured subsequently conducts herself while making the claim. In other words,

while the insured's subsequent conduct might affect whether the insurance company is required to pay the claim, it does not affect whether the claim for payment was false or fraudulent in the first place.

Similarly, the fact that petitioner was convicted of making a false statement while presenting her claim for payment did not change the nature of her underlying claim for payment. The underlying claim remained false or legitimate depending on whether she was unlawfully driving under the influence.

The bottom line on the second count is that the jury instructions indicated that petitioner would be making a false claim if she falsely reported that her vehicle was stolen, but this was not in fact the case. (1RT 219-220.) This is because the provisions of the WGI policy paid for damage not only in the case of theft, but also in the case of collision. (1CT 194.) What the jury needed to know in order to determine whether petitioner made a false claim was whether she was unlawfully under the influence of alcohol. (1CT 195.)

The Court of Appeal accordingly should have reversed the judgment with respect to this count as well. Petitioner respectfully requests that this Court grant review or remand with instructions to the Court of Appeal to modify its opinion. (Cal. Rules of Court, rule 8.500, subd. (b), 8.528, subd. (d).)

G. This Court Should Grant Review.

The distinction between making a false claim for payment and making a false statement in support of an otherwise valid claim for payment

is a distinction that the Legislature saw fit to distinguish when it enacted Penal Code section 550. This is not splitting hairs. It is an important distinction that makes sense. From the perception of an offender such as petitioner, who is young and wants to put this incident behind her, it is one thing to explain a conviction on her otherwise clean record for making a false statement, which indicates a past incident of dishonesty. It is quite another thing to explain a conviction for making a false claim for payment, which is essentially a theft crime. The Opinion collapses this distinction where it should not have been collapsed. Virtually all insurance policies contain a clause that conditions what would otherwise be a valid claim for payment on not making any false statements of fact. The Legislature, however, saw fit to make a distinction. The Court should grant review to settle this important question of law or remand to the Court of Appeal with instructions to modify the Opinion. (Cal. Rules of Court, rule 8.500, subd. (b), 8.528, subd. (d).)

CONCLUSION

Based on the preceding argument and analysis, petitioner requests that the Court grant review or remand to the Court of Appeal with instructions to modify its Opinion.

Dated: February 7, 2010

LAW OFFICES OF HELEN SIMKINS IRZA

By: _____
Helen S. Irza

Attorney for Petitioner
Melissa Kay Murphy

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court rule 8.360(b)(1), I certify that the foregoing brief has 8271 words as counted by Microsoft Word, excluding the table of contents and table of authorities.

Dated: February 7, 2010

LAW OFFICES OF HELEN SIMKINS IRZA

By: _____

Helen S. Irza

Attorney for Petitioner
Melissa Kay Murphy

APPENDIX

EXHIBIT 1: Court Opinion, California Court of Appeal Case No E045880, *People v. Murphy*, dated December 28, 2009.

Filed 12/28/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MELISSA KAY MURPHY, Defendant and Appellant.	E046742 (Super.Ct.No. FSB060016) OPINION

APPEAL from the Superior Court of San Bernardino County. Bryan Foster, Judge. Affirmed.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steve Oetting and Meredith A. Strong, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Melissa Kay Murphy of procuring or offering false information for filing (count 1—Pen. Code, § 115, subd. (a)), insurance fraud (false

claim) (count 2—Pen. Code, § 550, subd. (a)(4)), and insurance fraud (false statement) (Pen. Code, § 550, subd. (b)(1)). The court granted defendant three years of formal probation on various terms and conditions including service of a 180-day jail term. On appeal, defendant contends she was improperly convicted of the felony offense of procuring or offering false information for filing in count 1 because that offense was preempted by more specific recently enacted misdemeanor offenses. In addition, defendant maintains that the trial court erred in failing to give a sua sponte jury instruction in connection with count 2 that the jury was required to find defendant was not entitled to receive payment for the loss she made a claim for. We affirm the judgment in full.

FACTUAL AND PROCEDURAL HISTORY

San Bernardino Deputy Sheriff Jay Staviski was on patrol in the mountainous region of San Bernardino County on March 5, 2006, when, at 2:47 a.m., he came across a gold 2001 Chevrolet Malibu on Highway 18 that was "smashed into the side of the hill." The vehicle had sustained extensive damage, with both airbags deployed. Deputy Staviski checked the car and surrounding area to see if anyone was hurt, but could not find anyone. There was no key in the ignition. Deputy Staviski provided dispatch with the license plate number on the vehicle and dispatch provided him with the name and address of the registered owner of the car. Deputy Staviski drove to the address provided.

Defendant, the registered owner of the vehicle, answered the door. Upon contact, defendant had a phone in her hand, and reported to Deputy Staviski that she had been

attempting to obtain the number for the California Highway Patrol (CHP) in order to report her vehicle as stolen. Defendant had blood on her face, a small laceration on her nose, and blood on her right hand. Defendant informed Deputy Staviski that she had injured herself at work. Deputy Staviski drove defendant and her mother to the vehicle.

Defendant informed Deputy Staviski that she had met a friend at a bar in Running Springs around 11:00 p.m. the preceding evening. They left the bar around 2:00 a.m. and found the vehicle missing. Defendant reported that she attempted to go back into the bar to call the CHP to report the vehicle as stolen; however, the bar was already closed. Defendant's cell phone had a low battery and poor reception, so she was also unable to report the vehicle stolen using her cell phone. Defendant and her friend left the bar for defendant's residence and, on the way, discovered her vehicle on the side of the road; however, they did not stop, but continued on. Defendant reported that all her vehicle keys were accounted for.

Deputy Staviski took a stolen vehicle report from defendant on CHP form No. 180. After filling out and filing the form, the data contained therein was entered into a nationwide stolen vehicle system, which allowed law enforcement across the country to run a vehicle's license plate number or Vehicle Identification Number (VIN) to determine whether a vehicle had been stolen. After Deputy Staviski completed the form, defendant signed it under penalty of perjury.

Deputy Staviski noticed a few things regarding the vehicle and defendant's story which "struck [him] as odd." Deputy Staviski noted, "that the driver's seat was moved all the way forward, which would indicate somebody small was driving the vehicle."

Defendant appeared to be five feet one inch tall and 120 pounds. The ashtray of the vehicle was open and in plain view. It contained cash including a $10 bill and other denominations, which Deputy Staviski believed was strange because "if somebody is going to take the time to steal a car, they're going to steal the cash that's in view." Deputy Staviski noted that there was no damage to the ignition or loose wires beneath the dashboard. In many recovered stolen vehicles, the ignition has been "punched," i.e., "some foreign object [has been used] to punch the ignition out, remove a section of it so [the thief] can stick some form of object in there to start the vehicle." A CHP station was located on Highway 18 between the bar and defendant's home; defendant had not stopped at that station to report the vehicle as stolen on her way home.

Defendant informed Deputy Staviski that she had imbibed alcohol while at the bar; however, she did not exhibit any objective symptoms of intoxication. He did not perform any field sobriety tests, chemical tests, or investigate the accident as the result of driving under the influence.

Defendant's friend, Lisa Barbato, testified that she called defendant from a pay phone on the night of March 4, 2006, and they agreed to meet at the Fireside Inn Bar in Running Springs. Barbato arrived sometime between 11:00 p.m. and midnight; defendant arrived 15 to 20 minutes thereafter. They drank, played pool and danced. Defendant drank one or two beers while Barbato drank a couple of beers. Defendant left the bar first. She reentered the bar and informed Barbato that she could not find her car. Defendant asked Barbato for a ride home. Defendant did not call the police from the bar.

They left the bar together sometime after 2:00 a.m. The door behind them locked so that they could not get back in to call the police.

Barbato drove defendant home. They did not stop at the CHP station, which was located between the bar and defendant's home, because Barbato did not think about it. On the way they came across defendant's vehicle. They pulled over and spent between four and five minutes looking through it. Barbato's cell phone was not working so they could not call the police at that time. They left the site to head straight for defendant's house. When they arrived, defendant appeared to call the CHP.

The responding officer, Deputy Collins, interviewed Barbato and she related a story substantially identical to that to which she testified. Barbato was later interviewed by district attorney investigators to whom she again related the same version of events. Investigator Smith informed Barbato he had a videotape of Barbato and defendant getting into defendant's car. He showed her the videotape, but refused to play it for her because he said it needed to be enhanced. Barbato testified that she continued to relate the same version of events at least 10 times. Barbato informed Smith that she had to go to work. Smith offered her a ride; however, since she was a delivery driver, she needed her vehicle and declined the offer. Smith informed Barbato that she could not leave until they were done questioning her. He informed her that they had retrieved her fingerprints from defendant's vehicle. She asked if she could call her work. They told her she could not. They blocked her path when she attempted to leave.

Barbato testified that when she was already half an hour late to work, she agreed they could write down whatever version of events they wanted her to say. She then

relayed a different version in response to questions posed by the investigators. The resultant statements contained in Investigator Smith's report alleged that she reported that defendant drove the car, crashed it, and that it was not stolen. Those statements were not the truth.

Investigator Smith testified that when he initially interviewed Barbato she gave a version of events consistent with her testimony and that which she had reported to Deputy Collins. However, after Smith explained the evidence in the case, Barbato changed her story. She relayed that, around closing time, she observed defendant in her car arguing with a man. The man exited the car; defendant drove off, upset, at around 70 miles an hour. Barbato followed. The roads were wet and icy. She came around a corner and found defendant had crashed. Defendant incurred a cut to her hand and had blood smeared on her face. Barbato told defendant to go home and report the accident the next morning so that she would not face a DUI charge. Smith testified that he never told Barbato she could not leave nor prevented her from leaving during questioning.

On the day of the accident, defendant held a policy with Western General Insurance covering her vehicle. She made a claim on that policy regarding the accident. The vehicle was reported as "a total theft recovered." A recorded statement was taken from defendant on March 9, 2006. In that statement, defendant reported that her car was stolen. She alleged that she came out of the bar and found that her car was missing, but she could not get back into the bar to report it missing. On the way home, she and her friend found the vehicle on the side of the road. They pulled over, checked it out, and

left. She reported that her keys were missing and she never found them. She ended the recording by affirming under penalty of perjury that all her statements were true.

DISCUSSION

A. Preemption

Defendant contends the Legislature enacted misdemeanor statutes, which more specifically defined the felony offense for which she was convicted in count 1, subsequent to the latter's enactment; thus, she asserts her felony conviction is preempted and must be reversed. Defendant specifically notes that Vehicle Code section 20, Vehicle Code section 31, and Vehicle Code section 10501 are all more specific statutes delineating her offense, which preempt her conviction under Penal Code section 115.[1]

"The preemption doctrine provides that a prosecution under a general criminal statute with a greater punishment is prohibited if the Legislature enacted a specific statute covering the same conduct and intended that the specific statute would apply exclusively to the charged conduct. [Citations.] To determine the applicability of this doctrine in a particular case, the courts have developed two alternative tests. Under these tests, a prosecution under the general statute is prohibited if: (1) 'each element of the general

---

[1] Only in her reply brief does defendant assert that Vehicle Code section 31, an infraction, is a more specific statute defining her offense; thus, she alleges it would preempt her felony conviction under Penal Code section 115. An appellate court will ordinarily not address an issue raised for the first time in an appellant's reply brief because to do so would deprive the respondent of the opportunity to address the issue in its briefing. (*REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500; *Tilton v. Reclamation Dist. No. 800* (2006) 142 Cal.App.4th 848, 864, fn. 12.) Accordingly, we deem review of the issue as it relates to Vehicle Code section 31 forfeited.

statute corresponds to an element on the face of the [specific] statute'; or (2) 'it appears from the statutory context that a violation of the [specific] statute will necessarily or commonly result in a violation of the general statute.' [Citations.]" (*People v. Jones* (2003) 108 Cal.App.4th 455, 463.)

"Consideration must be given to the entire context surrounding the 'special' statute to determine the true overlap of the statutes and to ascertain the intent of the Legislature." (*People v. Jenkins* (1980) 28 Cal.3d 494, 503.) "The fact that the Legislature has enacted a specific statute covering much the same ground as a more general law is a powerful indication that the Legislature intended the specific provision alone to apply. Indeed, in most instances, an overlap of provisions is determinative of the issue of legislative intent and 'requires us to give effect to the special provision alone in the face of the dual applicability of the general provision . . . and the special provision. . . .' [Citation.]" (*Id.* at pp. 505-506.)

1. *Vehicle Code Section 20*

Penal Code section 115, subdivision (a), provides that "[e]very person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony." To prove that a defendant is guilty under Penal Code section 115, the People must prove, "1. The defendant caused a false document to be filed in a public office in California; [¶] 2. When the defendant did that act, she knew that the document was false; [¶] AND [¶] 3. The document was one that, if genuine, could be legally

filed." (CALCRIM No. 1945.) Vehicle Code Section 20 provides that "[i]t is unlawful to use a false or fictitious name, or to knowingly make any false statement or knowingly conceal any material fact in any document filed with the Department of Motor Vehicles [(DMV)] or the [CHP]." As of this time, there is no jury instruction or published case defining the elements of Vehicle Code section 20; however, merely by resort to the statute itself, it is readily apparent that those elements would include proof that (1) the defendant made a false statement or concealed a material fact; (2) did so knowingly; and (3) the statement was included in a document that was filed with the DMV or the CHP.

The elements of Penal Code section 115 and Vehicle Code section 20 do not correspond. (*People v. Jones*, *supra*, 108 Cal.App.4th at p. 463; See also *People v. Powers* (2004) 117 Cal.App.4th 291, 298-299.) First, Penal Code section 115 is primarily concerned with the filing of a false or fraudulent *instrument*. On the other hand, Vehicle Code section 20 chiefly deals with the making of false *statements* that are included in a document. Thus, a prosecution under Vehicle Code section 20 could involve a document that would not be considered per se false even while containing false statements therein. Second, regarding the concealment of facts, Vehicle Code section 20 requires that the omitted or obfuscated subject matter be material, whereas Penal Code section 115 has no corresponding materiality requirement. (See *People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1578-1579.) Third, Penal Code section 115 requires that the instrument be "procured" or "offered" for filing; thus, the offense can be completed at the moment a defendant offers the document for filing with knowledge of its falsity. (*People v. Garfield* (1985) 40 Cal.3d 192, 195.) However, Vehicle Code section 20

requires that the document containing the false statement be "filed." Fourth and finally, Penal Code section 115 requires that the instrument be submitted for filing with any public office, but Vehicle Code section 20 specifically delineates that the document must be filed with the DMV or CHP.

Likewise, a violation of Vehicle Code section 20 will not necessarily, or even commonly, result in a violation of Penal Code section 115. "Vehicle Code section 20 merely renders it unlawful to use a false or fictitious name or to knowingly make a false statement or knowingly conceal any material fact *in any document filed with* [*DMV*]. Numerous documents are filed with [DMV] . . . ." (*People v. Molina* (1992) 5 Cal.App.4th 221, 226.) Penal Code section 115 requires that the instrument itself be false or forged, not merely that it contain false or fictitious information. Thus, a prosecution under Vehicle Code section 20 will most commonly involve fictitious or false information included on a nonetheless valid document. (See *Molina*, at pp. 226-232 [conviction under Penal Code section 118 for perjury for filing of fraudulent license application not precluded by Vehicle Code section 20 because unlike other documents, license application was required to be signed under penalty of perjury].)

Here, defendant procured or offered the fraudulent CHP form No. 180 for filing by the deputy; she did not file the document herself. Thus, defendant's offense arguably involved more egregious conduct because it necessarily involved another individual. Moreover, the whole purpose for filing of the CHP form No. 180 was to report a stolen vehicle; hence, the instrument itself was entirely fraudulent, rather than a valid document that merely contained false statements: "'The core purpose of Penal Code section 115 is

to protect the integrity and reliability of public records.' [Citations.]" (*Feinberg*, *supra*, 51 Cal.App.4th at p. 1579.) Furthermore, the CHP No. 180 form was not filed with the CHP or the DMV; rather, it was taken by a deputy who entered it in "[their] records." Thus, defendant's conviction under Penal Code section 115 was not preempted by Vehicle Code section 20.

2. *Vehicle Code Section 10501*

Defendant additionally contends her felony conviction under Penal Code section 115 was preempted by Vehicle Code Section 10501, subdivision (a), a misdemeanor. That section provides: "It is unlawful for any person to make or file a false or fraudulent report of theft of a vehicle required to be registered under this code with any law enforcement agency with [the] intent to deceive." Like Vehicle Code section 20, no jury instruction or case law enumerates the elements of Vehicle Code section 10501; however, again, merely by resort to the statute itself, the elements would be as follows: (1) the defendant made a false report of the theft of her vehicle; (2) she did so with the intent to deceive; and (3) the report was made to any law enforcement agency.

Here, again, the elements of Penal Code section 115 and Vehicle Code section 10501, subdivision (a), do not correspond. (*People v. Jones*, *supra*, 108 Cal.App.4th at p. 463; See also *People v. Powers*, *supra*, 117 Cal.App.4th at pp. 298-299.) As the People note, Vehicle Code section 10501's lack of a "requirement that the false report, if genuine, could have been legally filed" provides a legally decisive distinction reflecting the Legislature's intent, pursuant to Penal Code section 115, to protect recordation of documents in public institutions and the public's reliance upon them, a concern not

apparent in Vehicle Code section 10501. Additionally, as noted above in the discussion of Vehicle Code section 20, Penal Code section 115's prohibition on knowingly procuring or offering false instruments to be filed is legally distinct from Vehicle Code section 10501's prohibition on making false statements or actually filing a false report of vehicle theft. This is because an offense under Penal Code section 115 is more egregious because it inherently induces the conduct and reliance of others in its commission. Moreover, unlike Vehicle Code section 10501, Penal Code section 115 "[d]oes not require that the act must be done with the intent to defraud another, nor is there any provision therein requiring that anyone be defrauded thereby. . . . The crime of violating section 115 of the Penal Code is sufficiently proven when it is shown that the accused intentionally committed the forbidden act." (*People v. Geibel* (1949) 93 Cal.App.2d 147, 168-169.) Similarly, a violation of Vehicle Code section 10501 will not necessarily, or even commonly, result in a violation of Penal Code section 115 because the former is concerned with the filing of the false or fraudulent report by the reporter himself or herself; thus, it lacks the more morally turpitudinous act of inducing behavior by another. Therefore, defendant's conviction under Penal Code section 115 was not preempted by Vehicle Code section 10501.

As the People note, "'there is a presumption against repeals by implication; they will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation, or where the later provision gives undebatable evidence of an intent to supersede the earlier; the courts are bound to maintain the integrity of both statutes if they may stand together. [Citations.]' . . ." (*People v. Valladares* (2009) 173

Cal.App.4th 1388, 1394.) We have reviewed the summary digest sections of Statutes and Amendments to the Code, and find no legislative intent that either Vehicle Code sections 20 or 10501 should supersede Penal Code section 115 under circumstances such as those present in this case. Likewise, as discussed above, both Vehicle Code statutes can operate concurrently with Penal Code section 115. Therefore, defendant's conviction under the latter must stand.

B. Jury Instruction on Count 2

Defendant contends the court erred in failing to give a sua sponte jury instruction on count 2 to help the jury determine whether she made a false or fraudulent claim for payment, i.e., an insurance claim to which she knew she was not entitled. She argues she was entitled to payment under the insurance policy regardless of whether she or a thief was driving; therefore, she was forbidden from claiming payment only if she was unlawfully driving under the influence at the time of collision. Thus, she asserts the jury should have been instructed on the elements for finding a person was driving under the influence. We disagree.

The jury was given the standard jury instruction on Insurance Fraud (Fraudulent Claims) (Veh. Code, § 550, subd. (a)(4)) as set forth in CALCRIM No. 2000: "The defendant is charged in Count Two with insurance fraud committed by fraudulent claim. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant falsely or fraudulently claimed payment for a loss due to theft of a motor vehicle; [¶] 2. The defendant knew that the claim was false or fraudulent; [¶] AND [¶] 3. When the defendant did that act, she intended to defraud. Someone *intends*

to defraud if he or she intends to deceive another person either to cause a loss of money, or to cause damage to, a legal, financial, or property right. [¶] For the purpose of this instruction, a *person* includes a corporation. [¶] A person *claims*, *makes*, *or presents a claim for payment* by requesting payment under a contract of insurance for a loss."

Defendant never requested her now proposed instruction below; however, this did not forfeit her contention on appeal. Penal Code section 1259 permits a reviewing court to review any jury instruction given, refused, or modified even though no objection was made if substantial rights are affected. Defendant does not contend that CALCRIM No. 2000 is an incorrect statement of the law.

Defendant claims that she was entitled to receive payment on her insurance claim, despite her fraudulent statements made therein, so long as the jury did not find that she was under the influence of alcohol while she was driving the vehicle. The People contend that another provision of defendant's insurance policy providing that "[t]he company will not provide coverage under this policy to any person who has knowingly concealed or misrepresented any material fact or circumstance or engaged in fraudulent conduct in connection with the presentation or settlement of a claim," invalidated defendant's claim because she falsely reported that the vehicle had been stolen. Thus, the jury's determination of whether she was intoxicated at the time of the collision was irrelevant to her conviction under count 2. We agree.

Defendant contends that a claim not paid under the misrepresentation clause cited above is not paid because the insured made a false statement in that claim, not because the insured filed a false claim. Thus, she asserts that the People are ignoring the

distinction between making a false claim for payment and a false statement in support of a claim, both being separate offenses for which she was convicted in this case. However, the exclusionary provision of the insurance policy at issue requires that the insured make a misrepresentation regarding a "material fact or circumstance;" thus, an insured could be convicted under Vehicle Code section 550, subdivision (b)(1), for making a false statement in connection with an insurance claim which was not "material" and still have a valid claim. On the other hand, here, where defendant's fraudulent statements bore on the material facts and circumstances regarding the claim, her filing of the claim was invalid. Thus, convictions would be proper in both counts because defendant made false statements in connection with an insurance claim and made material misrepresentations regarding the facts of that claim such that her claim was invalid. Moreover, even if we agreed with defendant's interpretation of the requisite findings for a conviction on count 2, we find that her contention is subsumed within the elements as presented in the instructions as given. CALCRIM No. 2000 more than adequately conveyed to the jury that it was required to find that defendant made a fraudulent insurance claim, payment of which she was not entitled to receive.

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

/s/ MILLER
J.

We concur:

/s/ McKINSTER
Acting P. J.

/s/ RICHLI
J.

DECLARATION OF SERVICE

Case Name: MELISSA MURPHY Court of Appeal No. E046742

I, Helen S. Irza, declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to this proceeding. My business address is 3525A Del Mar Heights Road #216, San Diego, CA 92130.

On February 7, 2010, I served the attached

PETITION FOR REVIEW

on each of the following addresses, by placing a true and correct copy in a separate envelope for each addressee, and addressing each such envelope respectively as follows:

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Each envelope was then sealed and deposited in the United States mail by me with fully prepaid postage affixed at San Diego, California on February 7, 2010.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed in San Diego, California on February 7, 2010.

HELEN S. IRZA