SUPREME COURT COPY

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MELISSA KAY MURPHY,** **Defendant and Appellant.**	Case No. S180181

SUPREME COURT
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Fourth Appellate District, Division Two, Case No. E046742
San Bernardino County Superior Court, Case No. FSB060016
The Honorable Bryan F. Foster, Judge

RESPONDENT'S ANSWER TO APPELLANT'S OPENING BRIEF ON THE MERITS

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
MEREDITH A. STRONG
Deputy Attorney General
State Bar No. 255840
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2297
Fax: (619) 645-2271
Email: Meredith.Strong@doj.ca.gov
Attorneys for Plaintiff and Respondent

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ISSUE PRESENTED

Is appellant's conviction under Penal Code section 115 preempted by Vehicle Code sections 10501, subdivision (a) and 20?

INTRODUCTION

After appellant crashed her car into the side of a hill, she lied to the sheriff's deputy and her insurance company to avoid responsibility. She told both parties that the car had been stolen while she was drinking at a nearby bar. A jury convicted her of one count of filing a false or fraudulent instrument with the Sherriff's Department and two counts of insurance fraud.

Appellant appealed her convictions.[1] Regarding her conviction for filing a fraudulent instrument under Penal Code section 115, she argued the Penal Code provision had been implicitly repealed by newer, more specific statutes, namely, Vehicle Code sections 10501 and 20. The Court of Appeal below rejected this contention finding no legislative intent to repeal the more general Penal Code provision. (Slip Op. at p. 13.) The Court of Appeal was correct. The Vehicle Code provisions do not cover appellant's conduct, do not include all of the elements of the Penal Code provision, and violations of the Vehicle Code provisions will not commonly result in violations of the Penal Code provision. Accordingly, Penal Code section 115 was not implicitly repealed and respondent respectfully requests this Court affirm the judgment of the Court of Appeal below.

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[1] The issue currently before this Court pertains only to appellant's appeal of count 1.

STATEMENT OF THE CASE

On August 22, 2008, a San Bernardino County jury convicted appellant of one count of procuring or offering a false or forged instrument for filing (Pen. Code, § 115, subd. (a);[2] count 1) and two counts of insurance fraud (§ 550, subd. (a)(4) and (b)(1); counts 2 and 3). (1 CT 134-136; 1 CT 142.)

On September 22, 2008, appellant was granted three years' formal probation with 180 days of local time. (1 CT 159-1; 1RT 265.) Appellant timely appealed the judgment. (1 CT 162.)

As to count 1, appellant argued the prosecutor improperly charged her with a violation of offering or procuring a false or forged instrument for filing (§ 115, subd. (a).) She specifically urged that Vehicle Code sections 10501 (filing a false report of vehicle theft) and 20 (providing false statements on a CHP filing) provided more specific criminal statutes that preempted application of the Penal Code provision. The Court of Appeal for the Fourth District, Division Two, affirmed defendant's convictions in a published opinion on December 28, 2009. The court found Vehicle Code section 10501 did not implicitly repeal Penal Code section 115 for purposes of appellant's convictions. The elements did not correspond and the violation of the Vehicle Code provision would not commonly result in a violation of the Penal Code provision. (Slip Op. at pp. 11-12.) Further, the court found Vehicle Code section 20 also did not implicitly repeal Penal Code section 115 because the elements did not correspond and a violation of Vehicle Code section 20 would not "necessarily, or even commonly, result in a violation of Penal Code section 115." (Slip Op. at pp. 9-10.)

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[2] All future statutory references are to the Penal Code unless otherwise indicated.

Defendant's petition for rehearing was denied on January 22, 2010. Defendant filed a petition for review in this Court on February 7, 2010, and this Court granted the petition on April 22, 2010.

STATEMENT OF THE FACTS

San Bernardino County Deputy Sherriff Jay Staviski was patrolling Lake Arrowhead on March 5, 2006. (1 RT 61-62.) At 2:47 a.m., Deputy Staviski came across a Gold Chevy Malibu crashed into the side of a hillside on Highway 18. (1 RT 67[time], 63.) The vehicle had extensive damage and both airbags had deployed. There was no key in the ignition or anywhere else in the vehicle. (1 RT 64.) There was no damage to the ignition area, such damage is common with stolen vehicles. (1 RT 65-66.) After checking the area for victims or injured passengers and finding no one, Deputy Staviski called dispatch and ran the license plate to discover the registered owner. (1 RT 67.) Appellant was the registered owner of the crashed car. Deputy Staviski drove to her address in Arrowhead Villas, about 10 minutes from the crash site, and appellant answered the door. (1 RT 67-68.) When she opened the door, appellant had a laceration on her face, a blood smear on her cheek and a bloody cut on her right hand. (1 RT 69.) Appellant told Deputy Staviski that she was trying to contact the California Highway Patrol ("CHP") because her vehicle had been stolen. (1 RT 70.) Deputy Staviski told her he had located her vehicle. He drove appellant and appellant's mother back to the crash site. At the crash site, Deputy Staviski filled out a stolen vehicle report (California Highway Patrol Form 180, hereinafter, "CHP Form 180") detailing appellant's story regarding how and when the vehicle was stolen. (1 RT 70-71.)

Appellant told Deputy Staviski that she had met a friend at the Fireside Inn bar around 11:00 p.m. that evening, and when she and her friend left the bar at 2:00 a.m., the vehicle was gone. (1 RT 73.) Appellant signed the CHP Form 180 under penalty of perjury. (1 RT 73.)

Deputy Staviski noticed two things about the vehicle which "struck him as odd." First, the driver's seat was pulled all the way forward, indicating someone small was driving the vehicle. Appellant was about five feet one inch tall and weighed 125 pounds. Secondly, there was cash left in the center console of the vehicle, in plain view. (1 RT 74.) Nothing about the vehicle indicated that it had been stolen. (1 RT 75.)

Appellant explained to Deputy Staviski that she did not call CHP from the bar because by the time she turned around to reenter the bar, the door was locked and she could not get in. Appellant could not use her cell phone because the reception was poor and her battery was low, and she was not familiar with the area and thus did not know where to find a pay phone. (1 RT 79.) Appellant told Deputy Staviski that her friend then drove her home and they saw her vehicle on the side of the road. (1 RT 80.) She also told him that she had received the cuts on her face and hand at work. (1 RT 89.)

Typically, once the CHP Form 180 is complete, Deputy Staviski sends it to teletype and teletype enters the information into the sheriff's records. Eventually that information is also entered into the stolen vehicle system. (1 CT 90.)

Appellant also filed a claim with her insurance company. Like the story she told Deputy Staviski, appellant told the insurance agent that her car had been stolen.[3] (1 RT 92-100.) This gave rise to her two convictions for insurance fraud. (1 CT 134-136; 1 CT 142.)

At the time of trial, Lisa Barbato and appellant had been friends for 10 years. (1 RT 143.) On the night of the crash, Barbato met appellant at the

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[3] Because the facts underlying appellant's convictions on counts 2 and 3 are not relevant to the issues before this Court, respondent has omitted them.

Fireside Inn around 11:00 p.m. (1 RT 146-147.) Barbato testified that appellant went out into the parking lot close to closing time and discovered her car was missing. (1 RT 147.) Appellant went back into the bar to tell Barbato that she could not find her car. Barbato testified that appellant did not call the police from the bar. (1 RT 150.) Barbato gave appellant a ride home and on the way, they discovered appellant's car on the side of the road. The two stopped for four or five minutes to look at the crashed vehicle. (1 RT 151.) They opened the door and looked around. (1 RT 160.) Barbato continued to appellant's house and when they arrived, appellant called the CHP. (1 RT 152.)

About a year and a half prior to trial, Barbato was interviewed by District Attorney Investigators Gary Smith and Ed Niper. (1 RT 153, 174.) Investigator Smith testified that when he interviewed Barbato she gave two separate statements. (1 RT 177.) In the first statement, she told him a story which was largely consistent with her trial testimony. (1 RT 177.)

Then, Investigator Smith explained the evidence to Barbato. He told her about the cash left in the center console and the position of the driver's seat. (1 RT 179.) Barbato became nervous and uncomfortable and she appeared to be concerned that her mother was listening. (1 RT 179.) Investigator Smith asked her to step outside and she agreed. (1 RT 179.)

After they went out to the porch, Barbato told Investigator Smith that appellant was her best friend and she was having a hard time telling the truth because she did not want appellant to get in trouble. (1 RT 180.) Investigator Smith testified that Barbato then told him a different version of the incident. (1 RT 180.)

Barbato's second statement to Investigator Smith was as follows: Barbato arrived at the bar and appellant was already there. The two consumed a few alcoholic drinks at the bar and appellant had been drinking prior to arriving at the bar. (1 RT 181, 192.) Throughout the night, there

were multiple trips to the parking lot to smoke cigarettes. (1 RT 180.) At one point, Barbato went outside and saw appellant sitting in the driver's seat of her car with a man in the passenger seat. Appellant and the man were arguing and appellant was upset. (1 RT 181.) It was close to closing time and Barbato saw the man step out of appellant's car. Appellant then sped off out of the parking lot and Barbato got in her car and followed appellant. (1 RT 181.) Barbato told Investigator Smith that it was cold that night and the roads were icy. (1 RT 182.) Investigator Smith testified that Barbato told him appellant sped off at an estimated 70 miles per hour and she was not able to keep up with her. (1 RT 182.) As Barbato rounded a turn, she saw appellant's vehicle crashed into the side of the hill. (1 RT 182.) Barbato stopped to assist appellant and told appellant the best thing to do was to just go home. On the way back to appellant's house, appellant told Barbato that she was going to report the vehicle stolen. Barbato did not think this was a good idea because the story sounded "phoney." (1 RT 183.) Barbato advised appellant to report the car accident in the morning and potentially face a hit-and-run charge. (1 RT 183.) Barbato told Investigator Smith that she remembered appellant had cut her hand and she saw appellant wiping her cheek and smearing blood on it. (1 RT 184.)

ARGUMENT

I. BECAUSE PENAL CODE SECTION 115, SUBDIVISION (A), HAS NOT BEEN IMPLICITLY REPEALED BY MORE SPECIFIC STATUTES, APPELLANT WAS PROPERLY CHARGED AND CONVICTED OF THIS OFFENSE

Appellant argues the Court of Appeal incorrectly determined that her conviction for violating Penal Code section 115 was not implicitly preempted by Vehicle Code sections 10501, subdivision (a), and section 20. (AOBM 10-31.) This contention is without merit because the elements of

Vehicle Code sections 10501 and 20 are materially different than those of Penal Code section 115, subdivision (a). Violations of the Vehicle Code provisions will not necessarily or commonly result in violations of the Penal Code provision. Further, appellant's actions are not covered by Vehicle Code section 20. Under the facts of this case, the Vehicle Code statutes are not more specific statutes than the Penal Code provision. Accordingly, the Court of Appeal below correctly concluded that the Vehicle Code provisions did not implicitly preempt Penal Code section 115 under these circumstances and respondent respectfully requests this Court affirm the judgment.

The implicit preemption doctrine prohibits "prosecution under a general criminal statute with a greater punishment . . . if the Legislature enacted a specific statute covering the same conduct and intended that the specific statute would apply exclusively to the charged conduct." (*People v. Jones* (2003) 108 Cal.App.4th 455, 463.) To determine if the doctrine is applicable, courts must decide whether, "(1) . . . each element of the general statute corresponds to an element on the face of the special statute, or (2) . . . it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute." (*People v. Watson* (1981) 30 Cal.3d 290, 295-296.) Under the first test, "a special statute will not preempt a general statute unless all the requirements of the general one are covered in the special." (*People v. Molina* (1992) 5 Cal.App.4th 221, 226-227, citing *People v. Ruster* (1976) 16 Cal.3d 690.) Under the second test, courts examine the "context in which the statutes are placed." (*People v. Jenkins* (1980) 28 Cal.3d 494, 502.) "If it appears from the entire context that a violation of the "special" statute will necessarily or commonly result in a violation of the general statute, the *Williamson* rule may apply even though the

elements of the general statute are not mirrored on the face of the special statute." (*People v. Jenkins Jenkins,* 28 Cal.3d 494, 502.)

"The rule is not one of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict." (*People v. Walker* (2002) 29 Cal.4th 577, 586.)

There is a strong presumption against repeal by implication. The Court of Appeal has recently emphasized this principle:

> [F]or purposes of statutory construction, the various pertinent sections of all the codes must be read together and harmonized if possible. [Citations.] However, . . . [citation] [W]hen a later statute supersedes or substantially modifies an earlier law but without expressly referring to it, the earlier law is repealed or partially repealed by implication. The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes. [Citations.] Thus 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. Vallardes* (2009) 173 Cal.App.4th 1388, 1393-1394, citing *People v. Bustamante* (1997) 57 Cal.App.4th 693, 699 (emphasis omitted).) Similarly, this Court has stated:

> [A]ll presumptions are against a repeal by implication. (Citation) Absent an express declaration of legislative intent, we will find an implied repeal only when no rational basis exists to harmonize the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent that they cannot operate concurrently.

(*People v. Acosta* (2002) 29 Cal.4th 105, 122.) Like *Vallardes*, this Court has found that, "courts are bound, if possible, to maintain the integrity of

both statutes if the two may stand together." (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573; see also *Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420.)

A. Vehicle Code Section 10501 Does Not Implicitly Preempt Penal Code Section 115

Appellant contends that Vehicle Code section 10501 preempts section 115, because the two share identical elements. (AOBM 18.) Because the two statutes are comprised of different elements and criminalize different conduct, this claim fails. The Court of Appeal correctly determined that the two statutes did not evince a legislative intent to repeal section 115 under the circumstances of this case. (Slip Op. at pp. 11-13.)

Vehicle Code section 10501 states:

> 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.

This crime is a misdemeanor. (Veh. Code, § 40000.9.)

Appellant was charged and convicted of violating Penal Code section 115, subdivision (a), which, provides,

> 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, registered, or recorded under any law of this state or of the United States, is guilty of a felony.

On its face, Vehicle Code section 10501 does not constitute a more specific criminal statute than Penal Code section 115, subdivision (a) because the two statutes lack an identity of elements. (*People v. Jones, supra*, 108 Cal.App.4th at p. 463.) Looking to the language of the statute, Penal Code section 115, subdivision (a), has three elements: first, the defendant procured or offered a false or forged instrument to be filed,

registered or recorded in a public office, second, the defendant committed that act knowingly; and three, the instrument was one that, if genuine, could be legally filed. (Pen. Code, § 115.) Vehicle Code section 10501 has two elements: first, the defendant made or filed a false report of theft of a vehicle with a law enforcement agency; and second, at the time the defendant did this, she had the intent to deceive. (Veh. Code, § 10501.)

Respondent agrees that the two provisions share some common elements, but an overlap of some elements will not suffice to meet the test established by this Court. As explained above, the implicit preemption doctrine applies where "*each* element of the general statute corresponds to an element *on the face* of the special statute, . . ." (*People v. Watson, supra,* 30 Cal.3d 290, 295-296, emphasis added.) Under this test, "a special statute will not preempt a general statute unless *all the requirements of the general one are covered in the special.*" (*People v. Molina, supra,* 5 Cal.App.4th 221, 226-227, citing *People v. Ruster, supra,* 16 Cal.3d 690, emphasis added.)

The most critical distinction between the two provisions is that the Penal Code provision requires the procurement or offering of a false "instrument." The Vehicle Code section has no such requirement; it requires only the making or filing of a false report.

An instrument has been defined as,

> a "formal legal document whereby a right is created or confirmed, or a fact recorded; a formal writing of any kind, as an agreement, deed, charter, or record, drawn up and executed in technical form, so as to be of legal validity." (Oxford English Dict. (2d ed. CD-ROM 1994); accord, Merriam-Webster's 10th Collegiate Dict. (2000) p. 605 ["a formal legal document (as a deed, bond, or agreement)].") A legal dictionary likewise defines instrument as "[a] written legal document that defines rights, duties, entitlements, or liabilities, such as a contract, will, promissory note, or share certificate."

> (Black's Law Dict. (7th ed.1999) pp. 801-802, cols. 2 & 1.)

(*People v. Powers* (2004) 117 Cal.App.4th 291, 294-295 [*Powers*].) In *People v. Parks* (1992) 7 Cal.App.4th 883, the court considered whether or not a temporary restraining order constituted an "instrument" within the meaning of Penal Code section 115. There, the court found that a temporary restraining order did meet the definition, noting:

> As enacted in 1872, section 115 was one of five sections (§§ 113, 114, 115, 116, and 117) which formed chapter 4 of the Penal Code. Chapter 4 was and is entitled "Forging, Stealing, Mutilating, and Falsifying Judicial and Public Records and Documents." The "ostensible objects to be achieved" were the integrity of "judicial and public records." The "evils to be remedied" clearly included "forging, stealing, mutilating, and falsifying" such records. Whatever else may be meant by the word "instrument," on these facts we find that protection of judicial and public records such as the documents in this case was clearly within the legislative intent of section 115.

(*People v. Parks, supra,* 7 Cal.App.4th at p. 887.)

In contrast, Vehicle Code section 10501 requires only the filing of "a false or fraudulent report." (Veh. Code, §10501.) This is different from a false instrument in two material ways. First, a false report can be either a written or a verbal report. Merriam Webster's dictionary defines a "report" as "a usually detailed account or statement." (Merriam-Webster Online Dict. (2010) retrieved August 9, 2010, from http://www.merriam-webster.com/dictionary/report.) Similarly, a legal dictionary defines report as "A formal oral or written presentation of facts." (Black's Law Dict. (7th ed. 2000) p. 1044, col. 2.) In the context of false reports of crimes, even the Penal Code contemplates oral reports. Penal Code section 148.5 prohibits the making of a false report of a crime:

> Every person who reports to any peace officer . . . that a felony or misdemeanor has been committed, knowing the report to be false, is guilty of a misdemeanor.

(§ 148.5, see also *People v. Lawson* (1979) 100 Cal.App.3d 60, 67 ["A person who voluntarily supplies information [orally] about a purported crime to a law enforcement officer makes a report, within the meaning of the statute."].)

The requirement of a physical document under section 115 is consistent with the legislative purpose behind the Penal Code provision. "The core purpose of Penal Code section 115 is to protect the integrity and reliability of public records. [Citations.] This purpose is served by an interpretation that prohibits any knowing falsification of public records." (*People v. Feinberg* (1997) 51 Cal.App.4th 1566, 1579; (*Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682; see *People v. Baender* (1923) 68 Cal.App. 49, 55, 59-60; but see *People v. Standley* (1932) 126 Cal.App. 739, 745 ["legislative intention in the enactment of the section is clearly one to protect the integrity of our system of recordation of instruments and the vice interdicted is the placing of false or fictitious instruments of record which might have the effect to cloud the record."].)

Given the potential reliance on publicly recorded instruments, and their appearance of authenticity, procuring or offering a false instrument is more egregious criminal conduct than simply making or filing a false report of vehicle theft and thus, the Legislature is justified in punishing it more severely. "The Legislature may properly enact alternative penal provisions 'to punish less despicable conduct less severely, and to punish more despicable conduct more severely.'" (*People v. Powers*, *supra*, 117 Cal.App.4th at p. 299, citing *People v. Baniqued* (2000) 85 Cal.App.4th 13, 32.)

Further, not every false written report of vehicle theft is an "instrument," within the meaning of Penal Code section 115. (See *People v. Powers*, *supra*, 117 Cal.App.4th at p. 295 ["California courts have shown reluctance to interpret section 115 so broadly that it encompasses any

writing that may be filed in a public office."]; see also *People v. Olf* (1961) 195 Cal.App.2d 97, 110 [*Olf*] [noting "every paper writing is not necessarily an instrument within the settled statutory meaning of the term."][4].) For example, a defendant's personal written account of the theft of his or her vehicle may not qualify as an "instrument." Likewise, an oral report would also not satisfy the requirement of an "instrument." Here, the CHP form 180 constitutes an instrument because it was signed under penalty of perjury,[5] thus making it a "formal legal document whereby a . . . fact [was] recorded" and it qualifies as a "a formal writing of any kind, [such] as . . . [a] record, drawn up and executed in technical form, so as to be of legal validity." (*Powers, supra*, 117 Cal.App.4th at pp. 294-295.) A false report of a stolen vehicle may or may not be accompanied by such formalities which would lend it the legal validity of an "instrument."

Accordingly, the Penal Code section is actually more specific in this context as it requires the procurement or offering of a physical "instrument." The Vehicle Code provision does not require a physical document, but only a "report" which can be either oral or written and the

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[4] In *Olf*, the court provided the following definition of an instrument: "With reference to writings the term 'instrument' as employed in our statutes has been defined to mean an agreement expressed in writing, signed, and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty." (*Olf, supra*, 195 Cal.App.2d at p. 110.) But, courts have since found this definition too rigid, and interpreted the word more broadly. (See *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682-684; and see *People v. Powers, supra*, 117 Cal.App.4th at pp. 294-295.)

[5] Notably, because appellant signed the CHP form 180 under penalty of perjury, she could have been charged with perjury under Penal Code section 118, also a felony (Pen. Code, § 126). (See *People v. Barrowclough* (1974) 39 Cal.App.3d 50, 55-56.)

report need not meet the definition of an "instrument." Thus, a requirement of the general statute is not reflected in the specific statute.

However, as this Court has noted, the inquiry does not end with a comparison of the elements. Where "it appears from the entire context that a violation of the "special" statute will necessarily or commonly result in a violation of the "general" statute," the implicit preemption rule may still apply. (*People v. Jenkins* (1980) 28 Cal.3d 494, 502.) Here, violations of the Vehicle Code section do not necessarily result in violations of the Penal Code section. The facts of this case aptly demonstrate this point. When appellant made her initial statement to the officer that her vehicle had been stolen, she violated the Vehicle Code section. It was not until Deputy Staviski had completed the CHP Form 180 (the false "instrument"), appellant had signed it under penalty of perjury and offered it for filing, that she had committed the violation of the Penal Code provision. Had Deputy Staviski realized appellant was lying about the car being stolen, he would not have completed or filed the CHP Form 180. Under these facts, appellant would still be guilty of the misdemeanor Vehicle Code violation (and Pen. Code, § 148.5, also a misdemeanor), but she would not be guilty of the felony Penal Code violation. Similarly, appellant's friend, Lisa Barbato, violated the Vehicle Code provision, but not the Penal Code section. Although she was not charged, Barbato made a false report of a vehicle theft to the district attorney investigators. At the time, she knew Investigator Smith was not recording her statement, she testified to being frustrated by this fact. (1 RT 162.) This false statement was a violation of Vehicle Code section 10501, but not a violation of Penal Code section 115, subdivision (a), as Barbato never knowingly procured or offered a false instrument for filing.

Anytime a defendant makes a false report of vehicle theft, but the agency discovers it is fraudulent prior to completing a false instrument, the

conduct would qualify as a violation of the Vehicle Code section, but not the Penal Code provision. Another situation may occur where the defendant makes the false report, but then changes his or her mind and decides to tell the truth before signing or offering any false instrument. Still another common situation would occur anytime someone calls 9-1-1 to make a false report of a vehicle theft, that report is filed with the 9-1-1 operator, but no false "instrument" is ever created. Essentially, the defendant who calls 9-1-1 files an oral report.

It is also possible to file a false report of vehicle theft without making a false report of vehicle theft, thus avoiding a statutory interpretation which would render portions of the Vehicle Code provision surplusage. Anytime a defendant walks into a law enforcement agency and, with the intent to deceive, files someone else's false report of vehicle theft, he or she has filed a false report (although perhaps not a false "instrument"), but that defendant never actually made the false report.

As demonstrated, there are numerous situations in which a defendant may make or file a false report with a law enforcement agency, but intervening forces prevent this false report from being completed as an "instrument" and relied upon as genuine. When violations of the specific statute do not necessarily or commonly result in violations of the general statute, the implicit preemption rule is inapplicable.

People v. Chardon (1999) 77 Cal.App.4th 205, 214, is instructive. There, the defendant argued that her conviction for false impersonation (§ 529, subd. (3)) was implicitly preempted by Vehicle Code section 40504, subd. (b). In *Chardon*, the defendant gave her sister's name and signed her sister's name on a traffic citation. She was convicted of false impersonation under Penal Code section 529, subdivision 3. The more specific statute, Vehicle Code section 40504,

subdivision (b), prohibited the giving of a "false of fictitious signature on a promise to appear." (*People v. Chardon, supra* 77 Cal.App.4th at p. 213.) Rejecting defendant's argument that the violation of Vehicle Code section 40504, subdivision (3), would commonly result in a violation of Penal Code section 529, subdivision (3), the court noted that,

> While a false signature on a promise to appear is an act that may commonly harm the person whose name is forged or benefit another, this is only one of the ways that Vehicle Code section 40504, subdivision (b) may be violated. An equally "common" violation of Vehicle Code section 40504, subdivision (b) would be committed by signing a fictitious name on the promise to appear. A fictitious signature on a promise to appear cannot violate Penal Code section 529, subdivision 3 because the false personation statute applies only to impersonations of real persons. Hence, under the Williamson rule, Vehicle Code section 40504, subdivision (b) is not a special statute which controls over Penal Code section 529, subdivision 3 because the Vehicle Code violation will not necessarily or commonly result in a violation of the false personation statute.

(*Chardon, supra*, 77 Cal.App.4th at p. 214.) The same is true here. While the filing of a false report of vehicle theft may often result in a violation of Penal Code section 115, that is not the only manner by which to violate the Vehicle Code provision. An equally common violation will occur when a defendant simply makes a false report without filing any document or instrument. As indicated in *Chardon*, where it is "equally common" that a defendant will violate the specific statute and not the general statute, it cannot be said that violations of the specific will "necessarily or commonly" result in violations of the general statute.

The fact that Vehicle Code section 10501 provides alternate means of violating the statute based on "making" or "filing" a false report does not alter this analysis. In *People v. Powers, supra,* 117 Cal.App.4th 291, the

court reached a similar result. There, the defendant was charged with both offering a false instrument to be filed in a public office under section 115, and failure to keep and submit a complete and accurate record of fishing activities as required by department regulations. (Cal. Code Regs., tit. 14, § 190 (reg.190).)" (*People v. Powers, supra,* 117 Cal.App.4th at p. 298.) Similar to the issue in this case, violation of section 115 is a felony, while violating regulation 190 is a misdemeanor. In analyzing whether or not violations of regulation 190 necessarily or commonly result in violations of the Penal Code provision, the court held,

> A violation of regulation 190 will not necessarily, or even commonly, result in a violation of section 115. A person who fails to file any fishing activity report will be guilty of violating regulation 190, but not section 115. Two of the regulation 190 counts alleged in this case are expressly based on a failure to submit fishing reports, and not a failure to submit accurate reports.

(*Id.* at p. 299.) Thus, in *Powers*, the different ways in which regulation 190 could be violated were all considered when determining whether or not violations of regulation 190 commonly or necessarily result in violations of Penal Code section 115. Here too, when considering whether or not violations of the specific statute will necessarily and commonly result in violations of the general, this Court should look to the entire array of possible ways which could lead to violations of the Vehicle Code provisions, not just those which result in a violation by "filing" a false report of vehicle theft.

Appellant argues that the "making" of an oral report of a stolen vehicle "will ultimately procure the filing of a false instrument." (AOBM 18.) In support of this argument, appellant cites Penal Code section 11108, which requires certain peace officers to submit descriptions of property that has been reported stolen to the

Department of Justice. (AOBM 18.) Penal Code section 11108 states,

> Each sheriff or police chief executive shall submit descriptions of serialized property, or nonserialized property that has been uniquely inscribed, which has been reported stolen, lost, found, recovered, held for safekeeping, or under observation, directly into the appropriate Department of Justice automated property system for firearms, stolen bicycles, stolen vehicles, or other property, as the case may be.

However, contrary to appellant's assertion, this section does not turn every false report of a vehicle theft into the procurement or offering of a false instrument. It is not clear that this could ever turn a false report of a vehicle theft into a violation of Penal Code section 115. After all, the defendant who falsely reported did not procure or offer any instrument. Further, the reduction of the false report to a physical document happens after the defendant's report, without his knowledge that the police officer will submit a written document. Such facts would not support a conviction for knowingly procuring or offering a false instrument under section 115.

The purpose of section 11108 is to catalogue criminal statistics, hence its inclusion in article 3, "Criminal identification and statistics." The database also aids in the recovery of legitimately stolen or lost property. (§ 11108.5 [requiring notice to reporting parties when stolen property is recovered].) The effectiveness of this statute necessarily turns on the accuracy of the information submitted. In the examples provided of instances where defendants may make a false oral report of a stolen vehicle and the officer to whom they are reporting discovers the falsity prior to submitting a report, the officer would not be required to submit a report of stolen property which he knows was not actually stolen. He may be required to submit a report indicating that a false report was filed. But, in

that instance, the "instrument" or "document" would not be false, as it would indicate that the report itself was untrustworthy or unreliable.

Further, Vehicle Code section 10500 governs the specific reporting of stolen vehicles,

> Every peace officer, upon receiving a report *based on reliable information* that any vehicle registered under this code has been stolen, taken, or driven in violation of Section 10851, . . . , shall, immediately after receiving that information, report the information to the Department of Justice Stolen Vehicle System.

(§ 10500, emphasis added.) That peace officers are required to report such information only when it is "based on reliable information" demonstrates that the recordation of these incidents must be accurate. Again, in the hypothetical where the police officer uncovers the ruse prior to filing a CHP 180, the officer would not be required to report to the Department of Justice that the property had been stolen. To require this would run counter Vehicle Code section 10500's requirement that the reports be based on reliable information and such filing of knowingly false information would completely undermine the purpose behind Penal Code section 11108.

These distinctions do not eliminate the possibility that a defendant can commit an act which violates both provisions. Indeed, if a defendant walks into a law enforcement agency and fills out a CHP 180 form, signs it under penalty of perjury, and submits it to the clerk for filing, she has violated both the Penal Code provision and the Vehicle Code provision. However, that the same act can violate multiple criminal statutes is not unusual; indeed, it is why the multiple punishment bar exists. (See Pen. Code, § 654.)

Additionally, there are many situations in the criminal law where the same conduct can be charged as a misdemeanor or as a felony. Notably, all "wobbler" offenses may be charged as felonies or misdemeanors, and the

decision on how to charge these crimes is left to the sound discretion of prosecutors. (See *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 69-70.) In such situations, the prosecutor has the discretion to charge the defendant according to the specific facts of the incident. (*Id.* at p. 81 ["District attorneys are continually faced with factual situations . . . which would legally support the filing of either felony or misdemeanor charges[,]" and must exercise discretion in choosing between them.]; see also *People v. Plumlee* (2008) 166 Cal.App.4th 935, 941 [same].) Prosecutors are entrusted with broad discretion in making these charging decisions. "The district attorney's discretionary functions extend from the investigation and gathering of evidence relating to criminal offenses (citation), through the crucial decisions of whom to charge and what charges to bring, . . . [Citations.]" (*People v. Dehle* (2008) 166 Cal.App.4th 1380, 1387.) Further, "under the doctrine of separation of powers, courts must scrupulously avoid interfering with the executive's prosecutorial function, including the exercise of its broad charging discretion." (*People v. Cortes* (1999) 71 Cal.App.4th 62, 79; see also *People v. Adams* (1974) 43 Cal.App.3d 697, 708 ["A prosecutor is not subject to judicial supervision in determining what charges to bring and how to draft accusatory pleadings."].)

The differences in the elements and the fact that violations of the Vehicle Code section will not necessarily or commonly result in violations of the Penal Code section cut strongly against a judicial determination that the Legislature intended to preempt Penal Code section 115 in this context. Repeals by implication are disfavored, and all presumptions are against such a judicial determination of legislative intent. "Absent an express declaration of legislative intent, we will find an implied repeal only when no rational basis exists to harmonize the two potentially conflicting statutes, and the statutes are irreconcilable, clearly repugnant, and so inconsistent

that they cannot operate concurrently." (*People v. Acosta, supra,* 29 Cal.4th 105, 122.)

As noted above, "courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes. . . . [Repeals by implication] will occur only where the two acts are so inconsistent that there is no possibility of concurrent operation." (*People v. Vallardes, supra,* 173 Cal.App.4th 1388, 1393-1394, internal citations omitted.)

Without more than the mere existence of situations where the same conduct can violate both statutes, it is not clear the Legislature intended to have Penal Code section 115, subdivision (a) preempted in this context. The two statutes can be harmonized and read together to criminalize different conduct when different facts warrant more or less punishment. As such, this Court cannot affirmatively conclude that there is no possibility of concurrent operation. The Legislature did not intend Vehicle Code section 10501 to repeal Penal Code section 115, subdivision (a), in the context of false reports of vehicle theft.

It is also unclear *why* the Legislature would deem appellant's conduct in this instance less egregious than other violations of Penal Code section 115, subdivision (a). By accompanying Deputy Staviski back to her vehicle, completing a CHP Form 180, signing it under penalty of perjury authorizing its filing and causing nationwide reliance on its accuracy, appellant's conduct was more consistent with that of other violations of Penal Code section 115 than it was with simply making a false report of a vehicle theft. (See, e.g., *People v. Gangemi* (1993) 13 Cal.App.4th 1790 [filing false deed of trust]; *People v. Hassan* (2008) 168 Cal.App.4th 1306 [offering false marriage license]; *People v. Parks, supra,* 7 Cal.App.4th 883 [filing false temporary restraining order].)

The Vehicle Code section and the Penal Code section do not share identical elements and a violation of Vehicle Code section 10501 will not necessarily or commonly result in a violation of Penal Code section 115, subdivision (a). Accordingly, Vehicle Code section 10501 is not a more specific statute which implicitly preempts Penal Code section 115, subdivision (a). Consequently, the prosecutor properly charged appellant under Penal Code section 115, subdivision (a).

B. Penal Code Section 115 Was Not Implicitly Preempted by Vehicle Code Section 20

Appellant also contends that Vehicle Code section 20 preempts section 115, because "each element of section 115 corresponds to an identical and more specific element of Vehicle Code section 20." (AOBM 20.) Respondent disagrees. As an initial matter, Vehicle Code section 20 does not cover appellant's conduct, it is inapplicable and thus, this claim fails. Additionally, the two statutes are comprised of different elements and a violation of Vehicle Code section 20 will not necessarily or commonly result in a violation of Penal Code section 115. For these reasons, appellants claim fails and the Court of Appeal correctly held that the Vehicle Code provision does not implicitly repeal the Penal Code provision. (Slip Op. at pp. 8-11.)

Vehicle Code section 20 provides:

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

As noted above, Penal Code section 115, subdivision (a), provides:

> 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, registered, or

recorded under any law of this state or of the United States, is guilty of a felony.

1. Because no document was ever filed with the DMV or the CHP, Vehicle Code section 20 is inapplicable to the instant case

At the outset, Vehicle Code section 20 does not cover the conduct in this case and thus is inapplicable. Appellant never filed anything with the Department of Motor Vehicles or the California Highway Patrol. Her false document was the police report which was filled out by Deputy Staviski of the San Bernardino County Sherriff's Department. (1 RT 61-62.) The document itself was a CHP form (1 CT 90), but nothing in the record indicates that this form was filed with the CHP. Deputy Staviski testified that he filled out the CHP Form 180 based on the information appellant provided to him (1 RT 71-73,) and that normally once the form is complete, he sends it to teletype and teletype enters the information into the *sherriff's* records. (1 RT 90.) Appellant told Deputy Staviski that she was trying to get the number for CHP when he arrived, but she had not yet contacted them. (1 RT 70.) This is further supported by closing arguments. As to count 1, the prosecutor argued, "if you believe and you find that this car was not stolen, then that CHP Form 180, which was filed *with the sherriff's department*, which Deputy Staviski testified, gets entered into a nationwide computer system of stolen vehicles; she is guilty of count 1, filing that false document as a false theft report." (1 RT 227-228 (emphasis added).)

Because no document was filed with either state agency mentioned in Vehicle Code section 20, it is inapplicable to the facts of this case. (Veh. Code, § 20.) The People could not have proved a violation of Vehicle Code section 20 as one of the elements requires proof that a false statement was filed with either the DMV or the CHP. Accordingly, the People could not have charged or convicted appellant with a violation of

this Vehicle Code provision. Under these facts, Vehicle Code section 20 cannot serve to preempt Penal Code section 115, subdivision (a).

Appellant argues that all reports of stolen vehicles are eventually filed with the Department of Motor Vehicles and accordingly, appellant's false report was eventually filed with the DMV. (AOBM 22-23.) Appellant is correct that the DMV is eventually notified of vehicles which are reported stolen (Veh. Code, § 10503), but the statutes do not indicate that an actual document is ever filed with the Department. Vehicle Code section 20 requires a "document" to be filed with the Department, and there is no indication from the evidence presented at trial or the statutory mandates with respect to reports of vehicle thefts, that a document, and particularly the one appellant signed, was ever filed with the DMV or the CHP. Likewise, appellant's reliance on Vehicle Code sections 2407 and 2408 is misplaced. (AOBM 23-24.) These provisions pertain to accident reports, not reports of stolen vehicles. Vehicle Code section 2407 states:

> The department shall prepare and on request supply to police departments, coroners, sheriffs, and other suitable agencies or individuals, *forms for accident reports* required under this code, which reports shall call for sufficiently detailed information to disclose *with reference to a traffic accident* the cause, conditions then existing, and the persons and vehicles involved.

(Veh. Code, § 2407, emphasis added.) And Vehicle Code section 2408 states:

> The department shall tabulate and may analyze all *accident reports* and publish annually or at more frequent intervals statistical information based thereon as to the number and location of *traffic accidents*, as well as other information relating to *traffic accident prevention*. Based upon its findings after such analysis, the department may conduct further necessary detailed research to more fully determine the cause and control of *highway accidents*. It may further conduct experimental field tests within areas

> of the State to prove the practicability of various ideas advanced in traffic control and *accident prevention.*

(Veh. Code, § 2407, emphasis added.) These statutes say nothing of stolen vehicle reports and whether or not all stolen vehicle reports are filed with the CHP. While the case here involved an automobile accident as well, appellant was not charged in connection with the accident, but was charged in connection with her false report that the vehicle had been stolen.

Appellant never filed a document with the DMV or the CHP; she offered a document for filing to Deputy Staviski. He then filed the stolen vehicle report with the Sherriff's Department. Under the facts of this case, no violation of Vehicle Code section 20 occurred and thus that provision cannot implicitly repeal Penal Code section 115 under the circumstances.

2. Even if applicable to the facts of this case, Vehicle Code section 20 does not implicitly repeal Penal Code section 115 because the two statutes have distinguishable elements and the violation of the Vehicle Code provision will not commonly result in the violation of the Penal Code provision

Further, even if this Court determines that appellant did file a document with the DMV or CHP, Vehicle Code section 20 does not implicitly repeal Penal Code section 115. First, the elements of the Vehicle Code provision do not correspond with the elements of the Penal Code provision. Second, a violation of Vehicle Code section 20 will not commonly result in a violation of Penal Code section 115.

As noted above, the elements of the Penal Code provision are as follows:

> (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;

> (3) The document was one that, if genuine, could be legally filed.

(See CACLRIM 1945.) There is currently no pattern jury instruction or published case delineating the elements of Vehicle Code section 20, but by resort to the statute itself, the court below found that the elements are as follows:

> (1) [T]he defendant made a false statement or concealed a material fact;
>
> (2) did so knowingly; and
>
> (3) [T]he statement was included in a document that was filed with the DMV or the CHP.

(Slip Op. at p. 9; Veh. Code, § 20.)

First, Penal Code section 115 requires the defendant to cause "a false document" to be filed. Vehicle Code section 20 only requires the inclusion of false statements or concealed material facts in a document. Unlike the Penal Code provision, to violate the Vehicle Code provision, the entire document need not be false. As the Court of Appeal noted, "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." (Slip Op. at p. 9.) The Court of Appeal noted several other distinctions in the elements of the two statutory provisions:

> [R]egarding 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 . . .) [Further,]. . . 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."

(Slip Op. at pp. 9-10.) The Vehicle Code provision's specification that the facts be material is not simply a more specific element than the Penal Code provision's requirement that the document be "false." As noted above, the Penal Code provision prohibits the offering of a "false instrument" that, in its entirety is fabricated. Conversely, the Vehicle Code provision specifies that the facts concealed must be "material" because the entire document may or may not be false. For example, an application for a driver's license would not be false, in its entirety, where the applicant may have concealed material facts, such as a previous driving record, or possession of a license to drive in other states. These facts are likely "material," as they may influence the applicant's ability to procure the license, but they do not, in and of themselves, render the entire application a false instrument. Under this hypothetical, the applicant would have violated the Vehicle Code provision, but not the Penal Code provision.

As discussed above, the second test to discern whether or not the Legislature intended to implicitly repeal a statute in certain contexts is a determination of whether, "it appears from the statutory context that a violation of the special statute will necessarily or commonly result in a violation of the general statute." (*People v. Watson, supra,* 30 Cal.3d 290, 295-296.) The Court of Appeal here correctly noted that,

> 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].)

(Slip Op. at p. 10.)

Given the number of documents which are filed with the DMV and the CHP, there are countless situations in which a defendant may conceal a material fact in one of these documents. In these instances, the defendant would be guilty of the misdemeanor offense codified in Vehicle Code section 20. However, the situations where a defendant files a document or instrument that is, in its entirety, false or fraudulent, would be rarer and more egregious. Accordingly, the defendant in that situation would be guilty of the felony offense codified in Penal Code section 115.

Again, the facts of this case aptly demonstrate the distinctions in the statutes and the legislative intent behind criminalizing the more egregious behavior more severely. Appellant completed and offered the fraudulent CHP form No. 180 for filing by the deputy. The CHP Form 180 is specifically designed as a report of a vehicle theft. Appellant's car had not been stolen, and she knew it had not been stolen. Thus, the completion and offering of the CHP Form 180 was false and fraudulent in its entirety. Appellant did not merely conceal material facts on an otherwise valid document. Further, the CHP Form 180 was to be entered into a nationwide database and relied on by multiple agencies. "'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.) Because the elements do not overlap, and a violation of the Vehicle Code provision will not necessarily or even commonly result in a violation of the Penal Code provision, section 20 of the Vehicle Code does not implicitly repeal section 115 of the Penal Code in this context.

Appellant also argues that the implicit repeal of Penal Code section 115 by Vehicle Code section 20 is "further supported by the "Legislature's tacit approval for more than 25 years – 1958-1984 – of the decision in *People v. Wood* [(1958)] 161 Cal.App.2d 24 [*Wood*]." (AOBM 28.) At the outset, this Court has recognized a general rule of statutory construction indicating that legislative acquiescence or inaction is "a slim reed upon which to lean." (*Quinn v. State of California* (1975) 15 Cal.3d 162, 175.)

Further, appellant's reliance on *Wood* is misplaced because the situation in *Wood* is distinguishable. The defendant in *Wood* was tried and convicted of violating Penal Code section 115. On appeal, the Second District, Division Two, found that his convictions were erroneous because, under the facts of that case, Penal Code section 115 was implicitly repealed by Vehicle Code section 131, subdivision (d), the precursor to Vehicle Code section 20. (*Wood, supra,* 161 Cal.App.2d at p. 27.)

Wood was the president of a used car dealership. In connection with the sale of an automobile, the Vehicle Code required that he prepare certain documents including a, "Dealer's Report of Sale." Two copies of this form were required to be forwarded to the Department of Motor Vehicles no later than the end of the next business day following the sale. (*Id.* at p. 26, citing Veh. Code, § 177, subd. (b).) For each failure to submit this form within the required time, the Department of Motor Vehicles would assess a penalty of $3. Wood was also required to file a "Certificate of Non-Operation," in connection with the application for transfer of any interest in an automobile of which the registration has expired. This document also had to be forwarded to the DMV.

Wood was convicted of eight violations of Penal Code section 115 for filing eight of these documents (four of each) with incorrect dates, presumably to avoid the associated penalties for late filing and failing to properly register the vehicles. (*Id.* at p. 25.)

The court found that he was improperly convicted under Penal Code section 115 instead of Vehicle Code section 131, subdivision (d), which read, "Any person who knowingly makes a false statement or conceals a material fact in any document required to be filed with the department as herein provided shall be guilty of a misdemeanor."

For the reasons set forth above, the court's holding in *Wood* is inapposite to the Court of Appeal's holding in the instant case. The defendant in *Wood* did not file a false "instrument," as appellant did here. In *Wood*, the defendant filed documents indicating a sale had taken place, which was true. The documents were not false in their entirety, but rather contained false statements. The false statements were material as the date of sale determined whether or not the defendant in *Wood* was in compliance with his filing requirements as a car dealer. Here, appellant offered for filing a report of a stolen vehicle. That report, in its entirety, was false, because in fact, her vehicle had not been stolen. The Court of Appeal here noted, "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." (Slip Op. at p. 9.) That is precisely what happened in *Wood*, which makes it distinguishable from the instant case. Here, unlike in *Wood*, appellant offered a document that was "per se false," and not simply a document that contained material misrepresentations.

Appellant's conduct was properly charged as a violation of Penal Code section 115, and not as a violation of Vehicle Code section 20. Accordingly, the Court of Appeal correctly held that appellant's felony conviction under Penal Code section 115 was not preempted by Vehicle Code section 20, (Slip Op. at p. 11), and respondent requests this Court affirm the judgment.

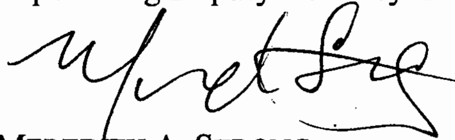
CONCLUSION

For the foregoing reasons, respondent respectfully requests that the judgment of the Court of Appeal be affirmed.

Dated: August 27, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
GARY W. SCHONS
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



MEREDITH A. STRONG
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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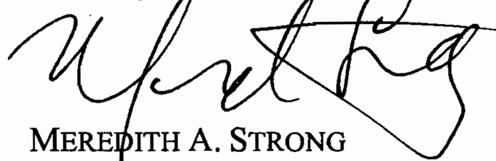
CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Answer To Appellant's Opening Brief On The Merits** uses a 13 point Times New Roman font and contains 9,334 words.

Dated: August 27, 2010

EDMUND G. BROWN JR.
Attorney General of California



MEREDITH A. STRONG
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Melissa Kay Murphy** No.: **S180181**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On August 27, 2010, I served the attached **RESPONDENT'S ANSWER TO APPELLANT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Helen Simkins Irza, Esq.
3525A Del Mar Heights Rd. #216
San Diego, CA 92131
(Attorney for Defendant Murphy)
[2 copies]

Grover Merritt, LDDA
Appellate Services Unit
San Bernardino District Attorney
412 W. Hospitality Lane, First Floor
San Bernardino, CA 92415

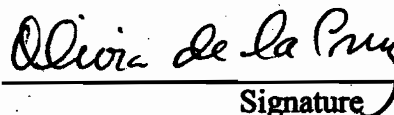
Court of Appeal of the State of California
Fourth Appellate District, Div. II
c/o Clerk of the Court
3389 Twelfth Street
Riverside, CA 92501

San Bernardino County Superior Court
Hon. Bryan F. Foster
c/o Clerk of the Court
351 N. Arrowhead
San Bernardino, CA 92415

and furthermore declare, I electronically served a copy of the above document from the Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on August 27, 2010 to Appellate Defender's, Inc's electronic notification address, eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 27, 2010, at San Diego, California.

Olivia de la Cruz
Declarant


Signature

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