SUPREME COURT
FILED
MAY 28 2015
Frank A. McGuire Clerk
Deputy

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JUANITA VIDANA, Defendant and Appellant.	Case No. S224546

Fourth Appellate District, Division Three, Case No. G050399
Riverside County Superior Court, Case No. RIF1105527
The Honorable Edward D. Webster, Judge

OPENING BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
LINDA GÁNDARA
Deputy Solicitor General
MICHAEL PULOS
Deputy Attorney General
State Bar No. 246474
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3034
Fax: (619) 645-2478
Email: Michael.Pulos@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Issue Presented 1
Introduction 1
Statement of the Case and Facts 2
Argument 4
I. Appellant's separate convictions for larceny and embezzlement based on the same theft were proper because larceny and embezzlement are different offenses 4
A. Section 954 permits multiple convictions based on the same act or indivisible course of conduct where, among other things, the act or conduct constitutes more than one offense 5
B. Whether separate code provisions describe more than one offense turns on whether the Legislature intended them to be different offenses 6
C. The Legislature intended larceny and embezzlement to be different offenses 7
1. Larceny and embezzlement are historically different offenses, and the Legislature preserved them as such in the Penal Code 8
2. Larceny and embezzlement have different elements, and neither is necessarily included within the other 13
3. Larceny and embezzlement are self-contained in different chapters of the Penal Code, and they have sometimes divergent punishments, enhancements, and statutes of limitations 14

TABLE OF CONTENTS
(continued)

Page

4. The 1927 Penal Code amendments, which grouped related offenses under the umbrella of "theft," did not convert larceny and embezzlement into a single offense 19

a. This court has repeatedly held that the substantive differences among the various theft offenses remain intact following the amendments 21

b. The Legislature did not intend the amendments to erase from the Penal Code the term "larceny" or "embezzlement," or the distinct offenses each represents 23

(1) The Legislature continues to treat larceny and embezzlement as distinct offenses long after the amendments 23

(2) The Legislature did not intend the amendments to be so broad as to remove the respective meanings of "larceny" and "embezzlement" from the Penal Code 27

II. Alternatively, appellant's separate convictions for larceny and embezzlement based on the same theft were proper because larceny and embezzlement are—at the very least—different statements of the same offense 29

Conclusion 31

TABLE OF AUTHORITIES

Page(s)

CASES

Blockburger v. United States
(1932) 284 U.S. 299 .... 7, 13

In re Basinger
(1988) 45 Cal.3d 1348 .... 14, 27

In re C.H.
(2011) 53 Cal.4th 94 26

Kellett v. Superior Court of Sacramento County
(1966) 63 Cal.2d 822 13

New York Trust Co. v. Eisner
(1921) 256 U.S. 345 12

People v. Ashley
(1954) 42 Cal.2d 246 21

People v. Beamon
(1973) 8 Cal.3d 625 5

People v. Belden
(1869) 37 Cal. 51 9

People v. Benavides
(2005) 35 Cal.4th 69 5

People v. Camodeca
(1959) 52 Cal.2d 142 24

People v. Darling
(1964) 230 Cal.App.2d 615 .... *passim*

People v. Davis
(1998) 19 Cal.4th 301 .... 13, 14, 21, 28

People v. De Coursey
(1882) 61 Cal. 134 .... 11, 12, 17

TABLE OF AUTHORITIES
(continued)

Page(s)

People v. Duff
(2010) 50 Cal.4th 787 5

People v. Gonzalez
(2014) 60 Cal.4th 533 .... *passim*

People v. Hannon
(1971) 5 Cal.3d 330 .... 28, 29

People v. Hickman
(1928) 204 Cal. 470 19

People v. Kramer
(2002) 29 Cal.4th 720 6

People v. Majors
(1884) 65 Cal. 138 13

People v. Mendoza
(2000) 23 Cal.4th 896 11

People v. Montoya
(2004) 33 Cal.4th 1031 5

People v. Myers
(1929) 206 Cal. 480 .... 19, 21, 22, 29

People v. Nazary
(2010) 191 Cal.App.4th 727 .... 3, 23

People v. Ortega
(1998) 19 Cal.4th 686 .... 5, 30

People v. Park
(2013) 56 Cal.4th 782 17

People v. Pearson
(1986) 42 Cal.3d 354 .... 5, 30

TABLE OF AUTHORITIES
(continued)

Page(s)

People v. Quvise
(1880) 56 Cal. 396 .... 11, 12

People v. Reed
(2006) 38 Cal.4th 1224 .... 5, 6, 14

People v. Rogers
(1971) 5 Cal.3d 129 28

People v. Sanchez
(2001) 24 Cal.4th 983 5

People v. Sanders
(1998) 67 Cal.Appl.4th 1403, 1416 29

People v. Tufunga
(1999) 21 Cal.4th 935 16

People v. Wiley
(1976) 18 Cal.3d 162 11

People v. Williams
(2013) 57 Cal.4th 776 .... *passim*

People v. Wittig
(1984) 158 Cal.App.3d 124 6

People v. Wooten
(1996) 44 Cal.App.4th 1834 13

People v. Wyatt
(2012) 55 Cal.4th 694 5

Wells v. One2One Learning Foundation
(2006) 39 Cal.4th 1164 25

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

Annotated Penal Code (1st ed. 1872, Haymond & Burch, commrs. annotators)
- § 484 .... 10, 11, 20, 24
- § 503 .... 10, 11

Crimes and Punishments Act of 1850 9

Education Code § 26139 et seq. 26

Elections Code
- § 383 28
- § 389 28
- § 14240 28

Government Code § 11007.5 26

Labor Code § 230.2 26

Penal Code
- pt. 1, tit. 13 9
- pt. 1, tit. 13, ch. 5 .... 9, 15, 24
- pt. 1, tit. 13, ch. 6 .... *passim*
- pt. 1, tit. 13, ch. 7 24
- pt. 1, tit. 13, ch. 8, § 532 15
- § 17, subd. (a) 17
- § 17, subd. (b) 17
- § 186.11 .... 17, 19, 26
- § 186.11, subds. (a)–(c) 17
- § 186.11, subd. (a)(1) 17, 18
- § 211 22
- § 288a 7, 30
- § 288a, subd. (f) 6, 7, 18
- § 288a, subd. (i) 6, 7, 18
- § 484 .... *passim*
- § 484, subd. (a) 10
- § 487 .... 15, 19
- § 487, subd. (a) 1, 2

TABLE OF AUTHORITIES
(continued)

Page(s)

§ 487, subd. (b)(3) 17
§ 489 .... *passim*
§ 490 .... *passim*
§ 490a .... *passim*
§ 501 .... 25, 26
§ 502.9 .... 16, 24
§ 503 .... *passim*
§§ 503– 508, 510 24
§ 503 et seq. 23
§ 504 .... 17, 19
§ 504b 24
§ 509 .... 14, 15, 27
§§ 509–513 15
§§ 509, 511–513 24
§ 511 .... 15, 16
§ 512 16
§ 513 16
§ 514 .... *passim*
§ 514 (1880) 10
§ 515 .... 16, 24
§ 525 24
§ 654 6
§ 799 .... 18, 19, 25, 28
§ 800 28
§ 801 .... 18, 19, 25
§ 801.6 26
§ 803 .... 18, 19, 25, 26
§ 950 29
§ 952 29
§ 954 .... *passim*
§ 954 (1872) 12

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes 1850
- ch. 99 9
- ch, 99, §§ 60–70 9
- ch. 99, § 60 9
- ch. 99, § 61 9
- ch. 99, § 66 9
- ch. 99, § 66 9
- ch. 99, § 70 9

Statutes 1851, ch. 95, §§ 2–3 9

Statutes 1856, ch. 139, §§ 7–8 9

Statutes 1863–1864, ch. 42, § 70 9

Statutes 1927
- ch. 619 20
- ch. 619, § 1 20
- ch. 619, § 7 20

Statutes 1976, ch. 1275, § 11 28

Statutes 1984, ch. 1270, § 2 25

Statutes 1989, ch. 897, § 21 25

Statutes 1996
- ch. 431, § 2 ..... 17, 26
- ch. 788 24

Statutes 2004, ch. 823, § 9 24

Statutes 2013, ch. 531, § 26 24

Statutes 2014, ch. 191, § 1 25

TABLE OF AUTHORITIES
(continued)

Page(s)

Vehicle Code
§ 4605 26
§ 10502 26
§ 10553 26
§ 38125 26

Welfare and Institutions Code § 15656 26

CONSTITUTIONAL PROVISIONS

California Constitution of 1849, art. IV, § 22 10

OTHER AUTHORITIES

CALCRIM No. 1800 14

ISSUE PRESENTED

Whether a defendant may be convicted of both grand theft by larceny (Pen. Code, § 487, subd. (a)) and embezzlement (Pen. Code, § 503)[1] based on the same act.

INTRODUCTION

Appellant stole more than $50,000 from her employer over a period of several months. For this conduct, a jury convicted appellant of both grand theft by larceny and embezzlement. Because larceny and embezzlement are "different offenses" (or, in the alternative, "different statements of the same offense"), appellant's dual convictions were proper under section 954.

Larceny and embezzlement have always been different offenses. When the American states adopted the British common law crime of larceny and the statutory crime of embezzlement, they maintained the firm historical distinctions between the two offenses. California was no exception. Both before and after the enactment of the Penal Code, the California criminal statutes, and this court's interpretation of those statutes, have treated larceny and embezzlement as distinct crimes. Indeed, larceny and embezzlement have distinct elements, and neither offense is included in the other. The two offenses also reside in separate chapters of the Penal Code; and each chapter provides the statutory elements, defenses, and punishments for its respective offense. Also, while the punishments, enhancements, and statutes of limitations for larceny and embezzlement mostly overlap, there are times when they diverge.

Contrary to the Court of Appeal's view, the Legislature's 1927 Penal Code amendments, which grouped larceny and embezzlement (along with false pretenses) under the general umbrella of "theft," did not "eliminate[]

[1] All further code references are to the Penal Code unless specified.

the distinctions between the various theft offenses." (See slip opn. at p. 9.) Indeed, this court has repeatedly held the opposite: The amendments were part of a procedural overhaul of the Penal Code, designed to make criminal prosecution simpler; they did not alter the substantive nature of any crime. Applying this court's well established precedent, larceny and embezzlement therefore retain their status as different offenses even after the amendments. Furthermore, the amendments should not be read as "literally excising the words 'larceny' and 'embezzlement' from the legislative dictionary," as the Court of Appeal here held. (See slip opn. at p. 9.) Long after the amendments, the Legislature itself acknowledged the continued existence of, and distinctions between, the offenses of larceny and embezzlement; and, in addition, the Court of Appeal's broad interpretation of the amendments would lead to absurd and legally incorrect results.

Because larceny and embezzlement are "different offenses" (or, in the alternative, "different statements of the same offense") under section 954, appellant may sustain a conviction for each offense based on her single theft. This court therefore should reverse the Court of Appeal and reinstate appellant's conviction for larceny.

STATEMENT OF THE CASE AND FACTS

Appellant stole $58,273.02 from her employer between June 2010 and May 2011. (Slip opn. at pp. 2–5.) She did so mainly by pocketing cash payments and never notifying the company that she had received them. (*Ibid.*) For this theft, she was charged with, and convicted of, one count of embezzlement (§ 503) and one count of grand theft by larceny (§§ 484, 487, subd. (a)). (Slip opn. at pp. 1–2.) The trial court suspended imposition of sentence and granted appellant 36 months' formal probation with some jail time. (Slip opn. at p. 2.) In addition to the usual fines and fees, appellant was ordered to pay $58,273.02 in victim restitution. (Slip opn. at p. 2.) She appealed. (Slip opn. at pp. 5–16.)

The Court of Appeal affirmed the judgment as modified in a partially published opinion. In the published portion of its opinion, the Court of Appeal held that larceny and embezzlement were merely two ways of committing a single offense (i.e., theft) and therefore could not be the basis of separate convictions for the same act. (Slip opn. at p. 11.) In so holding, the court parted ways with its sister division's opinion in *People v. Nazary* (2010) 191 Cal.App.4th 727, review denied Apr. 13, 2011, which held that larceny and embezzlement were different offenses under section 954. Because the Court of Appeal here concluded that larceny and embezzlement were not different offenses, and that appellant could not be convicted of both for a single act of theft, the court modified the judgment by striking appellant's larceny conviction. (Slip opn. at pp. 11, 17.) The court did not explain how or why it chose to strike the larceny conviction rather than the embezzlement conviction. (See *ibid.*)

In the unpublished portion of its opinion, the Court of Appeal rejected appellant's remaining challenges, which were allegations that insufficient evidence supported her two convictions; that the trial court abused its discretion in failing to reduce her charges to misdemeanors; and that the trial court abused its discretion in setting the restitution amount at $58,273.02. (See slip opn. at pp. 11–17.)

Appellant petitioned this court to review the insufficiency-of-the-evidence and victim-restitution issues. Respondent petitioned this court to review the question of whether a defendant could sustain separate convictions for larceny and embezzlement based on the same act.

This court denied appellant's petition for review, and it granted respondent's.

ARGUMENT

I. APPELLANT'S SEPARATE CONVICTIONS FOR LARCENY AND EMBEZZLEMENT BASED ON THE SAME THEFT WERE PROPER BECAUSE LARCENY AND EMBEZZLEMENT ARE DIFFERENT OFFENSES

Section 954 permits multiple convictions based on the same act or indivisible course of conduct where that act or conduct constitutes more than one offense. Whether separate code provisions define more than one offense turns on whether the Legislature intended them to be different offenses. Here, the Legislature intended larceny and embezzlement to be different offenses. First, the Legislature's enactment of larceny and embezzlement in the Penal Code preserved the firm historical distinctions between those offenses. Second, larceny and embezzlement "differ in their necessary elements," and "neither offense is included within the other." (See *People v. Gonzalez* (2014) 60 Cal.4th 533, 539 (*Gonzalez*).) Third, larceny and embezzlement are "self-contained" in different sections and chapters of the Penal Code, with each "set[ting] forth all the elements of a crime" and "each prescrib[ing] a specific punishment," which are not always the same (see *ibid.*), and the two offenses have sometimes divergent enhancements and statutes of limitations. Fourth, and finally, the 1927 amendments to the Penal Code, which grouped related offenses under the umbrella of "theft," did not change the substantive differences between larceny and embezzlement. Accordingly, because larceny and embezzlement are different offenses, section 954 permits appellant's dual convictions for those offenses based on her single theft of $58,273.02.

A. Section 954 Permits Multiple Convictions Based on the Same Act or Indivisible Course of Conduct Where, Among Other Things, the Act or Conduct Constitutes More Than One Offense

Section 954 provides that a defendant may be charged with and convicted of (1) "two or more different offenses connected together in their commission[]"; (2) "different statements of the same offense"; or (3) "two or more different offenses of the same class of crimes or offenses[.]"

Applying section 954, this court has repeatedly affirmed the rule "that the same act can support multiple charges and multiple convictions." (*Gonzalez*, *supra*, 60 Cal.4th at p. 537; see also, e.g., *People v. Wyatt* (2012) 55 Cal.4th 694, 704 [involuntary manslaughter and assault on a child resulting in death for the same act of killing a child]; *People v. Duff* (2010) 50 Cal.4th 787, 792–793 [second degree murder and assault on a child resulting in death for single act of suffocating child]; *People v. Sanchez* (2001) 24 Cal.4th 983, 989–991 [murder and gross vehicular manslaughter]; *People v. Ortega* (1998) 19 Cal.4th 686, 693 (*Ortega*) [grand theft and carjacking for the single act of taking a car]; *People v. Pearson* (1986) 42 Cal.3d 354 (*Pearson*) [sodomy and lewd conduct for the same act of sodomy]; *People v. Beamon* (1973) 8 Cal.3d 625, 639–640 [kidnapping for the purpose of robbery and robbery]; *People v. Montoya* (2004) 33 Cal.4th 1031, 1034 [carjacking and unlawful taking of a vehicle].) The only exception to the general rule permitting multiple convictions is where "one offense is necessarily included in the other." (*People v. Benavides* (2005) 35 Cal.4th 69, 97, internal citation omitted; see also *People v. Reed* (2006) 38 Cal.4th 1224, 1227 (*Reed*) ["[a] judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.]"].)

While a person may be convicted of more than one offense arising out of the same act or course of conduct, a person may be punished only once. (*Reed*, *supra*, 38 Cal.4th at p. 1226.) "Section 954," at issue in this case, only "concerns the propriety of multiple convictions, not multiple punishments, which are governed by section 654." (*Gonzalez*, *supra*, 60 Cal.4th at p. 537.) Thus, when "a single act constitutes more than one crime . . . , the person committing the act can be *convicted* of each of those crimes [under section 954], but [section] 654 prohibits *punishing* the person for more than one of them." (*People v. Kramer* (2002) 29 Cal.4th 720, 722, italics original.) Notably, because a defendant is only punished once for a single act or course of conduct, he or she suffers no adverse effect from section 954's permitting multiple convictions.[2]

B. Whether Separate Code Provisions Describe More Than One Offense Turns on Whether the Legislature Intended Them to Be Different Offenses

Consistent with section 954, a defendant may sustain multiple convictions for a single act or course of conduct where that act or course of conduct constitutes the commission of different offenses. Last year, this court in *Gonzalez* considered the meaning of "different offenses" in addressing the question of whether section 954 permitted a defendant to be convicted of both oral copulation of an unconscious person (§ 288a, subd. (f)) and oral copulation of an intoxicated person (§ 288a, subd. (i)) based on the same act. (*Gonzalez*, *supra*, 60 Cal.4th at p. 535.) The court explained that whether two Penal Code provisions described different offenses was a matter of legislative intent. (*Gonzalez*, at p. 537.) Because the Legislature

---

[2] Appellant here was granted probation. As a result, no sentence was imposed on her (see slip opn. at p. 2), and there was therefore no double punishment issue. (See *People v. Wittig* (1984) 158 Cal.App.3d 124, 137 [where probation is granted there is no double punishment issue to address under section 654].)

intended the various subdivisions of section 288a to describe different offenses, this court concluded that section 954 permitted convictions for each of the various subdivisions based on the same act.

In reaching its conclusion that the section 288a subdivisions were different offenses, this court stressed that they were substantively distinct because they "differ[ed] in their necessary elements—an act of oral copulation may be committed with a person who is unconscious but not intoxicated, and also with a person who is intoxicated but not unconscious—and neither offense is included within the other." (*Gonzalez*, *supra*, 60 Cal.4th at p. 539, citing *Blockburger v. United States* (1932) 284 U.S. 299, 304 ["where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"].) The court further explained that the text and structure of the section 288a subdivisions showed that the Legislature intended them to be independent offenses. (*Gonzalez*, *supra*, 60 Cal.4th at p. 539.) The various subdivisions are "self-contained," with each setting forth all the elements of the offense and specifying the punishment. (*Gonzalez*, at p. 539.) Although the punishments for the two subdivisions at issue in that case were the same (see § 288a, subds. (f) & (i)), the court noted that "[n]ot all of the[] punishments are the same" across the various section 288a subdivisions, which further indicated that each subdivision described a separate offense. (*Ibid.*)

Applying these same principles, larceny and embezzlement are different offenses within the meaning of section 954.

C. The Legislature Intended Larceny and Embezzlement to Be Different Offenses

Larceny and embezzlement are different offenses. First, the Legislature's enactment of larceny and embezzlement in the Penal Code

preserved the firm historical distinctions between those offenses. Second, larceny and embezzlement "differ in their necessary elements," and "neither offense is included within the other." (See *Gonzalez*, *supra*, 60 Cal.4th at p. 539.) Third, larceny and embezzlement are "self-contained" in different sections and chapters of the Penal Code, with each "set[ting] forth all the elements of a crime" and "each prescrib[ing] a specific punishment," which are not always the same (see *ibid.*), and the two offenses have sometimes divergent enhancements and statutes of limitations. Fourth, and finally, the 1927 amendments to the Penal Code, which grouped related offenses under the umbrella of "theft," did not change the substantive differences between larceny and embezzlement.

1. Larceny and embezzlement are historically different offenses, and the Legislature preserved them as such in the Penal Code

Larceny and embezzlement have always been different offenses. Our laws on larceny and embezzlement have their origins in early British law. (*People v. Williams* (2013) 57 Cal.4th 776, 781–786 (*Williams*).) Larceny was a crime at common law, and it was the only theft crime until the mid-to-late 18th century. (*Id.* at p. 782, citations omitted.) At that time, "subtle limitations on the common law crime of larceny spurred the British Parliament . . . to create the separate statutory offenses of theft by false pretenses and embezzlement." (*Id.* at p. 784, citations omitted.) Accordingly, in 1757, the British Parliament enacted a statute prohibiting theft by false pretenses; in 1799, it enacted a statute prohibiting embezzlement. (*Ibid.*, citations omitted.) From its origin, embezzlement "was considered a statutory offense separate and distinct from the common law crime of larceny." (*Ibid.*, citations omitted.)

"Britain's 18th-century division of theft into the three separate crimes of larceny, false pretenses, and embezzlement made its way into the early

criminal laws of the American states." (*Williams*, *supra*, 57 Cal.4th at p. 784.) In the original Crimes and Punishments Act of 1850, larceny and embezzlement were separately included in the Seventh Division (Offences Against Property) of the Statutes of California. (Stats. 1850, ch. 99, §§ 60–70, pp. 235–237.) Larceny was covered by section 60 (grand larceny) and section 61 (petit larceny); embezzlement was covered by section 66 (embezzlement by a public officer) and section 70 (embezzlement by clerks, apprentices, servants, or employees). (Stats. 1850, ch. 99, pp. 235–237.) In the case of embezzlement by a public officer, the punishment was a felony subject to up to 10 years' imprisonment. (Stats. 1850, ch. 99, § 70, p. 237.) For other forms of embezzlement, the punishment was to match that of larceny, i.e., to be punished in "the manner prescribed by law for feloniously stealing property of the value of the articles . . . taken, embezzled, or converted."[3] (Stats. 1850, ch. 99, § 66, p. 236.) In 1864, the crime of embezzlement was expanded to cover unlawful takings by an "[a]gent" from a "principal." (Stats. 1863–1864, ch. 42, § 70, pp. 40–41.) Larceny and embezzlement as described in the Crimes and Punishments Act were considered distinct offenses. (See *People v. Belden* (1869) 37 Cal. 51, 53 [explaining the distinction between the two offenses].)

In 1872, California created the Penal Code. Given that larceny and embezzlement were different offenses, the drafters housed them separately in the Penal Code's part 1, title 13, "Of Crimes Against Property": "Larceny" resided in chapter 5, and "Embezzlement" resided in chapter 6. The two offenses still inhabit those respective locations today. "Larceny" was defined as "the felonious stealing, taking, carrying, leading, or driving

---

[3] For five years between 1851 and 1856, possible punishment also included "death" for grand larceny and "any number of lashes not exceeding fifty upon the bare back" for petit larceny. (Stats. 1851, ch. 95, §§ 2–3, pp. 406–407; Stats. 1856, ch. 139, §§ 7–8, p. 220.)

away the personal property of another." (§ 484 (1872).)[4] "Embezzlement" was defined as "the fraudulent appropriation of property by a person to whom it has been [e]ntrusted." (§ 503 (1872).) These separate definitions remain intact today. (See § 484, subd. (a) [larceny] & §§ 484, subd. (a) & 503 [embezzlement].) The punishment for each offense was contained, as it is today, in its respective chapter. (See §§ 489, 490 [larceny]; § 514 [embezzlement].) The punishments for the two offenses were mostly equivalent except that beginning in 1880, and continuing today, when "embezzlement . . . is of the public funds of the United States, or of this state, or of any county or municipality within this state," the punishment was greater in two regards: the offense was an automatic felony,[5] and "the person so convicted [was] ineligible thereafter to any office of honor, trust, or profit in this state." (§ 514 (from 1880 to present).)[6]

In case there was any doubt that larceny and embezzlement were adopted as different offenses in the Penal Code, the California Code

---

[4] This language was chosen over the language in the New York Penal Code because California's "adjudications upon the statute were frequent and the definition had assumed certainty in the hands of the Courts." (Code commrs., note foll., Ann. Pen. Code, § 484 (1st ed. 1872, Haymond & Burch, commrs. annotators) pp. 187–188 (hereafter Ann. Pen. Code (1872)) [noting that "[a]s defined in the New York Penal Code, Sec. 584, 'larceny is the taking of personal property accomplished by fraud or stealth, or without color of right thereto, and with the intent to deprive another thereof'"].) In other words, California was codifying its well settled common law definition of larceny.

[5] In 1880, it was punishable with imprisonment up to ten years. (See § 514 (1880).)

[6] This punishment has constitutional origins. (See Cal. Const. of 1849, art. IV, § 22 ["No person who shall be convicted of the embezzlement, or defalcation of the public funds of this State, shall ever be eligible to any office of honor, trust, or profit under this State; and the Legislature shall, as soon as practicable, pass a law providing for the punishment of such embezzlement, or defalcation, as a felony"].)

Commission said so explicitly. In its notes to the first edition of the Penal Code, the California Code Commission described larceny and embezzlement as "different offenses." (Ann. Pen. Code (1872), § 484, p. 188.) In its note on embezzlement, the Commission took care to explain that "[t]his offense, in its commission and its punishment, is intimately connected to larceny." (*Id.* at § 503, p. 196.) Nonetheless, larceny and embezzlement are "different offenses," and they—along with other crimes affecting property—"require to be somewhat carefully distinguished." (*Id.* at § 484, p. 188, emphasis added.) Because the California Code Commission's versions of larceny and embezzlement were adopted by the Legislature, and because the definitions of larceny and embezzlement remain the same today, "the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature." (See *People v. Mendoza* (2000) 23 Cal.4th 896, 909, quoting *People v. Wiley* (1976) 18 Cal.3d 162, 171.)

Notably, not long after the Penal Code came into existence, this court was called upon—as it is again in this case—to determine whether larceny and embezzlement were different offenses for purposes of section 954. (See *People v. De Coursey* (1882) 61 Cal. 134 (*De Coursey*); see also *People v. Quvise* (1880) 56 Cal. 396 (*Quvise*).) This court held unequivocally that they were. (See *De Coursey*, at p. 135; *Quvise*, at p. 397.) In *De Coursey*, a defendant was charged with and convicted of one count of larceny for stealing a horse and buggy and a separate count of embezzlement for the same act. (*De Coursey*, at pp. 134–135.) At the time, section 954 was quite different from today's version and read: "The indictment must charge but one offense, and in one form only, except that when the offense may be committed by the use of different means, the

indictment may allege the means in the alternative." (See § 954 (1872); see also *De Coursey*, at p. 135 [explaining the one-offense rule].)[7] This court was thus tasked with determining whether larceny and embezzlement were "one offense" or two different offenses. (See *De Coursey*, at p. 135.) After examining the respective elements of larceny and embezzlement, the court said "it is very clear that the information in this case charges two separate and distinct crimes (and, in fact, defendant was convicted of both) . . . ." (*Id.* at p. 135.) Notably, in rejecting indictments containing allegations of both larceny and embezzlement for the same act, this court implicitly also rejected the notion that they constituted a single offense "committed by the use of different means." (Cf. § 954 (1872); see also *De Coursey*, at pp. 134–135; *Quvise*, at pp. 396–397.) That section 954 then *forbade*—but today *permits*—the charging and conviction of multiple "different offenses" or "different statements of the same offense" does not alter this court's unqualified determination that larceny and embezzlement were "[t]wo separate and distinct offenses" (*Quvise*, at p. 397) that were "in their nature essentially different and are dependent upon different facts" (*De Coursey*, at pp. 135–136).

As this court recalled in *Williams*, "a page of history is worth a volume of logic." (57 Cal.4th at p. 790, citing Justice Oliver Wendell Holmes, Jr. in *New York Trust Co. v. Eisner* (1921) 256 U.S. 345, 349.) The history of larceny and embezzlement—and its treatment by this court—lead to the inescapable conclusion that they are different offenses. As such, pursuant to section 954, a defendant may be charged with and convicted of both.

---

[7] The *De Coursey* opinion refers to section 95 rather than section 954. It appears this is a typographical error, as the language it cites is from section 954 as it then existed.

2. Larceny and embezzlement have different elements, and neither is necessarily included within the other

Larceny and embezzlement are different offenses because, just like the offenses in *Gonzalez*, they "differ in their necessary elements," and "neither offense is included within the other." (See *Gonzalez*, *supra*, 60 Cal.4th at p. 539; see also *Blockburger v. United States*, *supra*, 284 U.S. at p. 304 ["where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"]; *People v. Majors* (1884) 65 Cal. 138, 146, superseded by statute on other grounds as stated in *Kellett v. Superior Court of Sacramento County* (1966) 63 Cal.2d 822, 826 fn. 4 [two offenses existed for double jeopardy where "[t]he two crimes, although committed at one time and by the same act, are entirely different in their elements, and the evidence required to convict in the one case very different from that essential to a conviction in the other"].)

As for the crimes' respective elements, larceny is the felonious stealing, taking, carrying, leading, or driving away of the personal property of another. (§ 484.) That offense is committed by "every person who (1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and carries the property away." (*People v. Davis* (1998) 19 Cal.4th 301, 305 (*Davis*).) On the other hand, embezzlement is "the fraudulent appropriation of property by a person to whom it has been [e]ntrusted." (§ 503; see also § 484.) Embezzlement, unlike larceny, requires that (1) property be entrusted to a person based on "the existence of a 'relation of trust and confidence,' similar to a fiduciary relationship, between the victim and the perpetrator" (*People v. Wooten* (1996) 44 Cal.App.4th 1834, 1845,

citations omitted); and (2) the person breach that trust by converting or using the property with the intent to defraud its owner (*In re Basinger* (1988) 45 Cal.3d 1348, 1363–1364 (*Basinger*)).

Moreover, neither offense is included in the other because each contains elements that the other does not. (See *Reed*, *supra*, 38 Cal.4th at p. 1231 [under the applicable elements test, "if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former"].) Larceny requires that a defendant take or carry away the property (§ 484; *Davis*, *supra*, 19 Cal.4th at p. 305); by contrast, "[a] distinct act of taking is not necessary to constitute embezzlement." (§ 509.) Larceny also requires a trespass (*Davis*, at p. 305); embezzlement does not (see *Basinger*, *supra*, 45 Cal.3d at p. 1363). For larceny, an intent to permanently deprive the rightful owner of possession is needed (*Davis*, at p. 305); for embezzlement, "[a]n intent to deprive the rightful owner of possession even temporarily is sufficient" (*Basinger*, at p. 1363). Finally, embezzlement requires that property be fraudulently appropriated by "a person to whom it has been [e]ntrusted" (§ 503); larceny does not require fraudulent appropriation or an entrustment of property to the defendant (§ 484; see also CALCRIM No. 1800). Because there are circumstances in which a person can commit the one offense and not the other, neither is included in the other; rather, they are separate offenses. (*Reed*, at p. 1231.)

3. Larceny and embezzlement are self-contained in different chapters of the Penal Code, and they have sometimes divergent punishments, enhancements, and statutes of limitations

The structure of the larceny and embezzlement provisions, along with their sometimes divergent punishments, enhancements, and statutes of limitations, show that the Legislature has established and maintained them as different offenses. Similarly to *Gonzalez*, the offenses here are

respectively "self-contained" in different sections and chapters of the Penal Code, with each "set[ting] forth all the elements of a crime" and "each prescrib[ing] a specific punishment," which are not always the same. (*Gonzalez*, *supra*, 60 Cal.4th at p. 539.) Indeed, the Legislature's intent to treat larceny and embezzlement as separate offenses is clearer than it was in *Gonzalez*, because the oral copulation offenses at issue there were merely different subdivisions of one section of the Penal Code, whereas larceny and embezzlement occupy different sections—and, in fact, entirely different chapters—of the Penal Code. (Compare § 503 [chapter 6 of title 13 -- Embezzlement] with §§ 484, 487 [chapter 5 of title 13 -- Larceny].)[8] Each chapter is "self-contained" because each provides the statutory elements, defenses, and punishments for the respective offenses. (See *Gonzalez*, *supra*, 60 Cal.4th at p. 539.) In addition, other provisions in the Penal Code—namely, a crime enhancement provision and a certain statute of limitations—apply only to embezzlement and not to larceny.

Respondent expounds each of these points in turn:

First, the statutory elements and defenses for larceny and embezzlement are contained in their respective chapters. The elements for larceny are found in chapter 5, sections 484 and 487, and the elements for embezzlement are found in chapter 6, sections 503 through 508. The embezzlement chapter also contains statements of law and defenses that are specific to embezzlement. (See §§ 509–513.) For example, section 509 distinguishes embezzlement from some other types of theft by explaining that "[a] distinct act of taking is not necessary to constitute embezzlement." Section 511 articulates the claim-of-right defense, which excuses a defendant from liability for embezzlement where the defendant believes in

[8] The offense of theft by false pretenses is also found in a different chapter, namely, chapter 8, "False Personation and Cheats," section 532.

good faith that the property belongs to him or her. In that same vein, section 512 explains that the "intent to restore property" is no defense to embezzlement, while section 513 discusses how restoration of embezzled property may nonetheless serve to mitigate the punishment for that crime. These embezzlement provisions do not apply to larceny,[9] and they are found nowhere else in the Penal Code.

Second, the punishments for larceny and embezzlement are also contained in their respective chapters. (See §§ 489, 490, 502.9 [larceny]; §§ 514, 515 [embezzlement].) While the punishment for embezzlement is linked to the punishment for larceny and other theft offenses in most cases, section 514 provides the only full articulation of the punishment for embezzlement. And "[n]ot all of these punishments are the same" as the punishments for larceny. (See *Gonzalez*, *supra*, 60 Cal.4th at p. 539.) For example, section 514 provides a different punishment for "embezzlement . . . of the public funds of the United States, or of this state, or of any county or municipality within this state." Specifically, such an embezzlement is an automatic felony regardless of the amount, and it precludes "the person so convicted [from taking] any office of honor, trust, or profit in this state." (§ 514.) For the many federal, state, county, and city employees in California, this punishment distinction between embezzlement and other forms of theft is not merely technical. When a public employee is accused

---

[9] This court has held that a claim-of-right defense also exists for larceny. (See *People v. Tufunga* (1999) 21 Cal.4th 935.) While the court suggested in a footnote the possible application of section 511 to larceny through section 490a, it based its holding instead on the existence of this defense for larceny at common law. (See *id.* at pp. 952, fn. 4, 945–946.) Indeed, section 490a cannot be applied to chapter 6's embezzlement-specific provisions without rendering many of them nonsensical and legally inaccurate. (See *post*, section I.C.4.b.(2), pp. 27–29; see also *People v. Darling* (1964) 230 Cal.App.2d 615, 620 (*Darling*).)

of theft from his or her employer, it matters whether it is a simple larcenous theft by an employee (§§ 484, 487, subd. (b)(3)) or a breach of a trust amounting to embezzlement (§§ 503, 504). In the case of the former, depending on the amount, it would be either grand theft, which is punishable as a "wobbler,"[10] (§§ 484, 487, subd. (b)(3), 489, see also § 17, subd. (b)), or petty theft, which is punishable as a misdemeanor (§§ 484, 490, see also § 17, subd. (a)); in the case of the latter, as just explained, the punishment is considerably harsher (see § 514).[11]

Third, the Legislature also has distinguished between larceny and embezzlement in enacting the so-called "aggravated white collar crime enhancement." (See § 186.11.) This law was enacted by a 1996 statute, which added a new chapter to the Penal Code, entitled "Fraud and Embezzlement: Victim Restitution." (Stats. 1996, ch. 431 (A.B. 2827), § 2.) Among other things, section 186.11 provides for additional punishment—up to five years and a fine of up to $500,000—for felony conduct meeting certain enumerated criteria. (See § 186.11, subds. (a)–(c).) According to its plain language, section 186.11 only applies to "person[s] who commit[] two or more related felonies, *a material element of which is fraud or embezzlement*, which involve a pattern of related felony conduct." (See § 186.11, subd. (a)(1), italics added.) Thus, by its own terms, section 186.11 applies only to theft offenses involving "fraud or embezzlement"

---

[10] "[W]obblers" are crimes that "are chargeable or, in the discretion of the court, punishable as either a felony or a misdemeanor[.]" (*People v. Park* (2013) 56 Cal.4th 782, 789.)

[11] Notably, the existence of different punishments is not a necessary characteristic of different offenses. (See *De Coursey*, *supra*, 61 Cal. at pp. 135–136 [larceny and embezzlement are different crimes; "[i]t matters not that the punishment affixed by the law to both crimes is the same, the two crimes are in their nature essentially different and are dependent upon different facts"].)

and does not apply to certain other theft crimes, such as larceny or robbery. Indeed, this is consistent with its title as "the aggravated *white collar crime* enhancement." (See § 186.11, subd. (a)(1), italics added.) The Legislature's enactment of this enhancement evidences desire to treat embezzlement—along with other thefts involving fraud—as substantively distinct from non-fraud theft offenses, such as larceny and robbery.

Fourth, a difference in the respective statutes of limitations for larceny and embezzlement reveals the legislative intent to treat larceny as distinct from embezzlement. The statute of limitations for most grand thefts is three years from the discovery of the theft. (§§ 801, 803.) But there is no statute of limitations for embezzlement of public money. (§ 799.) Just as with the greater punishment for embezzlement of public funds discussed above, section 799 applies only to *embezzlement* of public money, not to *larceny* (or other theft) of public money. (See *Darling*, *supra*, 230 Cal.App.2d 615 [theft of welfare funds by false pretenses not subject to section 799].)

Importantly, with respect to the differences in punishment, the enhancement, and the statutes of limitations, it does not matter that none of those specific differences are applicable to this case. The same was true in *Gonzalez*, where the punishments for the two subdivisions at issue were equivalent. (See *Gonzalez*, *supra*, 60 Cal.4th at p. 535 [analyzing oral copulation of an unconscious (§ 288a, subd. (f)) and oral copulation of an intoxicated person (§ 288a, subd. (i))].) This court still found it relevant that the punishments for the various offenses were "not *all* . . . the same" because it showed that the Legislature could not have intended *any* of the various offenses to be the same crime. (See *id.* at p. 539, italics added.) Applying equivalent reasoning here, larceny and embezzlement are not the same offense. When a defendant steals public funds, a *different* punishment and a *different* statute of limitations apply depending on

whether the defendant stole those funds by *larceny* or whether the defendant stole those funds by *embezzlement*. (Compare §§ 484, 487, 489, 490 with §§ 503, 504, 514 and compare §§ 801, 803 with § 799.) Similarly, whereas a defendant's *larceny* of the quantity and degree articulated in section 186.11 would not subject a defendant to the "white collar theft enhancement," his or her *embezzlement* of that same quantity and degree does by definition. (See § 186.11 [applying where "a material element of [the crime] is fraud or embezzlement"].)

Because the full definitions of larceny and embezzlement are self-contained in their respective chapters, and because their punishments, enhancements, and statutes of limitations may differ, the Legislature intended larceny and embezzlement to be different offenses. (See *Gonzalez*, *supra*, 60 Cal.4th at p. 539.)

4. The 1927 Penal Code amendments, which grouped related offenses under the umbrella of "theft," did not convert larceny and embezzlement into a single offense

Larceny and embezzlement remain distinct offenses despite the 1927 amendments, which grouped them under the umbrella of "theft."

In 1927, the Legislature made several procedural amendments to the Penal Code with the goal of providing this state with "the most efficient system for the swift and certain administration of criminal justice." (*People v. Hickman* (1928) 204 Cal. 470, 477.) As part of this procedural reform, the Legislature "amalgamate[d] the crimes of larceny, embezzlement, false pretenses and kindred offenses under the cognomen of theft." (*People v. Myers* (1929) 206 Cal. 480, 483 (*Myers*).) This was accomplished by amending section 484 to list all the theft offenses together in one subdivision and by adding section 490a, which provides that "[w]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if

the word 'theft' were substituted therefor." (§§ 484, 490a; see also Stats. 1927, ch. 619, p 1046, § 1 & p. 1047, § 7.)

Based solely on these amendments, the Court of Appeal here held that larceny and embezzlement are not two "different offenses" (cf. § 954), but instead "merely two ways of committing the single offense of theft." (Slip opn. at p. 11.) The court rested its holding on its belief that the amendments "plainly eliminated the distinctions between the various theft offenses" and "literally excis[ed] the words 'larceny' and 'embezzlement' from the legislative dictionary." (Slip opn. at p. 9.) The Court of Appeal overstated the effect of the amendments.

First, this court has repeatedly explained that the amendments did not "eliminate[] the distinctions between the various theft offenses" (cf. slip opn. at p. 9); rather, they only effected a change in nomenclature, while leaving undisturbed the substance of any law. Larceny and embezzlement therefore remain distinct offenses following the amendments.

Second, the Legislature did not intend to "excis[e] the words 'larceny' and 'embezzlement' from the legislative dictionary." (Cf. slip opn. at p. 9.) On the contrary, long after the amendments, the Legislature has continued to treat larceny and embezzlement as extant and distinct offenses, frequently invoking their respective names for this purpose. In addition, the Legislature plainly did not intend this broad interpretation of the amendments because such an interpretation would lead to absurd and legally incorrect results.

Accordingly, larceny and embezzlement remain different offenses after the 1927 amendments.

a. This court has repeatedly held that the substantive differences among the various theft offenses remain intact following the amendments

Ample precedent from this court makes clear that larceny and embezzlement survived the 1927 amendments as different offenses. As this court explained soon after the amendments, and recently reaffirmed, "the essence of [the 1927 amendments] is simply to effect a change in nomenclature without disturbing the substance of any law." (*Myers*, *supra*, 206 Cal. at p. 485; see also *Williams*, *supra*, 57 Cal.4th at p. 789, quoting and citing *Myers* for that proposition.) The purpose of the amendments was merely to remove some of the *procedural* distinctions between these offenses—i.e., "the technicalities that existed in the pleading and proof of these crimes at common law" (*People v. Ashley* (1954) 42 Cal.2d 246, 258)—while maintaining all the *substantive* differences between them. (*Davis*, *supra*, 19 Cal.4th at p. 304.) Indeed, this court has repeatedly held that the Legislature's assembly of the various theft offenses under one umbrella did not change the distinct elements of those offenses. (See *Williams*, at p. 786 ["consolidation of larceny, false presentences, and embezzlement . . . did not change the elements of those offenses"]; *Davis*, at p. 304 [when larceny, embezzlement, and false pretenses were consolidated "most of the procedural distinctions between those offenses were abolished[; b]ut their substantive distinctions were not"]; *Ashley*, at p. 258 [describing larceny by trick and obtaining property by false pretenses as "crimes" that are "much alike" but "aimed at different criminal acquisitive techniques"]; *Myers*, at p. 483 ["[n]o elements of the former crimes have been changed by addition or subtraction" following the 1927 amendments].)

This court's recent decision in *Williams*, *supra*, 57 Cal.4th 776, further shows how firm the historical distinctions between the various theft

offenses have remained even after the 1927 amendments. At issue in that case was the element of robbery that requires the "felonious taking of personal property of another[.]" (*Williams*, *supra*, 57 Cal.4th at p. 779; see also § 211.) Called to determine what types of theft could constitute a "felonious taking," this court held that only theft by larceny could meet that element. (*Williams*, at pp. 779, 786–787.) In reaching this holding, the majority rejected a broad application of section 490a, which was added by the 1927 amendments. Under section 490a, "[w]herever any law or statute *refers to* or *mentions* larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." (Italics added.) In the dissent's view, because "felonious taking" was synonymous with larceny at common law, as the majority agreed (*Williams*, at pp. 786–787), the robbery statute's use of that phrase necessarily constituted a "refer[ence] to" or "mention[]" of larceny for purposes of section 490a. (See *Williams*, at pp. 796–797 (dis. opn. of Baxter, J.).) Accordingly, the robbery statute—read through the lens of section 490a—should permit any form of theft to meet its "felonious taking" requirement. (*Williams*, at pp. 796–797 (dis. opn. of Baxter, J.).) The majority disagreed with this application of section 490a, emphasizing the court's more-than-80-year history of reaffirming that the 1927 amendments did not change the elements of the theft offenses or the "substance of any law." (*Williams*, at p. 789; citing *Myers*, *supra*, 206 Cal. at p. 485.) By limiting the theft element of robbery to larceny, and by excluding false pretenses and embezzlement, *Williams* shows that each theft crime is a separate and distinct offense.

As this court's decisions make clear, the various theft offenses—including larceny and embezzlement—retained their substantive differences after the 1927 amendments. In concluding that the "legislative amendments plainly eliminated the distinctions between the various theft

offenses" (slip opn. at p. 9), the Court of Appeal simply ignored this court's unequivocal precedent to the contrary. (Compare slip opn. at pp. 5–11 with *Nazary*, *supra*, 191 Cal.App.4th at pp. 740–744 [discussing this court's precedent on the 1927 amendments and finding larceny and embezzlement to be different offenses for section 954 purposes].) Because larceny and embezzlement are substantively distinct following the 1927 amendments, they are still different offenses under section 954. (See *Gonzalez*, *supra*, 60 Cal.4th at pp. 539–540.)

b. The Legislature did not intend the amendments to erase from the Penal Code the term "larceny" or "embezzlement," or the distinct offenses each represents

Contrary to the Court of Appeal's conclusion, the 1927 amendments did not "excis[e] the words 'larceny' and 'embezzlement' from the legislative dictionary." (Cf. slip opn. at p. 9.) First, the Legislature itself continues to treat larceny and embezzlement as current and distinct offenses long after those amendments. Second, it is evident that the Legislature did not intend the amendments to remove the distinctive meanings of "larceny" and "embezzlement" from the Penal Code because such a broad interpretation of the amendments would lead to absurd and legally incorrect results.

(1) The Legislature continues to treat larceny and embezzlement as distinct offenses long after the amendments

Long since 1927, the Legislature has continued to treat larceny and embezzlement as distinct offenses.

First, the Legislature has left intact the Penal Code's separate chapter for embezzlement. (See § 503 et seq.) This is more than mere oversight. While section 484 now also contains an articulation of the offense of embezzlement, and sections 489 and 490 contain most of the substance of

the embezzlement punishments, these general "theft" sections contain only an incomplete description of embezzlement. By contrast, the embezzlement chapter continues to contain all the statutory articulations of the crime of embezzlement and related definitions (§§ 503–508, 510), information relating to the elements and defenses specific to embezzlement (§§ 509, 511–513), and the full gamut of punishment for embezzlement (§§ 514, 515). As explained in detail in Section I.C.3 above, these embezzlement sections contain information about embezzlement's elements, defenses, and punishments that the "theft" section does not. (See *ante*, pp. 15–16.) Indeed, this complete information about the law of embezzlement is not contained anywhere else in the Penal Code.

Moreover, the Legislature has continued to take affirmative steps to maintain embezzlement's separate chapter. Just last year, for example, a legislative amendment to section 504b went into effect. (See Stats. 2013, ch. 531 (A.B. 502), § 26, operative July 1, 2014.) Before that, in 1996, the Legislature indicated that larceny in chapter 5 was distinct from embezzlement in chapter 6 by separately adding to *both* chapters identical language increasing the penalties for committing the respective offenses against "an elder or dependent adult." (See Stats. 1996, ch. 788 (A.B. 1205); see also §§ 502.9, 515.)[12] The Legislature again amended these separate penalty provisions in 2004 to expand that penalty to cover offenses against any dependent "person." (See Stats. 2004, ch. 823 (A.B. 20), § 9.) If larceny and embezzlement were a single crime fully contained in chapter 5's section 484, it would be unnecessary for the Legislature to upkeep

[12] The same statute also added the identical penalty provision to extortion in chapter 7. (See § 525.) Extortion is indisputably a separate offense from any of the theft crimes. (See *People v. Camodeca* (1959) 52 Cal.2d 142, 148 [defendant properly convicted of both attempted theft by false pretenses and attempted extortion because they are separate crimes].)

chapter 6, and it would be redundant for the Legislature to add identical provisions to both chapters. Because legislative acts generally should not be read as unnecessary or redundant (see *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207 ["interpretations which render any part of a statute superfluous are to be avoided"]), it follows that the Legislature separately maintains chapter 6 because embezzlement is a separate offense.

Second, the Legislature has continued since 1927 to treat embezzlement separately from the other theft crimes in the Penal Code. For example, as explained above at pages 18 to 19, grand theft of any kind is normally subject to a statute of limitations of three years after discovery (§§ 801, 803), whereas "embezzlement of public money" has no statute of limitations (§ 799). (See also *Darling, supra,* 230 Cal.App.2d at p. 619 [section 799 does not apply to other types of theft of public money].) Notably, these limitations provisions were added to the Penal Code in 1984 and, in some cases, amended as recently as this year. (See Stats. 1984, ch. 1270, § 2 [adding sections 799 and 801]; Stats. 2014, ch. 191, § 1, eff. Jan 1, 2015 [amending section 803].) In addition, in 1989, the Legislature added section 501, which relaxed the charging and proof requirements for the "larceny or embezzlement" of certain property. (See Stats. 1989, ch. 897, § 21.) Some of section 501 applies to "trial[s] for larceny or embezzlement"; the Legislature's inclusion of the names of both offenses—rather than the blanket term "theft"—suggests that they are different. (See § 501.) Moreover, some of section 501 applies only to "trial[s] for *embezzlement*" and where "the offender is proved to have *embezzled* . . . "; the Legislature's deliberate omission of larceny from those clauses again evidences a legislative desire to distinguish the two offenses substantively. (See § 501, italics added.) Finally, as explained above (see *ante*, pp. 17 to 18), in 1996 the Legislature added its "aggravated white collar crime

enhancement," which applies to "fraud and embezzlement" crimes, but not to larceny. (See § 186.11, added by Stats. 1996, ch. 431 (A.B. 2827), § 2.)

In addition, the phrases "larceny or embezzlement," "theft or embezzlement," or "the crimes of theft or embezzlement" appear in numerous code provisions, both within and without Penal Code. And many of these provisions were enacted long after the 1927 amendments. (See, e.g., § 501, added in 1989 ["larceny or embezzlement"]; § 801.6 ["theft or embezzlement"], added in 1998; § 803, added in 2005 and amended in 2015 ["the crimes of theft or embezzlement"]; Veh. Code, § 10502 ["theft or embezzlement"], added in 1959 and amended in 1992; Veh. Code, § 38125 ["theft or embezzlement"], added in 1972 and amended in 1975; Veh. Code § 4605 ["theft or embezzlement"], added in 1976; Welf. & Inst. Code, § 15656 ["theft or embezzlement"], added in 1994 and amended in 2010; Educ. Code, § 26139 et seq. [referencing "prosecution for fraud, theft, or embezzlement"], added in 1995 and amended in 2013; Veh. Code, § 10553 ["theft or embezzlement"], added in 1970 and amended in 1980; Gov. Code, § 11007.5 [provision allowing state agencies to secure insurance against "burglary, robbery, theft, or embezzlement"]; Labor Code, § 230.2 [defining "[v]ictim" as including person against whom "[a] felony provision proscribing theft or embezzlement" has been committed], added in 2003.) If embezzlement is the same offense as larceny (or the other theft offenses) after 1927, it would be unnecessary for the Legislature to treat them separately in these code provisions years later. Simply put, the Legislature's separate references to "embezzlement" after 1927 suggest that it is still a separate offense. (See *In re C.H.* (2011) 53 Cal.4th 94, 103 ["[i]t is a settled principle of statutory construction, that courts should strive to give meaning to every word in a statute and to avoid constructions that render words, phrases, or clauses superfluous"].)

In sum, even after the 1927 amendments, the Legislature has never stopped treating larceny and embezzlement as different offenses. Quite the opposite, it has maintained them in separate chapters; it has distinguished their punishments, enhancements, and statutes of limitations; and it has invoked their respective names when referring to them respectively. The Legislature's treatment of larceny and embezzlement shows that it considers them to be different offenses.

(2) The Legislature did not intend the amendments to be so broad as to remove the respective meanings of "larceny" and "embezzlement" from the Penal Code

The Legislature did not intend the 1927 amendments to remove the distinctive meanings of "larceny" and "embezzlement" from the Penal Code because such a broad interpretation of the amendments would lead to absurd and legally incorrect results. As noted above, section 490a provides that "[w]herever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." Applied literally, as the Court of Appeal did here (see slip opn. at p. 9), section 490a would render several theft-related provisions nonsensical and contrary to undisputed law. For example, applying section 490a to section 503 would change that provision to read that "[theft] is the fraudulent appropriation of property by a person to whom it has been [e]ntrusted." But that is not the definition of all "theft"; it is the definition of embezzlement alone. (See *Basinger*, *supra*, 45 Cal.3d at pp. 1363–1364 [embezzlement is the type of theft that requires appropriation of entrusted property]. Similarly, applying section 490a to section 509 would alter that provision to read that "[a] distinct act of taking is not necessary to constitute [theft]." (§§ 490a, 509.) Again, this is the law for embezzlement

but not for larceny. (See *Davis*, *supra*, 19 Cal.4th 301, 305 [theft by larceny requires taking].)

The problems of a broad application of section 490a were further illustrated in *Darling*. (See *Darling*, *supra*, 230 Cal.App.2d at pp. 618–620.) There the court was called to determine which statute of limitations applied to the theft of welfare funds by false pretenses: Was it the three-year limitation that applied to most felonies, including grand theft by false pretenses (former § 800); or was it the exception for "embezzlement of public money," which prescribed no time limitation at all (former and current § 799)? (*Darling*, at p. 618.) In concluding that the normal three-year limitation period applied, the court rejected the argument that section 490a made section 799 applicable to all theft crimes. (*Darling*, at p. 619.) The court explained that this literal interpretation of section 490a would lead to "absurd and ridiculous results" and therefore must be rejected. (*Darling*, at p. 620.)[13] Indeed, the court observed, if section 490a actually supplanted "embezzlement" with "theft" throughout the codes, then a person who stole 10 cents from a parking meter—or other such "public funds"—would be subject to greater punishment (i.e., an automatic felony and ineligibility to hold office) (§ 514), would lose his or her right to vote (Elec. Code, §§ 383, 389 & 14240),[14] and would be subject to prosecution without limitation as to time (§ 799). (See *Darling*, at p. 620.) The 1927 amendments were not intended to have such a far reach. Instead, as the *Darling* court explained, and this court has said numerous times, the 1927

[13] This court has cited *Darling* twice for the proposition that "a literal interpretation of a statute is not necessarily controlling and will be rejected if it leads to an absurdity." (*People v. Hannon* (1971) 5 Cal.3d 330, 335 (*Hannon*); see also *People v. Rogers* (1971) 5 Cal.3d 129, 144.)

[14] These provisions were in effect when *Darling* was decided, and they coexisted with section 490a until they were later repealed in 1976. (See Stats. 1976, ch. 1275, § 11.)

amendments simply grouped the various theft crimes into a general definition of theft—or, as one court put it, "assembled" the "several crimes . . . under the term 'theft'" (*People v. Sanders* (1998) 67 Cal.Appl.4th 1403, 1416)—and did not change the substantive differences among those crimes. (See *Darling*, at p. 620; see also, e.g., *Myers*, *supra*, 206 Cal. at p. 483.)

Simply put, because a broad application of the 1927 amendments would lead to illogical and absurd results, this court should reject it. (See *Hannon*, *supra*, 5 Cal.3d at p. 335.) Instead, this court should again affirm its established precedent, which holds that the 1927 amendments did not "change the substance of any law" (*Myers*, *supra*, 206 Cal. at p. 483), and should conclude that—despite the amendments—larceny and embezzlement remain different offenses for purposes of section 954.

II. ALTERNATIVELY, APPELLANT'S SEPARATE CONVICTIONS FOR LARCENY AND EMBEZZLEMENT BASED ON THE SAME THEFT WERE PROPER BECAUSE LARCENY AND EMBEZZLEMENT ARE—AT THE VERY LEAST—DIFFERENT STATEMENTS OF THE SAME OFFENSE

Even if this court were to determine that larceny and embezzlement are not different offenses, section 954 still permits the dual convictions in this case because larceny and embezzlement are—at the very least—"different statements of the same offense." (See § 954.)

Section 950 requires that an accusatory pleading contain "[a] statement of the public offense or offenses charged therein." A "statement of offense" is "a statement that the accused has committed some public offense therein specified." (§ 952.) As explained in section I.A above, section 954 provides that a defendant may be charged "under separate counts" with, and convicted of, not only "two or more different offenses connected together in their commission" or "two or more different offenses of the same class of crimes or offenses," but also "different statements of the same offense." Accordingly, where a defendant's single act or course

of conduct can be averred as "different statements of the same offense," the prosecution may plead them as separate counts and seek conviction for each one. (§ 954; see also *Ortega*, *supra*, 19 Cal.4th at p. 692 [section 954 permits that a defendant be charged and convicted of "different statements of the same offense"], *Pearson*, *supra*, 42 Cal.3d at p. 354 [same]; cf. *Gonzalez*, *supra*, 60 Cal.4th at p. 537 ["Because we conclude that the subdivisions of section 288a describe different offenses, we need not determine whether section 954 allows conviction of different statements of the same offense"].)

Here, even if theft is a single offense, the undisputed substantive distinctions among larceny, embezzlement, and theft by false pretenses make them—at the very least—different *statements* of that single offense. (See § 954.) As explained in the previous section, each of the theft crimes—including larceny and embezzlement at issue here—is distinct in nature. (See section I.C, *ante*, pp. 7–29.) For all those same reasons, if this court were to determine that there is only one offense of "theft," then larceny and embezzlement are "different statements of th[at] same offense." (See § 954.) Accordingly, for this alternative reason, section 954 permits appellant's dual convictions here.

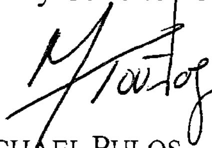
CONCLUSION

For the foregoing reasons, respondent respectfully requests that this court reinstate appellant's larceny conviction and affirm the remainder of the judgment.

Dated: May 26, 2015

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
LINDA GÁNDARA
Deputy Solicitor General



MICHAEL PULOS
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SD2013806208
71088229.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 8,532 words.

Dated: May 26, 2015

KAMALA D. HARRIS
Attorney General of California

MICHAEL PULOS
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

Case Name: **The People v. Vidana**
No.: **S224546**

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 May 27, 2015, I served the attached **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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

The Honorable Michael A. Ramos
District Attorney
San Bernardino Co. District Attorney's Office
303 West 3rd Street, 6th Floor
San Bernardino, CA 92415-0042

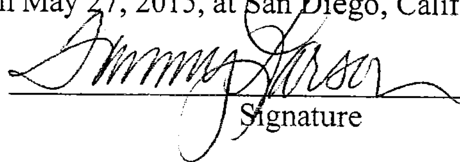
The Honorable Edward D. Webster
Riverside County Superior Court
Riverside Historic Courthouse
4050 Main Street
Riverside, CA 92501-3703

Fourth Appellate District
Division Three
Court of Appeal of the State of California
P.O. Box 22055
Santa Ana, CA 92702

and furthermore, I declare in compliance with California Rules of Court, rules 2.251(i)(1) and 8.71(f)(1), I electronically served a copy of the above document on May 27, 2015, on Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and on Appellant's attorney Valerie G. Wass via the registered electronic service address wass100445@gmail.com by 5:00 p.m. on the close of business day. The Office of the Attorney General's electronic service address is ADIEService@doj.ca.gov.

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 May 27, 2015, at San Diego, California.

Tammy Larson
Declarant


Signature

SD2015800751
71090587.doc