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.

No. S224546

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

ANSWER BRIEF ON THE MERITS

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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.	No. S224546

ANSWER BRIEF ON THE MERITS

ISSUE PRESENTED

Whether a defendant can be properly convicted of both grand theft by embezzlement (Pen. Code § 503) and grand theft by larceny (Pen. Code § 487, subd. (a)) based on the same conduct?

INTRODUCTION

Appellant misappropriated and took over $58,000 from cash payments that she accepted on behalf of her employer over the course of a year. She was charged with and convicted of one count of embezzlement and one count of grand theft by larceny. Her dual convictions are improper because embezzlement and larceny are not separate offenses but rather different ways to commit the single offense of theft, and Penal Code section 954 does not authorize dual convictions for the same offense or different statements of the same offense based on a single act or indivisible course of conduct.[1]

The offenses of larceny, embezzlement, and theft by false pretenses were consolidated into the single offense of theft in 1927 by the enactment of section 490a and the amendments to sections 484 and 952. Although the prosecution could properly charge appellant with two counts of theft under the separate theories of larceny and embezzlement and thereby avoid making an election between the two theories of theft, appellant could only be lawfully convicted of one theft offense. The Court of Appeal recognized the explicit intent of the Legislature and correctly concluded that "larceny and embezzlement are merely two ways of committing the single offense of theft," and it struck appellant's conviction for grand theft by larceny in count 2. (Slip opn. p. 11.) Because larceny and embezzlement are different ways to commit

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[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

a theft and constitute different statements of the same offense, appellant's dual convictions are prohibited by section 954 since each is based on the same theft. The Court of Appeal's analysis and holding is therefore correct and its opinion and judgment should be affirmed by this Court.

STATEMENT OF THE CASE AND FACTS

Appellant was employed as a credit agent for a concrete supply company. When she was on maternity leave it was discovered that $58,273.02 was missing from cash payments made by 12 customers that appellant had accepted on behalf of her employer between June 2010 and May 2011. Appellant denied taking any money from her employer but could not account for the missing money. (Slip opn. pp. 2-5.) She was thereafter charged with and convicted by a jury of embezzlement (§ 503 - count 1), and grand theft by larceny (§ 487, subd. (a) - count 2). (1CT 12-13, 105, 149-150.) On May 10, 2013, the trial court suspended imposition of sentence and placed appellant on formal probation for a period of 36 months, and ordered her to serve 240 days in jail. It also imposed the mandatory fines and fees and ordered appellant to pay $58,273.02 in victim restitution. (1CT 151-153; 2RT 501-503.) Appellant filed a timely notice of appeal. (1CT 175.)

In her appeal appellant made four contentions: there was insufficient evidence to support the verdicts; larceny and embezzlement are two ways to

commit the single offense of theft and thus her dual convictions based on the same theft are improper; the trial court abused its discretion by failing to reduce her convictions to misdemeanors; and, the trial court abused its discretion by imposing victim restitution in the amount of $58,273.02. (Slip opn. p. 2.) On January 23, 2015, in an opinion certified for partial publication, the Court of Appeal modified but otherwise affirmed the judgment. (Slip opn. pp. 1, 17.) In the published portion of its opinion the court agreed that larceny and embezzlement constitute two ways to commit the single offense of theft, and it struck appellant's conviction for grand theft in count 2. (Slip opn. pp. 11, 17.) The court rejected appellant's other contentions in the unpublished portion of the opinion. (Slip opn. pp. 11-16.)

Appellant filed a petition for review seeking review on the insufficiency of evidence and victim restitution issues. Respondent filed a petition for review with regard to the court's holding that larceny and embezzlement are not separate offenses but rather different ways to commit the same offense. On April 1, 2015, this Court granted respondent's petition and denied appellant's petition.

ARGUMENT

I.

LARCENY AND EMBEZZLEMENT ARE NOT SEPARATE AND DISTINCT OFFENSES BUT INSTEAD ARE TWO DIFFERENT WAYS TO COMMIT THE SINGLE OFFENSE OF THEFT

A. Introduction & Summary of Argument

A defendant may be lawfully convicted of multiple counts based on a single act or indivisible course of conduct as long as each count constitutes a different offense and is not a lesser included offense of another. (§ 954; *People v. Benavides* (2005) 35 Cal.4th 69, 97.) In 2014, this Court found that the determination of whether different statutory provisions constitute "different offenses" or merely set forth different ways to commit the same offense "turns on the Legislature's intent in enacting these provisions, and if the Legislature meant to define only one offense, we may not turn it into two." (*People v. Gonzalez* (2014) 60 Cal.4th 533, 537 ("*Gonzales*").

Appellant was convicted of one count of embezzlement and one count of grand theft by larceny based upon the same theft of cash from her employer. Embezzlement is proscribed by sections 503 and 484, subdivision (a), and theft by larceny is proscribed by section 484, subdivision (a). Although both types of theft have different elements, the California Legislature has explicitly pronounced its intent that embezzlement and larceny are merely two ways to commit the single offense of theft, and this Court has

articulated that in 1927 the formerly distinct offenses of embezzlement, larceny, and theft by false pretenses were consolidated into the "single crime of 'theft' defined by section 484." (*People v. Davis* (1998) 19 Cal.4th 301, 304.) Since larceny and embezzlement are merely two different ways to commit the single offense of theft they do not constitute "different offenses" within the meaning of section 954, and dual theft convictions for larceny and embezzlement are prohibited when they are based on the same act or course of conduct.

B. Section 484, Subdivision (a), Proscribes Only a Single Offense of Theft While Enumerating Different Ways to Commit the Offense

1. The Legislature's 1927 Enactment of Section 490a and Amendments to Sections 484 and 952 Are Explicit Indications of Its Intent to Consolidate the Various Types of Theft Into a Single Consolidated Theft Offense

In *People v. Gonzalez, supra*, 60 Cal.4th 533, this Court explained how a reviewing court determines whether the Legislature, by enacting separate statutory provisions, intended to define separate offenses or merely describe different ways the same offense can be committed:

> In addressing this question [whether"'[w]e begin by examining the statute's words, giving them a plain and commonsense meaning. [Citation.] We do not, however, consider the statutory language "in isolation." [Citation.] Rather, we look to "the entire substance of the statute ... in order to determine the scope and purpose of the provision ....

> [Citation.]" [Citation.] That is, we construe the words in question "'in context, keeping in mind the nature and obvious purpose of the statute ... .' [Citation.]" [Citation.] We must harmonize "the various parts of a statutory enactment ... by considering the particular clause or section in the context of the statutory framework as a whole."'" (*People v. Acosta* (2002) 29 Cal.4th 105, 112 [124 Cal.Rptr.2d 435, 52 P.3d 624].) "If, however, the statutory language is susceptible of more than one reasonable construction, we can look to legislative history in aid of ascertaining legislative intent." (*People v. Robles* (2000) 23 Cal.4th 1106, 1111 [99 Cal.Rptr. 2d 120, 5 P.3d 176].)

(60 Cal.4th at pp. 537-538.)

Section 484 was enacted in 1872, and it originally stated, "Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." In 1872 the Legislature also enacted section 503, which defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been intrusted."

The California Legislature amended section 484 in 1927, thereby consolidating the previously distinct crimes of larceny, embezzlement, and theft by false pretenses into a single offense of theft. (*People v. Williams* (2013) 57 Cal.4th 776, 785; *People v. Davis, supra*, 19 Cal.4th at p. 304; *People v. Cuellar* (2008) 165 Cal.App.4th 833, 837.) Subdivision (a) of section 484, which defines the offense of theft, is substantially similar to the 1927 amendment to section 484. Presently it provides in part:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been

> entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.[2]

As amended section 484 includes embezzlement, evidenced by the fact it includes the following language that is very similar to that in section 503: "Every person . . . who shall fraudulently appropriate property which has been entrusted to him or her, ... is guilty of theft."

At the same time section 484 was amended the Legislature also enacted section 490a, in order "to further clarify its intent to bring all of the theft crimes under one umbrella."[3] (*People v. Sanders* (1998) 67 Cal.App.4th 1403, 1416.) Section 490a provides, "Wherever 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."

In 1927 the Legislature also amended section 952, which added the provision, "in charging theft it shall be sufficient to allege that the defendant

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[2] Section 484 has been amended numerous times. (Stats. 1927, ch. 619, § 1; Stats. 1935, ch. 802, § 1; Stats. 1965, ch. 1602, § 1; Stats. 1967, ch. 1335, § 1; Stats. 1980, ch. 1090, § 1; Stats. 2000, ch. 176, § 1.)

[3] Stats, 1927, ch. 619, § 7.

unlawfully took the property of another."[4] (Stats. 1927, ch. 612, § 1.)

In *People v. Myers* (1929) 206 Cal. 480, this Court explained the legislative intent behind the 1927 amendments:

> The amendment to section 484, in connection with the other cognate legislation such as the amendments to sections 951 and 952 of the Penal Code (Stats. 1927, p. 1043), is designed not only to simplify procedure but also to relieve the courts from difficult questions arising from the contention that the evidence shows the commission of some other of these crimes than the one alleged in the indictment or information, a contention upon which defendants may escape just conviction solely because of the border line distinction existing between these various [theft] crimes.

(206 Cal. at p. 484, footnotes omitted.)

The purpose of consolidating the theft crimes in 1927 was to simplify pleading and proof technicalities in theft offenses and "also to relieve the courts of the necessity of drawing fine distinctions as to whether the particular crime charged had been proved, and the prosecution of charging in advance, at its peril, an offense which the evidence, because of such fine distinctions, might show not to exist, although the guilt of the defendant be manifest." (*People v. Fewkes* (1931) 214 Cal. 142, 149.) The crime of theft can now simply be alleged as an "unlawful taking," and juries no longer need to be concerned about "the technical differences between the several types of theft,

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[4] Section 952 was last amended in 1929, and it states in part, "In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another." (Stats. 1929, ch. 159, § 1.)

and can return a general verdict of guilty if they find that an 'unlawful taking' has been proved." (*People v. Ashley* (1954) 42 Cal.2d 246, 259.)

Despite the clear legislative intent to consolidate the previously distinct theft offenses, respondent contends that the Legislature intended larceny and embezzlement to remain separate offenses following the 1927 statutory amendments. It points to the following in support of its position: the enactment of the larceny and embezzlement statutes in the Penal Code preserved the historical distinctions between the two offenses; larceny and embezzlement have different elements and neither is an included offense in the other; the larceny and embezzlement statutes are "self-contained" in different chapters and sections of the Penal Code and sometimes have divergent punishments and statutes of limitations; and, the 1927 statutory amendments which grouped the distinct offenses "under an umbrella of 'theft'" did not convert them into a single theft offense. (OBM 7-29.) For the reasons discussed below, respondent's position lacks merit.

2. The Fact That Larceny and Embezzlement Have Different Elements and Neither Is Necessarily Included in the Other Does Not Render Them Separate Offenses

Relying on *People v. Gonzalez, supra*, 60 Cal.4th 533, respondent asserts that larceny and embezzlement constitute separate offenses because they have different elements and neither is included within the other. (OBM

13.) In *Gonzalez*, this Court addressed the question of whether a defendant can be convicted of oral copulation of an unconscious person (§ 288a, subd. (f)), and oral copulation of an intoxicated person (§ 288a, subd. (i)), when each is based on the same act. (60 Cal.4th at p. 535.) Although this Court observed that each of the subdivisions of the statute had different elements and were not included offenses of the other, it did not hold that those factors alone mandate a finding of separate offenses. (*Id.* at p. 539.) In finding that the various subdivisions of section 288a constitute separate offenses, this Court looked at the text and structure of the statute. It explained:

> Subdivision (a) of section 288a defines what conduct constitutes the act of oral copulation. Thereafter, subdivisions (b) through (k) define various ways the act may be criminal. Each subdivision sets forth all the elements of a crime, and each prescribes a specific punishment. Not all of these punishments are the same. That each subdivision of section 288a was drafted to be self-contained supports the view that each describes an independent offense, and therefore section 954 is no impediment to a defendant's conviction under more than one such subdivision for a single act.

(60 Cal.4th at p. 539.)

In *Blockburger v. United States* (1932) 284 U.S. 299, 304 [76 L.Ed. 306, 52 S.Ct. 180] ("*Blockburger*"), the United States Supreme Court addressed the issue of whether selling drugs without their original packaging (26 U.S.C.S. § 692) and selling drugs without a written order (26 U.S.C.S. § 696) constituted separate offenses when based on the same act or transaction. (284 U.S. at pp. 300-301.) It found the applicable test to be "whether each

provision requires proof of a fact which the other does not." (*Id.* at p. 304.) The court held that because each statute required proof of a different element, the defendant had committed two offenses. (*Ibid.*)

Unlike the statutes in question in *Gonzalez* and *Blockburger*, section 484 includes larceny and embezzlement in the *same* subdivision, which describes a single offense of theft. And as discussed in Section B-1, *ante*, the 1927 amendments to sections 484 and 952 and the enactment of section 490a are clear indications that the Legislature intended to consolidate larceny, embezzlement, and theft by false pretenses into a single theft offense.

The mere fact that larceny and embezzlement differ in their elements and neither is necessarily included within the other does not render them separate offenses because, as noted by the Court of Appeal, "an offense that can be committed in multiple ways will naturally have varying elements." (Slip opn. p. 10, compare with *People v. Nazary* (2010) 191 Cal.App.4th 727, 742 [larceny and embezzlement are separate offenses because they have different intents and elements].) This conclusion is also supported by case law.

In *People v. Craig* (1941) 17 Cal.2d 453, 455, this Court explained that under section 261, "but one punishable offense of rape results from a single act of intercourse, although that act may be accomplished under more than one of the conditions or circumstances specified in the foregoing subdivisions."

Two and a half years later this Court reiterated that when rape is accomplished under more than one of the circumstances set forth in the various subdivisions of the statute, there is only one punishable rape offense. (*People v. Scott* (1944) 24 Cal.2d 774, 777.) Subsequently in *People v. Collins* (1960) 54 Cal.2d 57, 59, this Court again noted, "The subdivisions of section 261 do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape."

In *People v. Ryan* (2006) 138 Cal.App.4th 360, the defendant was convicted of violating section 470, subdivision (a), and section 470, subdivision (d), for her act of signing another person's name to a check and using it to make a purchase at a store. She was also convicted of violating subdivisions (a) and (d) of section 470 for signing the same person's name to a check and attempting to use it at another store. (*Id.* at pp. 363-364.) The Court of Appeal held that "the various subdivisions of section 470 do not set out greater and lesser included offenses, but different ways of committing a single offense, i.e., forgery." (*Id.* at p. 364.) Similarly in *People v. Zanoletti* (2009) 173 Cal.App.4th 547, 556, the court found that section 550, subdivision (a), which proscribes insurance fraud, "includes nine enumerated acts that constitute violations," and it held that the various paragraphs of subdivision (a) "simply describe different means of committing the single crime of insurance fraud." (*Id.* at p. 556, fn. 3.)

Contrary to respondent's assertion, merely because embezzlement and larceny have different elements and neither is included within the other does not render them separate offenses. As the Court of Appeal aptly noted, "Statutory construction cannot consist in merely counting elements." (Slip opn. p. 10.) The fact that both embezzlement and larceny are included in section 484, subdivision (a), and the Legislature clearly expressed its intent to consolidate them into a single theft offense, leads to the inescapable conclusion that embezzlement and larceny are merely different ways to commit a theft, rather than separate and distinct offenses.

3. Larceny and Embezzlement Are Not "Self-Contained" In Different Chapters of the Penal Code Because the Section 484 Theft Offense Includes Both Larceny and Embezzlement and The Punishment and Statute of Limitations for Each is Substantially the Same

Respondent contends that the larceny and embezzlement statutory provisions which include their respective elements, defenses, and punishments, are "self-contained" in different chapters and sections of the Penal Code and combined with the fact they sometimes have "divergent punishments, enhancements and statutes of limitations," illustrates "that the Legislature has established and maintained them as different offenses." (OBM 14-19.) It asserts that because "larceny and embezzlement occupy different

sections — and, in fact, entirely different chapters — of the Penal Code," the intent of the Legislature to treat them as separate offenses is even more clear than in *People v. Gonzalez, supra*, 60 Cal.4th 533, because the statutory provisions in *Gonzalez* were contained in different subdivisions of the same statute. (OBM 15.) This portion of respondent's argument fails because it does not recognize that in 1927 the previously distinct offenses of larceny, embezzlement, and theft by false pretenses were consolidated into section 484 and thereby merged into a single theft offense. (*People v. Williams, supra*, 57 Cal.4th at p. 785.)

When the California Penal Code was created in 1872, larceny and embezzlement statutes were contained in separate chapters of Part 1, Title 13 "Of Crimes Against Property." Chapter 5 contained the larceny statutes and the embezzlement statutes were placed in Chapter 6. Although Chapters 5 and 6 continue to have their original titles, since 1927 embezzlement has also been included Chapter 5. Respondent's assertion that the larceny and embezzlement statutes are "self-contained" in separate chapters is therefore disingenuous.

Embezzlement is defined in section 503, which was enacted in 1872 and has never been amended. As discussed in Section B-1, *ante*, in 1927 the Legislature created a consolidated theft offense and the section 503 definition of embezzlement was added to section 484. Today section 484, subdivision

(a), sets forth the elements of the crime of theft. It states in pertinent part, "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, *or who shall fraudulently appropriate property which has been entrusted to him or her*, . . . , is guilty of theft." (Italics added.) Even though the elements of embezzlement are still found in Part 1, Title 13, Chapter 6 of the Penal Code, they are also included in Chapter 5 of Title 13. As noted by the court in *People v. Artis* (1993) 20 Cal.App.4th 1024:

> [T]here are no conflicts between the elements to prove, or the punishment for, embezzlement under section 484 and embezzlement defined in section 507. Each is punished "in the manner prescribed for theft of property of the value or kind embezzled." (§ 514.)

(20 Cal.App.4th at p. 1027.)

Section 514 mandates that embezzlement "is punishable in the manner prescribed for theft of property of the value or kind embezzled." To determine the appropriate punishment for theft by embezzlement it is necessary to refer to the statutes in Chapter 5 of Title 13 in Part 1 of the Penal Code. The amount of money or property taken determines whether the offense constitutes petty theft or grand theft (§ 487, 488). The punishment for grand theft is set forth in section 489, while the punishment for petty theft is contained in section 490.

With minor exceptions, regardless of the method by which a theft was committed, it is punished identically pursuant to the same statutes. Here the

Court of Appeal properly found "the fact that embezzlement carries a harsher punishment in a very specific situation is not sufficiently indicative of the Legislative intent to overcome the otherwise explicit indications of its intent embodied in section 484 and 490a." (Slip opn. p. 11.)

Although respondent acknowledges that "the punishment for embezzlement is linked to the punishment for larceny and other theft offenses," it asserts that "section 514 provides the only full articulation of the punishment for embezzlement." (OBM 16.) Respondent notes that a different punishment for embezzlement of public funds is provided in section 514, and unlike other grand thefts, pursuant to section 799, embezzlement of public funds has no statute of limitations. (OBM 16-18.) But section 424, which is contained in the Penal Code in Part 1, Title 12 "Of Crimes Against the Revenue and Property of This State," also proscribes the punishment for embezzlement of (nonfederal) public funds. And other than embezzlement of public funds, the punishment for a theft committed by embezzlement cannot specifically be ascertained in Part 1, Title 13, Chapter 6 of the Penal Code , and instead requires reference to the appropriate theft statutes in Chapter 5 of Title 13.

Respondent points out that pursuant to section 509, embezzlement does not require a "distinct act of taking," and embezzlement has specific defenses not applicable to other types of theft. (OBM 15-16.) As previously discussed

in Section B-2, *ante*, different methods of committing the same crime will necessarily have different elements, and the fact they also have different defenses does not render them separate and distinct offenses. Respondent cites no authority to support its assertion that because larceny and embezzlement have different defenses they are separate and distinct offenses.[5]

4. The Section 186.11 White Collar Crime Enhancement Which Includes "a Material Element of Which is Fraud or Embezzlement" Does Not Reflect a Legislative Intent to Make Embezzlement a Separate Offense From Larceny

Section 186.11, subdivision (a)(1), provides in part:

> Any person who commits two or more related felonies, *a material element of which is fraud or embezzlement*, which involve a pattern of related felony conduct, and the pattern of related felony conduct involves the taking of, or results in the loss by another person or entity of, more than one hundred thousand dollars ($100,000), shall be punished, upon conviction of two or more felonies in a single criminal proceeding, in addition and consecutive to the punishment prescribed for the felony offenses of which he or she has been convicted, by an additional term of imprisonment in the state prison as specified

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[5] Respondent argues, "Each chapter is "self-contained" because each provides the statutory elements, defenses, and punishments for the respective offenses. (See *People v. Gonzalez, supra*, 60 Cal.4th at p. 539.)" (OBM 15.) Although the *Gonzalez* court noted that each of the subdivisions of section 288a sets forth the elements of an offense as well as a specific punishment, it did not mention whether there were different defenses to the various subdivisions of the statute. *Gonzalez* therefore fails to support respondent's contention that the fact larceny and embezzlement have different defenses demonstrates they are separate offenses.

> in paragraph (2) or (3). This enhancement shall be known as the aggravated white collar crime enhancement. (Italics added.)

Respondent argues that the enactment of section 186.11 in 1996 evidences the Legislature's intent to treat embezzlement and thefts involving fraud "substantively distinct" from theft offenses not involving fraud. (OBM 17-18.) Again respondent cites no authority to support its position.

Although one of the elements of the "aggravated white collar crime enhancement" is that fraud or embezzlement is a material element of at least two related felonies committed by the defendant (§ 186.11, subd. (a)(1), see also CALCRIM No. 3221), the purpose of the enhancement is not to distinguish embezzlement and thefts involving fraud from other thefts, or to render them separate offenses. Rather, it was enacted "'to provide a mechanism for greater punishment for criminals who engage in a pattern of fraudulent activity that results in a large amount of accumulated takings.'" (*People v. Denman* (2013) 218 Cal.App.4th 800, 813, citing *People v. Williams* (2004) 118 Cal.App.4th 735, 747.)

Section 12022.6, which became effective on July 1, 1977, sets forth the great taking enhancement. (Added Stats. 1976, ch. 1139, § 305.5.) Subdivision (a) of the current version of the statute requires the imposition of additional punishment "[w]hen any person takes, damages, or destroys any property in the commission or attempted commission of a felony, with the intent to cause that taking, damage, or destruction," and the loss exceeds

$65,000.[6] Respondent's argument is further diluted by the fact that section 12022.6 does not differentiate between different types of theft and is based solely on the amount of the taking.

5. Although Larceny and Embezzlement Were Historically Distinct Offenses, The 1927 Statutory Amendments Consolidated Several Types of Theft, Including Larceny and Embezzlement, Into A Single Theft Offense Which Continues Today Under the Present Statutory Scheme

Appellant does not dispute the fact that historically larceny and embezzlement were separate and distinct offenses. But as explained in Section B-1, *ante,* that distinction changed in 1927 with the amendments to sections 484 and 952 and the enactment of section 490a. Nevertheless, respondent contends that the 1927 statutory amendments which grouped larceny and embezzlement "under the umbrella of 'theft'" constituted a procedural reform that "only effected a change in nomenclature" and did not convert them into a single theft offense. (OBM 19-20.) Respondent's position not only ignores the explicit pronouncement of the Legislature's intent to

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[6] A loss exceeding $65,000 requires an additional year of punishment (§ 12022.6, subd. (a)(1)); a loss exceeding $200,000 requires two years of additional punishment (§ 12022.6, subd. (a)(2)); a loss exceeding $1,300,000 requires three additional years of punishment (§ 12022.6, subd. (a)(3)); and a loss exceeding $3,200,000 requires four years of additional punishment (§ 12022.6, subd. (a)(4)).

consolidate the previously separate theft offenses into a single theft offense, but also prior opinions of this Court and lower courts which make it clear that the various types of theft are merely different theories or methods to commit the section 484 theft offense. (See e.g. *People v. Farell* (2002) 28 Cal.4th 381, 390 ["fraud and embezzlement simply are methods by which a charged theft is accomplished"]; *People v. Davis, supra*, 19 Cal.4th at p. 304 [referring to "theories of theft"]; *People v. Fenderson* (2010) 188 Cal.App.4th 625, 641 [referring to theft by embezzlement as a "theory of theft"]; *People v. Counts* (1995) 31 Cal.App.4th 785, 793 ["under section 484, there is simply one consolidated crime of theft, which the jury may find upon either theory, if there is an 'unlawful [taking]' (§ 952)"]; *People v. Darling* (1964) 230 Cal.App.2d 615, 618, superceded by statute on other grounds as stated in *Bradwell v. Superior Court* (2007) 156 Cal.App.4th 265, 273 ["section 484, as amended in 1927, redefines theft by consolidating with such definition various 'criminal acquisition techniques' which were the subject of different common law-defined larcenous offenses"].)

In *People v. Davis, supra*, 19 Cal.4th 301, this court explained:

> When *the formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses were consolidated in 1927 into the single crime of "theft" defined by Penal Code section 484*, most of the procedural distinctions between those offenses were abolished. But their substantive distinctions were not: "The elements of the several types of theft included within section 484 have not been changed, however, and a judgment of conviction of theft, based on a general verdict

> of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses." (*People v. Ashley* (1954) 42 Cal. 2d 246, 258 [267 P.2d 271].)

(19 Cal.4th at pp. 304-305, italics added.)

Respondent asserts that "the Legislature has continued to treat larceny and embezzlement as distinct offenses." (OBM 23.) It points to the fact that the Legislature "left intact the Penal Code's separate chapter for embezzlement." (OBM 23.) But as illustrated in Section B-3, *ante*, while embezzlement statutes remains in Part 1, Title 13, Chapter 6 of the Penal Code, they are also included in the larceny chapter of the Penal Code - Chapter 5 of Title 13. Respondent argues that "the Legislature has continued to take affirmative steps to maintain embezzlements' separate chapter" as it has continued to amend some of the embezzlement statutes in Chapter 6, even as recently as 2013. (OBM 23-24.)

Despite the fact that embezzlement statutes are included in multiple chapters in the Penal Code, there can be no doubt that embezzlement is not a separate and distinct offense from larceny. Any argument to the contrary is dispelled by the fact that section 484 encompasses both embezzlement and larceny in its definition of the theft offense, and section 490a clearly and distinctly equates larceny, embezzlement, or stealing with the single offense of "theft." Further, section 503, which defines embezzlement, has not been amended since it was enacted in 1927, while section 484, which also defines

embezzlement as part of the consolidated theft offense, has been amended numerous times. (See fn. 2, *ante*.)

Recently in *Lopez-Valencia v. Lynch* (9th Cir. 2015) 798 F.3d 863, the Ninth Circuit Court of Appeals noted that section 484 "is indivisible because the jury need not unanimously agree on how the defendant committed theft." (*Id.* at p. 869.) It explained:

> In California, "[i]t has long been the general rule . . . that when a single crime can be committed in various ways, jurors are not required to unanimously agree upon the mode of commission." *People v. Griffin*, 90 Cal.App.4th 741, 750, 109 Cal.Rptr.2d 273 (2001). The California Supreme Court has spoken directly on juror unanimity under the theft statute, reasoning that while all jurors must agree that the defendant committed some form of unlawful taking, it is "immaterial whether or not [the jury] agreed as to the technical pigeonhole into which the theft fell." *People v. Nor Woods*, 37 Cal. 2d 584, 233 P.2d 897, 898 (Cal. 1951).

Respondent asserts that the Legislature did not intend to remove the "distinctive meanings of 'larceny' and 'embezzlement' from the Penal Code by its 1927 amendments, and it argues against a broad application of the amendments on the basis that such an application "would lead to illogical and absurd results." (OBM 27-29.) For the reasons previously discussed, the different definitions of larceny and embezzlement remain intact as distinct theories of theft, but in 1927 they were consolidated into the single crime of theft proscribed by section 484.

C. Appellant's Dual Convictions Are Improper Because They Are Based on the Same Theft

It is not disputed that appellant's convictions in counts 1 and 2 are based on the same theft of money from her employer. The information charged appellant with embezzlement pursuant to section 503. (1CT 12-13.) The fact that the prosecutor did not charge embezzlement under section 484, subdivision (a), or under both sections 503 and 484, subdivision (a), is irrelevant, because the Legislature has defined only one theft offense and it cannot be converted into two. (See *People v. Gonzalez, supra*, 60 Cal.4th at p. 537.)

Since embezzlement and larceny are not separate offenses, but rather two ways to commit a theft, appellant was improperly convicted of both counts and they should be consolidated into a single count. (*People v. Craig, supra*, 17 Cal.2d. at p. 458.) Appellant's convictions are based on evidence that she misappropriated money from her employer, and therefore the Court of Appeal properly struck appellant's conviction in count 2 for grand theft by larceny. (Slip opn. p. 11.)

II.

ALTHOUGH SECTION 954 PERMITS THE PROSECUTION TO CHARGE DIFFERENT STATEMENTS OF THE SAME OFFENSE IN SEPARATE COUNTS IT DOES NOT AUTHORIZE MORE THAN ONE CONVICTION FOR THE SAME OFFENSE

A. Introduction

Respondent asserts, as an alternate argument, that even if theft is a single offense appellant's dual theft convictions based on the same theft are proper because embezzlement and larceny constitute "different statements of the same offense" within the meaning of section 954. (OBM 29-30.) Respondent's argument is not supported by any direct authority and lacks merit.

As shown below, although section 954 allows the prosecution to charge the same offense in more than one count when each is based on a different legal theory, the statute does not permit more than one conviction for the same offense when each is based on the same act or course of conduct. Because larceny and embezzlement are merely two ways to commit the single crime of theft (see Argument I, *ante*), even though they constitute different statements of the same offense, a defendant can only be properly convicted of one theft offense based on the same theft.

B. Section 954 Permits More Than One Conviction Based on the Same Act or Indivisible Course of Conduct When That Act or Conduct Constitutes More Than One Distinct Offense

Section 954 provides in part:

> An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; . . .

Although section 954 states that "the defendant may be convicted of any number of the offenses charged," this language does not mean that a defendant may be properly convicted of each and every alternative statement of an offense that is alleged in the accusatory pleading. Rather, a defendant may only be properly convicted of multiple *distinct or different offenses* when they are based on a single act or course of conduct. This is evident from the language in section 954.

The statute defines three categories of charges that can be joined in one action: "*different offenses* connected together in their commission," "*different statements* of the same offense," and "*different offenses* of the same class of crimes or offenses, under separate counts." (§ 954, italics added.) In the next

sentence the statute sets forth the charges of which the defendant may be convicted: "The prosecution is not required to elect between the *different* offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of *the offenses* charged." (*Ibid.*) The reference to "the offenses" in the second half of the preceding sentence clearly relates back to and is thus modified by the reference to "the different offenses or counts" in the first clause. (*White v. County of Sacramento* (1982) 31 Cal.3d 676, 680 ["A longstanding rule of statutory construction -- the 'last antecedent rule' -- provides that 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote'"]; *Runyon v. Board of Trustees of California State University* (2010) 48 Cal.4th 760, 768 [courts prefer "the most natural reading" of the text in a statute].)

It is significant that section 954 uses the term "different offenses" in conjunction with only two of the three categories of charges that may be properly joined in a proceeding - "*different offenses* connected together in their commission," and "*different offenses* of the same class of crimes or offenses, under separate counts." The remaining category of charges - "*different statements* of the same offense" - differs from the other two categories as it concerns an alternative means of pleading *the same offense* rather than a different one. And most importantly, this category is not

referenced in the language that addresses the charges of which a defendant may be *convicted*. The most reasonable construction of the language in section 954 is that the statute authorizes multiple convictions for different or distinct offenses, but does not permit multiple convictions for a different statement of the same offense when it is based on the same act or course of conduct.

A judicially created exception to section 954 prohibits multiple convictions that are based on necessarily included offenses. (*People v. Sanders* (2012) 55 Cal.4th 731, 737; *People v. Ortega* (1998) 19 Cal.4th 686, 692; *People v. Pearson* (1986) 42 Cal.3d 351, 355.) It logically follows that if a defendant cannot be convicted of a greater and a lesser included offense based on the same act or course of conduct, dual convictions for the same offense based on alternate legal theories would necessarily be prohibited.

It is permissible, pursuant to section 954, to charge the same offense based on different legal theories. (*People v. Ryan, supra*, 138 Cal.App.4th 360, 368.) "'When a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way. Such allegations do not require the prosecutor to prove that the defendant committed the crime in more than one way.'" (*People v. Moussabeck* (2007) 157 Cal.App.4th 975, 981, quoting *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532-1533.) But it is clear that multiple convictions based on a single

criminal act are permissible only if the charges allege *separate criminal offenses*. (*People v. Muhammad* (2007) 157 Cal.App.4th 484, 490; see also *People v. Smith* (2012) 209 Cal.App.4th 910, 916-917 [defendant improperly convicted of two counts of indecent exposure based on one incident of exposure]; *People v. Coyle* (2009) 178 Cal.App.4th 209, 217 [defendant improperly convicted of three counts of murder for killing one person]; *People v. Ryan, supra*, 138 Cal.App.4th at p. 368 [defendant improperly convicted of more than one forgery with respect to a single instrument because various subdivisions of section 470 described different ways of committing the same offense].)

The commission of more than one type of theft enumerated in section 487, in reference to the same theft, only constitutes a single theft offense. Pursuant to section 954, appellant was properly charged with two counts of theft as separate statements of the same offense, but she could only be lawfully convicted of one. (*People v. Craig, supra*, 17 Cal.2d at p. 458; *People v. Smith, supra*, 191 Cal.App.4th at p. 205; *People v. Ryan, supra*, 138 Cal.App.4th at p. 368.) The Court of Appeal recognized that appellant's dual theft convictions are unlawful, and it properly struck appellant's grand theft conviction in count 2.

CONCLUSION

Based upon the foregoing argument and authority, the judgment of the Court of Appeal should be affirmed.

Dated: December 11, 2015

Respectfully Submitted;

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Juanita Vidana

WORD COUNT CERTIFICATE

I hereby certify that I prepared the foregoing Answer Brief on the Merits, and the computer-generated word count for this brief is 6,815 words, which does not include the cover, tables, or this certificate.

Dated: December 11, 2015

Valerie G. Wass

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

Case: *People v. Vidana*, California Supreme Court Case No. S224546

I, Valerie G. Wass, certify:

I am an active member of the State Bar of California and am not a party to this cause. My business address is 556 S. Fair Oaks Ave., Suite 9, Pasadena, California 91105. On December 12, 2015, I deposited in a mailbox regularly maintained by the United States Postal Service at Santa Barbara, California, in the county in which I reside, a copy of the attached ANSWER BRIEF ON THE MERITS, in a sealed envelope with postage fully prepaid, addressed to each of the following:

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My electronic service address is wass100445@gmail.com. On December 12, 2015, I transmitted a PDF version of the same document described above by electronic mail to the parties identified below using the e-mail service addresses indicated:

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I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed this 12th day of December, 2015.

VALERIE G. WASS