SUPREME COURT COPY

SUPREME COURT CASE NO. S180181

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
	)
Plaintiff and Respondent,	) Court of Appeal No.
	) E046742
v.	)
	) Superior Court No.
MELISSA KAY MURPHY,	) FSB060016
	)
Defendant and Petitioner.	)
	)

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

REPLY BRIEF ON THE MERITS

LAW OFFICES OF
HELEN SIMKINS IRZA

HELEN S. IRZA (SBN 190680)
3525A Del Mar Heights Rd. #216
San Diego, CA 92130
Telephone: (858) 366-2680

Attorney for Petitioner
Melissa Kay Murphy

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

TABLE OF CONTENTS

Page

REPLY 1

I. UNLIKE THE DOCTRINE OF IMPLIED REPEAL, THE *WILLIAMSON* PREEMPTION DOCTRINE *MUST* BE APPLIED IN THE ABSENCE OF STRONG EVIDENCE THAT THE LEGISLATURE INTENDED A CONTRARY RESULT 1

II. PETITIONER'S CONVICTION IS PREEMPTED BY VEHICLE CODE SECTION 10501 5

A. Respondent's Arguments Addressing The First Prong Of The *Williamson* Test Lack Merit 5

1. The Existence Of A Disjunctive Phrase In Vehicle Code Section 10501 Does Not Remove It From *Williamson's* Purview 6

2. The Modern, Well-Settled Definition Of False Instrument That Can Be Filed Under State Or Federal Law Includes A False Stolen Vehicle Report; If The Court Disagrees, Then Appellant's Conviction Must Be Reversed For Lack Of Substantial Evidence Or On The Grounds That A Change In The Law Cannot Be Applied Retroactively 11

3. If Section 115 Is Read To Have An Additional Element, Then Vehicle Code Section 10501 Has A More Specific Counterpart 14

B. Respondent's Arguments Addressing The Second Prong Of The *Williamson* Test Also Lack Merit 16

III. PETITIONER'S CONVICTION IS PREEMPTED BY VEHICLE CODE SECTION 20 20

IV. THE POLICY BEHIND THE LEGISLATIVE SCHEME IS OBVIOUS AND SOUND 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Generes v. Justice Court
(1980) 106 Cal.App.3d 678 13

Mitchell v. Superior Court
(1989) 49 Cal.3d 1230 2

People v. Acosta
(2002) 29 Cal.4th 105 2

People v. Chardon
(1999) 77 Cal.App.4th 205 7

People v. Farina
(1963) 220 Cal.App.2d 291 7-8

People v. Gilbert
(1969) 1 Cal.3d 475 7-8

People v. Hassan
(2008) 168 Cal.App.4th 1306 ..... 12, 22

People v. Jenkins
(1980) 28 Cal.3d 494 ..... 4, 7

People v. Mayer
(1980) 110 Cal.App.3d 809 3

People v. Parks
(1992) 7 Cal.App.4th 883 ..... 13, 22

People v. Powers
(2004) 117 Cal.App.4th 291 ..... passim

People v. Tate
(1997) 55 Cal.App.4th 663 13

People v. Vallardes
(2009) 173 Cal.App.4th 1388 2

TABLE OF AUTHORITIES
(continued)

Page

People v. Watson
(1981) 30 Cal.3d 290 19

People v. Wood
(1986) 177 Cal.App.3d 327 1

Schatz v. Allen Matkins Leck Gamble & Mallory LLP
(2009) 45 Cal.4th 557 1

Williamson v. Superior Court
(1973) 30 Cal.App.3d 8 3

STATUTES

Evidence Code section 250 ..... 17, 20

Penal Code section 115 ..... passim

Vehicle Code section 20 ..... passim

Vehicle Code section 2407 ..... passim

Vehicle Code section 2408 ..... passim

Vehicle Code section 10500 ..... passim

Vehicle Code section 10501 ..... passim

Vehicle Code section 10503 ..... passim

Vehicle Code section 10504 ..... passim

REPLY

I. UNLIKE THE DOCTRINE OF IMPLIED REPEAL, THE *WILLIAMSON* PREEMPTION DOCTRINE *MUST* BE APPLIED IN THE ABSENCE OF STRONG EVIDENCE THAT THE LEGISLATURE INTENDED A CONTRARY RESULT.

Respondent confuses the concepts of preemption and repeal. (Respondent's Answer ("RA") at pp. 7-9.) As a consequence, respondent fails to distinguish between the two different sets of policy considerations that apply when determining whether a preemption has occurred, on the one hand, and when determining whether a repeal will be implied, on the other.[1]

The rule for finding that there has been an implied repeal is that "[c]ourts will find that a statute has been implicitly repealed by a subsequent act of the legislature if it clearly is intended to occupy the entire field covered by the prior enactment." (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573-574.) "In order for the second law to repeal or supersede the first, the former must constitute a revision of the *entire subject,* so that the court may say that it was intended to be a substitute for the first." (*Id.* at p. 573 [citation omitted].) The test for determining whether a later-enacted statute implicitly repeals an earlier statute is thus the direct converse of the *Williamson* preemption test in many respects.

Respondent is correct that there is a strong presumption against repeals by implication. But this is because repeals by implication violate a

---

[1] Respondent's confusion may arise from the fact that many older cases refer to preemption under the *Williamson* rule as repeal *pro tanto*. (E.g. *People v. Wood* (1958) 161 Cal.App.2d 24, 29.)

cardinal rule of statutory construction in that they result in the existence of statutory language enacted by the Legislature "on the books," which the courts nevertheless effectively treat as a nullity and refuse to give effect. Courts accordingly find repeal by implication only as a last resort, where no other construction makes sense:

> For purposes of statutory construction, the various pertinent sections of all the codes must be read together and harmonized if possible. ... 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. 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.

(*People v. Vallardes* (2009) 173 Cal.App.4th 1388, 1393-1394 [citations omitted].) For this reason, repeals by implication are relatively rare and will be found only where two statutes are "irreconcilable, clearly repugnant, and so inconsistent that they cannot operate concurrently." (*People v. Acosta* (2002) 29 Cal.4th 105, 122.)

By contrast, preemption, which is the issue here, occurs where the enactment of a statute displaces or curtails a particular entity's authority to enforce a statute. The *Williamson* preemption doctrine, in particular, divests the executive branch of its usual plenary authority to use prosecutorial discretion to decide which of two statutes it will choose to enforce, and mandates instead that prosecutors must enforce a particular statute under certain circumstances. (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1250.) While unbridled prosecutorial discretion is the general

rule, the *Williamson* preemption doctrine is applied in circumstances where to *not* apply the rule would result in statutory language enacted by the Legislature "on the books" that is almost certain to never be given effect. Here, for example, why would a prosecutor ever choose the extra effort and risk of demonstrating that a defendant filed a false stolen vehicle report *with intent to deceive* in order to obtain a misdemeanor conviction under Vehicle Code section 10501 instead of simply demonstrating that the defendant filed the false stolen vehicle report *knowingly* and thereby, with much less of a burden, obtain a felony conviction under section 115? The answer is that there is no reason why a prosecutor would ever take on a higher burden of proof to obtain a misdemeanor conviction instead of a felony conviction. For this reason, under circumstances where the *Williamson* test is satisfied, to hold that prosecutors have a choice between a general and a specific statute would be to effectively treat the more specific statute as a nullity that will never be enforced or otherwise given effect as a practical matter.

Unlike implied repeal, the *Williamson* rule is thus invoked in order to give effect to statutory language that would otherwise be ignored. In other words, the *Williamson* preemption doctrine applies where it is "necessary to prevent a general statute from swallowing up the exceptions contained in specific enactments." (*People v. Mayer* (1980) 110 Cal.App.3d 809, 814; see also *Williamson v. Superior Court* (1973) 30 Cal.App.3d 8, 15 ["[The] use of the conspiracy law in such situation becomes a device for defeating the legislative intent to impose a lesser

penalty upon prostitution than upon pimping, or to impose a greater penalty for the substantive offense of prostitution than was established by the Legislature"].) As a consequence, the doctrine is *not* disfavored. To the contrary, the enactment of a more specific statute which imposes a less severe penalty is generally a "determinative" indication that the specific statute controls absent a strong showing of contrary 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. ...

(*People v. Jenkins* (1980) 28 Cal.3d 494, 505-506 [emphasis added] [citation omitted].)

The *Williamson* rule is thus a rule that limits prosecutorial discretion, not a rule that results in the actual repeal of any part of a statute. It is further a rule that exists in order to determine Legislative intent, not a rule of strict statutory construction. Finally, it is a rule that gives life to statutory language that would otherwise be ignored, not a rule that overrides statutory language enacted by the Legislature as a last resort. Keeping these principles in mind, respondent's arguments that section 115 is not preempted by Vehicle Code sections 10501 and 20 are unavailing.

II. PETITIONER'S CONVICTION IS PREEMPTED BY VEHICLE CODE SECTION 10501.

A. Respondent's Arguments Addressing The First Prong Of The *Williamson* Test Lack Merit.

Respondent organizes the elements of section 115 in a different way than petitioner, and then makes three arguments based on the first prong of the *Williamson* test why petitioner's conviction is not preempted by Vehicle Code section 10501. First, respondent argues that the first element of Vehicle Code section 10501 is less specific than section 115, because it criminalizes the filing of a written document *and* the making of an oral report, while section 115 criminalizes *only* the filing or attempted filing of a written document. (RA 12-17.) Second, respondent asserts that the definition of false instrument is different than the current definition set forth in modern appellate decisions, and contends that not all false stolen vehicle reports are false instruments under that definition. (RA 10-12.) Third, respondent contends that section 115 contains an extra element with no counterpart in Vehicle Code section 10501, namely that the document that is filed "might be filed, or registered, or recorded under any law of this State or of the United States." (RA 9-10.)

Depicted schematically, with additions in bold, respondent's arguments boil down to an assertion that Vehicle Code section 10501 does not carve out an exception to section 115, because the first three elements of section 115, as organized by respondent, are purportedly more specific than Vehicle Code section 10501:

Element	PC 115	VC 10501
1	Procuring or offering a written document to be filed.	Filing a written document **or making an oral report**.
2	A false instrument. • **New definition.**	A false stolen vehicle report.
2 ½	**The instrument can be legally filed.**	**No counterpart.**
3	In a public office.	In any law enforcement agency.
4	Knowingly.	With intent to deceive.

Respondent appears to concede that the remaining two elements of Vehicle Code section 10501 are more specific than those of section 115. Petitioner addresses each argument made by respondent in turn below.

1. <u>The Existence Of A Disjunctive Phrase In Vehicle Code Section 10501 Does Not Remove It From *Williamson's* Purview</u>.

Respondent's first argument is that the two statutes do not overlap in a way that triggers the *Williamson* preemption rule, because Vehicle Code

section 10501 covers oral *and* written reports while section 115 covers written reports *only*. (RA 12-17.) In support of this argument, respondent relies on *People v. Chardon* (1999) 77 Cal.App.4th 205, 214, and *People v. Powers* (2004) 117 Cal.App.4th 291, 298, but ignores the cases cited by petitioner in the opening brief, *People v. Farina* (1963) 220 Cal.App.2d 291, 293-294, and this Court's decision in *People v. Gilbert* (1969) 1 Cal.3d 475, 480-481. (RA 15-17; OBM 15.)

In *Chardon*, the court of appeal did find that the disjunctive phrase that was at issue in that case — "false or fictitious" — did, in the court's opinion, take the special statute out of *Williamson's* purview. (*Chardon, supra,* 77 CalApp.4th at p. 214.) The court in *Chardon*, however, applied the two prongs of the *Williamson* test mechanically, and did not consider the larger, fundamental question: Does the existence of a disjunctive phrase in a potentially preempting statute indicate that the Legislature did not intend "to give effect to the special provision alone in the face of the dual applicability of the general provision"? (*Jenkins, supra,* 28 Cal.3d at pp. 505-506.)

Respondent's other case, *People v. Powers,* arguably did not address the precise issue of how disjunctive phrases should be treated under the *Williamson* test. (*Powers, supra,* 117 Cal.App.4th at pp. 298-299.) Regardless, even if it did, the court in *Powers* also engaged in a mechanical application of the test without any big picture analysis of what a disjunctive phrase means in terms of Legislative intent.

Petitioner's cases are no better in the sense that they, too, make an assumption without any analysis of Legislative intent, although the assumption is the opposite of that in *Chardon* and *Powers,* namely that disjunctive phrases are analyzed as separate, alternative elements, not grouped together and analyzed as a single broad element, and, as a consequence, they do *not* take a potentially preempting statute out of *Williamson's* purview. (*Farina, supra,* 220 Cal.App.2d 291, 293-294; *Gilbert, supra,* 1 Cal.3d at pp. 480-481.)

As explained in the opening brief, disjunctive phrases must be considered alternatively, not together, in order to effectuate Legislative intent. Using Vehicle Code section 10501 as an example, the statute is phrased in the alternative as follows: "It is unlawful for any person to make *or* file a false or fraudulent report of theft of a vehicle ...." (Veh.Code, § 10501.) In enacting Vehicle Code section 10501, the Legislature therefore specifically identified and distinguished between *two* separate categories of conduct, *both* of which it intended to punish as misdemeanors: "making a false report" and "filing a false report." The only meaningful test whether section 115 is preempted is therefore to ask first, whether "making" a false report under Vehicle Code section 10501 carves out an exception, and to ask second, whether "filing" a false report under Vehicle Code section 10501 carves out an exception. To do otherwise is to elevate form over substance. This is because the fact that the Legislature communicated its intent to make both types of conduct a misdemeanor by enacting a single statute phrased in the alternative, i.e. a single statute that prohibits "making

or filing" a report, as opposed to enacting two statutes, one of which provides that it is unlawful to "make a false report" and the other of which provides that it is unlawful to "file a false report," is a meaningless distinction which should not affect the ultimate question whether the Legislature intended carve out an exception to section 115 or whether it intended for there to be dual applicability.

Another way of considering the issue leads inescapably to the same conclusion. As explained previously, the whole purpose behind the *Williamson* preemption rule is to give effect to statutory language that would otherwise be ignored. Here, Vehicle Code section 10501, as it was enacted by the Legislature, includes the words "*make or file,*" all of which must be given effect if at all possible. If this disjunctive phrase is analyzed as a single broad element, however, as was done in *Chardon*, as opposed to being analyzed separately, as two alternative elements, as was done in *Gilbert* and *Farina*, then the words "*or file*" as a practical matter will effectively be treated as a nullity that will never be enforced or otherwise given effect.

This is because, if the correct way of analyzing disjunctive clauses is to consider them as a single broad element, then the first element of Vehicle Code section 10501 is more general on its face than the first element of section 115. "Making an oral report or filing a written report" is broader than "filing a written report." It would also appear at first glance that a person who makes an oral stolen vehicle report would be in violation of

Vehicle Code section 10501, but would not be in violation of section 115.[2] As a consequence, if *Chardon* is followed and the disjunctive phrase, "make or file" is considered to be a single broad element, section 115 and Vehicle Code section 10501 would have dual applicability in the case of a suspect who is accused of filing a false written stolen vehicle report.

But, as previously pointed out, if prosecutors have discretion to charge a suspect with violating section 115 or violating Vehicle Code section 10501, they will *inevitably* elect to file felony charges under section 115, with its less burdensome scienter requirement, as opposed to filing misdemeanor charges under Vehicle Code section 10501, which requires proof of intent to deceive. The end result of treating the disjunctive phrase in Vehicle Code section 10501 as a single broad element for purposes of the *Williamson* test is, thus, that the filing of a false written stolen vehicle report will never be prosecuted as a misdemeanor. This means, as a consequence, that the words "*or filed*" in Vehicle Code section 10501, which specify that the filing of a false stolen vehicle report by a first-time offender is to be prosecuted as a misdemeanor, will be inevitably be ignored, and, as a practical matter will be rendered a nullity, which is precisely the result that the special-over-general rule was designed to avoid.

---

[2] Petitioner maintains that even if the Court disagrees, and decides that disjunctive phrases in a potentially preempting statute are analyzed as a single broad element, an oral stolen vehicle report will necessarily or commonly result in the filing of a written stolen vehicle report pursuant to section 11108, and Vehicle Code sections 2407, 2408, 10500, 10503, and 10504.

Indeed, this is what will almost always happen if there is a disjunctive phrase in a potentially preempting statute and *Chardon* is followed. The portion of the phrase that corresponds to the more general statute will be rendered a practical nullity. Elementary rules of statutory construction do not allow such a result.

By contrast, analyzing the disjunctive phrase "make or file" as two separate alternative elements for purposes of the *Williamson* test gives life to the words "*or filed.*" Suspects who are accused of filing false stolen vehicle reports will be prosecuted under Vehicle Code section 10501 as misdemeanants, for a first-time offense, and as misdemeanants or felons for additional offenses, but only if intent to deceive can be proven beyond a reasonable doubt. Suspects who are accused of filing other written instruments will be prosecuted under section 115.

Respondent's first argument why petitioner's conviction is not preempted by Vehicle Code section 10501 is thus unavailing. The existence of a disjunctive phrase in Vehicle Code section 10501 does not remove it from *Williamson's* purview.

2. The Modern, Well-Settled Definition Of A False Instrument That Can Be Filed Under State Or Federal Law Includes A False Stolen Vehicle Report; If The Court Disagrees, Then Appellant's Conviction Must Be Reversed For Lack Of Substantial Evidence Or On The Grounds That A Change In The Law Cannot Be Applied Retroactively.

Respondent's second argument is that the definition of false instrument is purportedly different than the current definition set forth in modern appellate decisions, and that not all false stolen vehicle reports are

false instruments under that definition. (RA 10-13.) Respondent's definition is a new one that has not been previously used in the context of 115 in any known published case. The asserted definition is based on an excerpt from one of two dictionary definitions that were quoted in *People v. Powers,* but not ultimately adopted in the court's decision. (*Powers, supra,* 117 Cal.App.4th at p. 294-295, 297.)

This Court, of course, can agree with respondent and decide that the courts of appeal have gone astray and that respondent's asserted dictionary definition of instrument should be adopted in the context of section 115. It is axiomatic, however, that any such change cannot be applied retroactively to petitioner. In addition, the evidence in the record is insubstantial that the stolen vehicle report satisfied the more formal definitions of instrument asserted by respondent, the more formal definition asserted by the Court of Appeal in the Opinion, or the more formal definition found in the older cases that interpreted section 115 and which have since been overruled. (See *People v. Hassan* (2008) 168 Cal.App.4th 1306, 1315-1316.) Petitioner objected below on the grounds that substantial evidence does not support her conviction if a different definition of instrument than that set forth in *Powers* is applied to her case. She did so at the first instance where the validity of the *Powers* definition was questioned, which was in the Opinion. (Petition for Rehearing at p. 3; Petition for Review at p. 12, OBM 14.) She has therefore preserved the issue.

The reality is that it was undisputed at trial and during the briefing phase of petitioner's appeal that the modern definition of false instrument

includes a false stolen vehicle report. This is because the modern definition of instrument as defined by the modern appellate cases includes almost all documents that are filed by laypersons in a public office and then relied upon by public officials:

> A document required or permitted to be filed in a public office is an instrument if (1) the claimed falsity relates to a material fact represented in the instrument; and (2a) the information contained in the document is of such a nature that the government is required or permitted by law, statute, or valid regulation to act in reliance thereon ....

(*Powers, supra,* 117 Cal.App.4th at p. 297; see also *Generes v. Justice Court* (1980) 106 Cal.App.3d 678, 682-684; *People v. Parks* (1992) 7 Cal.App.4th 883, 886-887)

It was also undisputed at trial, and indeed cannot be disputed, that a false stolen vehicle report satisfies this definition. Numerous statutes provide for the filing of a stolen vehicle report with various agencies. (*E.g.* Veh.Code, § 10504; Veh.Code, §§ 2407-2408; Veh.Code, § 10500; § 11108.) Those same statutes establish that a stolen vehicle report is a document that the government is permitted by law, statute, or valid regulation to act in reliance upon. (1RT 90-91; Veh.Code §§ 2407-2408, 10500, 10503-10504; 11108.) As a consequence, a false stolen vehicle report is a specific type of false instrument under the modern definition. (*See Powers, supra,* 117 Cal.App.4th at p. 297 [fishing activity records are instruments]; *People v. Tate* (1997) 55 Cal.App.4th 663, 667 [work referral forms filed with the probation office are instruments].)

Respondent's second argument why petitioner's conviction is not preempted by Vehicle Code section 10501 is thus unavailing.

3. If Section 115 Is Read To Have An Additional Element, Then Vehicle Code Section 10501 Has A More Specific Counterpart.

Respondent's third argument is that section 115 contains an extra element with no counterpart in Vehicle Code section 10501, namely that the document that is filed "might be filed, or registered, or recorded under any law of this State or of the United States." (RA 9-10.) A stolen vehicle report, however, will *always* satisfy this element, because it can be filed under numerous statutes, and indeed must always be filed under section 11108. (Veh.Code, §§ 2407, 2408, 10500, 10503, 10504.) As a consequence, even if the elements are reorganized according to respondent's preference, Vehicle Code section 10501 is still a more specific statute than section 115 in every meaningful respect. This is easily seen in the chart summarizing petitioner's reply arguments on the folowing page.

Element	PC 115	VC 10501
1	Procuring or offering a written document to be filed.	Filing a written document. [*Making an oral report is an alternative element.*]
2	A false instrument. • *Powers* Definition.	A false stolen vehicle report.
2 ½	The instrument can be legally filed.	False stolen vehicle reports may or must be filed under PC 11108, VC 2407, 2408, 10500, 10503, 10504.
3	In a public office.	In any law enforcement agency.
4	Knowingly.	With intent to deceive.

In sum, respondent's arguments attacking the first prong of the *Williamson* test — whether there is a correspondence of elements — are all unavailing with respect to Vehicle Code section 10501. An element-by-element comparison of the two statutes demonstrates that each element of section 115 corresponds to an identical or more specific element of Vehicle Code section 10501.

B. Respondent's Arguments Addressing The Second Prong Of The *Williamson* Test Also Lack Merit.

Respondent argues that the second prong of the *Williamson* test is not met, because "violations of the Vehicle Code section do not necessarily result in violations of the Penal Code section." (RA 14.) Respondent's arguments on this front are unavailing for two reasons.

First, all of respondent's examples involve hypothetical situations where an oral report is made, but a subsequent written report is not made for a variety of reasons. (RA 14-15.) As set forth above, however, the language in Vehicle Code section 10501 which prohibits "filing a false written report" must be analyzed separate and apart from the language that prohibits "making a false oral report" in order to credit substance over form and give effect to Legislative intent. Respondent has not given a single example of an instance where a person files a written stolen vehicle report with intent to deceive in such a way that the person's actions violate Vehicle Code section 10501, but do not violate section 115. Petitioner's counsel is not aware of one. Violation of the portion of Vehicle Code section 10501 which prohibits filing a written report will thus *necessarily* result in a violation of section 115.

Second, even if the Court disagrees with petitioner's contention that disjunctive phrases in a potentially preemptive statute must be analyzed as alternative elements, making an oral stolen vehicle report in Violation of Vehicle Code section 10501 will still necessarily result in a violation section 115. The language in section 11108 is mandatory. (§ 11108.) Under the statute, sheriffs and police officers are *required* to convert an oral

stolen vehicle report into written record in the Department of Justice database.

Respondent's contention that an electronic record is not a "document" (RA 24) does not represent an up-to-date understanding of how the law has adapted over the past 20 years in the face of the ubiquitous use of computers, email and other electronic communications as well as electronic, as opposed to paper, databases. As just one example, the Evidence Code definition of writing has been updated and currently reads:

> "Writing" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored.

(Evid.Code, § 250.) An entry into the DOJ database is therefore an instrument (assuming the modern definition of instrument under *Powers*). If for some reason the Court disagrees, then there was a fundamental misunderstanding of what was required to convict appellant at trial. There is no evidence in the record whatsoever as to what happened to the CHP form that was signed by petitioner, and certainly no testimony that it was filed. Deputy Staviski did not testify that he filed the physical document in the Sherriff's office. He testified that he teletyped the information in the physical document to his office, that the information would have then been automatically entered into his office's records, and that the information would have further been automatically uploaded to the DOJ database. (RT

90-91.) If is it true, as respondent contends, that electronic records are not instruments under section 115, then appellant's conviction must be reversed for lack of substantial evidence.

Respondent asserts that there is statutory authority for the proposition that a person may make an oral report but that a peace officer may nevertheless not enter the report into the database. In particular, respondent contends that a peace officer's duty to report under Vehicle Code section 10500 is limited to reports based on reliable information, and that not all oral reports as a consequence will be converted into a written record in the DOJ database. (RA 19.) Officer Staviski's behavior, however, demonstrates that the mandatory reporting duty set forth in the Penal Code section 11108 is the one that prevails as a matter of practice. Staviski testified that he did not believe petitioner, but that he nevertheless teletyped the information in the stolen vehicle report to his office, and that his office would have automatically entered the information into the DOJ database, and then immediately tagged the entry to show that the vehicle had been recovered. (RT 74, 90-91.)

In any event, it may in theory be possible to hypothesize a situation where an oral stolen vehicle report is so outrageous that a police officer decides to ignore section 11108 and to not enter the information into the DOJ reporting system, or to hypothesize about other unusual fact patterns, like a suspect who reports that a vehicle has been stolen and then, before the information is recorded, immediately confesses that it was not stolen under circumstances where it can still be shown that the suspect intended to

deceive someone with this behavior. Or, as another example postulated by respondent, to imagine a very sheltered person who contacts the police to falsely report that his vehicle has been stolen, yet, for some reason, is not possessed of common knowledge that the false information about the theft will be written down, entered into a database, and then radioed to local police officers in the area so they can look for the car.

The problem with these types of hypotheticals is twofold. First, these are highly unusual situations and do not represent the types of fact patterns that the Legislature was likely to have been considering when deciding when to punish people who file false stolen vehicle reports as misdemeanant and when to punish them as felons. As a consequence, they do not tend to shed much light on Legislative intent. Second, the second prong of the *Williamson* test is whether it appears 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 [emphasis added].) None of these situations are sufficiently common to conclude that dual applicability of the two statutes is warranted.

In any event, the proper test for analyzing the disjunctive phrase, "make or file," in section 10501 is that each prong must be assessed separately. As set forth above, there are *no* examples, not even outrageous or strange ones, that have been proposed where the successful filing of a false written stolen vehicle report in violation of Vehicle Code section 10501 will not also result in a violation of section 115.

Respondent's arguments that the second prong of the *Williamson* test is not satisfied are thus unavailing regardless of whether the Court treats the disjunctive phrase "makes or files" under *Chardon* or under *Gilbert* and *Farina*. Petitioner's conviction is therefore preempted by Vehicle Code section 10501. Full reversal of the first count is warranted.

III. PETITIONER'S CONVICTION IS PREEMPTED BY VEHICLE CODE SECTION 20.

Respondent makes three arguments why petitioner's conviction is not preempted by Vehicle Code section 20. All lack merit.

First, respondent contends that nothing in the record indicates that the stolen vehicle report in the instant case was filed with the California Highway Patrol or the Department of Motor Vehicles. (RA 23.) Respondent's assertion is confusing, however, because the prosecution's theory for why the CHP Form 180 at issue in the instant case is an instrument, which "if genuine, might be filed, or registered, or recorded under any law of this State or of the United States," is that the information in the form was entered into the DOJ database pursuant to section 11108 and Vehicle Code section 10500. Respondent nevertheless inconsistently concedes that all stolen vehicle reports that are entered into the DOJ database are automatically filed with the DMV, but then contends that electronic records cannot be instruments. (RA 24; Veh.Code §§ 10503, 10504.) As previously explained, the law has evolved to treat electronic records as "writings" in all respects the same way as physical paper documents are treated. (E.g., Evid.Code, §250.) If electronic records cannot be instruments, then there is no information in the record to support

a finding that CHP Form 180 was physically filed as a paper document, and count 1 must be dismissed for insubstantial evidence. If electronic records can be instruments, then the information in CHP Form 180 was automatically filed with the DMV. Either way, petitioner's conviction must be reversed, either on the grounds that her conviction is preempted, or on the grounds that it was not supported by substantial evidence.

Second, respondent contends CHP Form 180 is not an accident report that is required to be returned to the CHP pursuant to Vehicle Code sections 2407 and 2408. Petitioner disagrees. The form states that it is "furnished to all peace officers by the California Highway Patrol," and Vehicle Code sections 2407 and 2408 are the only code provisions that provide for the CHP to furnish forms to other peace officers. In the broad scheme of things, a stolen vehicle can certainly be conceptualized as a particular type of unexpected vehicular accident. In fact, Stavinski testified that the form is used to report a number of different types of incidents, and the form itself shows this. (RT 90.) In any event, if petitioner is wrong, this eliminates another theory for why the CHP Form 180 in the instant case was an instrument which "if genuine, might be filed, or registered, or recorded under any law of this State or of the United States".[3]

Third, respondent contends that there is a distinction between a false instrument, which purportedly must be false in its entirety, and the requirement in Vehicle Code section 20 the document that is filed contain a false material statement. This contention ignores the definition of

[3] Petitioner's counsel has been unable to locate a state law that authorizes a citizen to file a stolen vehicle report in a Sheriff's office.

instrument in *Powers* which defines a document to be an "instrument" if it contains a material misstatement of fact. (*Powers, supra,* 117 Cal.App.4th at p. 297.) It also ignores examples in the case law of instances where documents with material misstatements of fact that were filed as public records have been held to be instruments. (E.g., *Powers, supra,* 117 Cal.App.4th at 297-298 [finding fishing records to be false instruments based on materially false information contained within them]; *Parks, supra,* 7 Cal.App.4th at pp. 885-885 [finding a temporary restraining order with altered content to be an instrument]; *Hassan, supra,* 168 Cal.App.4th at pp. 1309-1316 [finding a confidential marriage license that contained a false material statement to be an instrument].)

For all of these reasons, respondent's arguments are unavailing. Petitioner's conviction is preempted by Vehicle Code section 20. Full reversal of the first count is warranted on this additional ground.

IV. THE POLICY BEHIND THE LEGISLATIVE SCHEME IS OBVIOUS AND SOUND.

Respondent asserts that there is no conceivable reason why the Legislature would want to punish the filing of false instruments in general as a felony, but to only punish a first-time offender who files a false stolen vehicle report as a misdemeanant, and to then do so only upon a showing of intent to deceive. (RA 21.) To the contrary, however, petitioner's case perfectly illustrates an entirely obvious reason for doing this. Viewing the facts in the light most favorable to the prosecution, petitioner gave a false statement on the spur of the moment after a terrifying accident at a time when she was injured and emotionally distraught in the face of an

intimidating authority figure. The Legislature no doubt recognizes that, human nature being what it is, many an otherwise honest person might instinctively succumb to the temptation to be less than truthful under such circumstances and that punishment of such behavior as a misdemeanor is accordingly appropriate for a first-time offense, and should only occur where an affirmative intent to deceive can be shown.

CONCLUSION

Based on the preceding argument and analysis, petitioner respectfully requests that the Court reverse the judgment against her on count 1.

Dated: September 20, 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 5644 words as counted by Microsoft Word, excluding the table of contents and table of authorities.

Dated: September 20, 2010

LAW OFFICES OF HELEN SIMKINS IRZA

By: _____

Helen S. Irza

Attorney for Petitioner
Melissa Kay Murphy

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 September 20, 2010, I served the attached

REPLY BRIEF ON THE MERITS

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:

Attorney General
110 W. "A" St., Ste. 1100
P.O. Box 85266
San Diego, CA 92186-5266

Appellate Defenders, Inc.
555 West Beech Street
Ste. 300
San Diego, CA 92101

Richard D. Petersen
Deputy District Attorney
17830 Arrow Blvd.
Fontana, CA 92335

Melissa Murphy
P.O. Box 3285
Lake Arrowhead, CA
92352

Appeals Division
San Bernadino Superior Court
401 N. Arrowhead Ave.
San Bernadino, CA 92415

Randall Isaeff
Deputy Public Defender
17830 Arrow Blvd
Fontana, CA 92335

Court of Appeal, 3389 Twelfth Street, Riverside, CA 92501

Each envelope was then sealed and deposited in the United States mail by me with fully prepaid postage affixed at San Diego, California on September 20, 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 September 20, 2010.

HELEN S. IRZA