IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT, V. VERONICA AGUAYO, DEFENDANT AND APPELLANT.	CASE NO. S254554

On Review of a Partially Published Decision of
the Court of Appeal, Fourth Appellate District, Division One

APPELLANT'S SUPPLEMENTAL REPLY BRIEF ON THE MERITS

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PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF AND RESPONDENT, v. VERONICA AGUAYO, DEFENDANT AND APPELLANT.	Case No. S254554

MS. AGUAYO'S SUPPLEMENTAL REPLY BRIEF

INTRODUCTION

In the state's supplemental brief, it made two arguments. In the first argument, the state claims that the Legislature intended to treat (a)(1) and (a)(4)[1] as different offenses by separating them into subparagraphs, defined by unique elements and punished differently. In its second argument, the state asserts that even if (a)(1) and (a)(4) state a single offense, because Ms. Aguayo committed two separate acts, neither conviction need be overturned under section 954.

/ / /

[1] All undesignated section references are to the Penal Code, and (a)(1), (a)(2), (a)(3) and (a)(4) are references to subdivisions of Penal Code section 245.

ARGUMENT

I. This Court's Determination of Whether the (a)(1) and (a)(4) Convictions Are Different Statements of the Same Offense Should Be Made Based on the Legislative Intent, as Informed by the Legislative History, and Determined Under a De Novo Standard of Review

In its supplemental brief, the state has argued that the legislative intent in separating the crime of aggravated assault into two subdivisions is determined by examining the text, structure, and penal consequences of the two provisions. According to the state, this specific action makes clear the legislature's intent to create separate offenses. (RSBM p. 12.) Moreover, the state contends that the separation of (a)(2) and (a)(3) for assaults with firearms and machine guns, respectively, confirms this interpretation. (RSBM pp. 12-13,) The state then posits that looking to the legislative history beyond the 2011 amendments is unnecessary because the language and structure of section 245 make it clear that the Legislature intended to treat (a)(1) and (a)(4) as distinct offenses. The state then asserts that if this was not the Legislature's intent, then the purpose the 2011 amendments sought to achieve, differentiating the (a)(1) strike prior conviction from the (a)(4) non-strike prior, would have been for naught because the charging instrument would not have to specify which subparagraph was violated. (RSBM pp. 13, 48.)

Initially, Ms. Aguayo points out that this Court is not being called

upon to construe section 245 in a vacuum, but is being asked to construe two sections, 245 and 954, and to do so for purposes of explicating how they interact. It is for section 954 purposes that the legislative intent in enacting (a)(1) and (a)(4) as separate subdivisions is relevant.

A. The Inferential Approach Need Not Be Employed Where the Legislative History Reveals Clear and Unequivocal Legislative Intent

The state has elected to argue for the inferential approach to resolving the issue of whether (a)(1) and (a)(4) are separate offenses by relying on *People v. Gonzalez* (2014) 60 Cal.4th 533, 536 (*Gonzalez*) and *People v. White* (2017) 2 Cal.5th 349, 359 (*White*). (RSBM p. 14.) But these cases do not support the state's conclusion here.

First, in *Gonzalez,* and again in *White,* this Court addressed the text and structure of statutory schemes that were unique. These statutes are unique in that they reflect the seriousness with which society views each unconsented sexual act, even when committed on a single occasion. (*People v. Harrison* (1989) 48 Cal.3d 321, 330.) The state has made no showing that the text and structure of (a)(1) and (a)(4) are similar to the sex offense statutes at issue in *Gonzalez* and *White*. In fact, the text and structure of (a)(1) and (a)(4) are not similar to those at issue in *Gonzalez* and *White*.

In *Gonzalez* this Court considered whether a defendant could be

convicted of oral copulation of an unconscious person under section 288a, subdivision (f), and oral copulation of an intoxicated person under section 288a, subdivision (i), based on the same act. This Court recognized the textural and structural distinctions between the new statute, section 288a, and the former section 261. (In the revision to former section 261, rape and unlawful intercourse with a minor were separated. (§§ 261, 261.5, respectively.)) This Court explained that section 288a was drafted to be self-contained, and therefore described an independent offense:

> Section 288a is textually and structurally different from former section 261. 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.

(*Gonzalez*, *supra,* 60 Cal.4th at p. 539.)

In *White*, this Court considered whether a defendant could be convicted of violating both section 261, subdivision (a)(3) (rape of an intoxicated person) and section 261, subdivision (a)(4)(A) (rape of an unconscious person) based on the same act. (*White*, *supra,* 2 Cal.5th at p.

352.) This Court found the elements of each offense to be different.

Second, this Court did not look to the legislative history in *Gonzalez* to resolve this issue of legislative intent, as it would have done if it had found an ambiguity in the statute. (*Gonzalez, supra,* 60 Cal.4th at pp. 537-538.) This Court's analysis in *Gonzalez* was based strictly on the structure and text of the statute, and on distinguishing *People v. Craig* (1941) 17 Cal.2d 453. Moreover, in *White*, this Court did not distinguish *Craig*–it overruled it. (*White, supra*, 2 Cal.5th at p. 359.) Even though this Court construed a different sex offense statute in *White*, it found the statute to be parallel to that construed in *Gonzalez* and concluded:

> The precise forms of rape at issue here and of oral copulation at issue in *Gonzalez* are identical except that the former involve sexual intercourse and the latter involve oral copulation. We see no suggestion that the Legislature intended, and no reason it might have intended, a different rule for rape than exists for oral copulation (and, presumably, for sodomy and sexual penetration).
>
> What we said in *Gonzalez, supra,* 60 Cal.4th at page 539, about the elements of the two forms of oral copulation being different applies equally to the two forms of rape. An act of rape "may be committed with a person who is unconscious but not intoxicated, and also with a person who is intoxicated but not unconscious[;] neither offense is included within the other."

(*White, supra*, 2 Cal.5th at p. 357.)

Although this Court did consider the legislative history in *White*, at the request of the parties, it found the legislative history devoid of legislative intent. Instead, this Court inferred the Legislature's intent, based on the consistency of treatment for the major sex crimes, and concluded:

> But nothing cited indicates the Legislature ever considered, or expressed an intent regarding, whether a person may suffer multiple convictions of the separate subdivisions of the various sex offenses. However, strong indications exist that the Legislature intended the rule to be consistent for each of these major sex crimes. As a result of the amendments over the years, today, the elements of the various ways the crimes can be committed (i.e., the various subparts of the statutes) are similar.
>
> This circumstance is no coincidence. It appears that was the Legislature's intent.
>
> For example, a 1986 enactment made changes in all four of these sections that helped to bring about this conformity. (Stats. 1986, ch. 1299, §§ 1, 3, 5, 6, pp. 4592–4599.)

(*White, supra*, 2 Cal.5th at pp. 358-359.)

In fact, this Court also refused to recognize legislative inaction as indicating its intent to ratify the *Craig* decision, finding that inaction could be based on many other things, such as the press of other more important matters, policy considerations, or a tendency to trust the court to correct its own errors. "The courts, not the Legislature, have generally interpreted, applied, and reconciled sections 654 and 954. Legislative inaction in this

regard most likely indicates a willingness to let the courts continue to do so. (*White, supra*, 2 Cal.5th at p. 360.)

Third, this Court did not reach the ultimate section 954 question at issue here in *Gonzalez* or *White* because this Court found the multiple convictions to be based on separate parallel offenses. (*Gonzalez, supra,* 60 Cal.4th at p. 540; *White*, 2 Cal.5th at p. 357.)

B. The Legislative History Clearly and Unequivocally Shows the Legislature's Intent that (a)(1) and (a)(4) Be Recognized as Alternative Statements of the Same Offense

This Court is often faced with determining the Legislature's intent where the statute is ambiguous and/or the Legislature's intent, as manifested in the language of the statute, is unclear. But here, that is not the case. In her opening brief, Ms. Aguayo set forth the Legislature's intent in separating assault with a deadly weapon (DW) from assault by means of force likely to produce great bodily injury (FLPGBI) into (a)(1) and (a)(4) respectively. (AOBM pp. 26-28, 64-65.) In order to avoid litigating whether a section 245 prior was for a strike, the Legislature separated the alternative means into two distinct parts in 2011, in which the (a)(1) DW would be instantly recognizable as a strike prior:

> AB 1026 amends existing Penal Code Section 245(a)(1) by deleting the words, "or by means of force likely to produce great bodily injury" and placing the deleted words in a new subdivision (Penal Code Section 245(a)(4)) so

> that in the future it will be clear what type of an assault occurred.
>
> AB 1026 will allow for a more efficient assessment of a defendant's prior criminal history and would lead to a more accurate and earlier disposition of criminal cases. AB 1026 does not create any new felonies or expand the punishment for any existing felonies. It merely splits an ambiguous code section into two distinct parts.

(A.B. 1026, Bill Analysis, Senate Rules Committee, June 14, 2011, with bill enacted on 8/5/2011 <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201120120AB1026> (A.B. 1026 Bill Analysis.) .) The sole basis for the bill, reflected in the bill analyses of the Assembly and Senate Public Safety Committees, as well as in the Senate Floor Analysis, was "merely" to separate the strike offense from the non-strike offense. Morever, the bill was passed by the Senate and the Assembly without a single opposing vote. (*Ibid*.) It is rare that this Court has such a clear and uncontroverted indication of legislative intent contained within the legislative history. These statements of legislative intent also indicate that no change was intended for any other purpose, such as how (a)(1) and (a)(4) are to interact with section 954. As this Court concluded in *White*, legislative inaction indicates a willingness to let the courts continue to interpret, apply and reconcile sections 654 and 954. (*White*, *supra*, 2 Cal.5th at p. 357.)

The state asserts that the separation of the firearm subdivisions, now (a)(2) and (a)(3) in section 245, is evidence that the Legislature intended (a)(1) and (a)(4) to be two separate provisions for purposes of section 954. (RSBM pp. 12-13.) This claim is a non-sequitur (RSBM pp. 12-13.) That separation was made long before the 2011 revision at issue here and was for a different purpose. The separation of firearms from the aggravated assault subdivision was made to provide greater punishment for assaults committed with firearms:

> In amending that provision in 1982 to create subparagraphs (1) and (2), the Legislature's apparent purpose was to require a minimum punishment of six months' imprisonment in county jail for aggravated assaults committed with a firearm (§ 245, subd. (a)(2)), but not for aggravated assaults committed by other means (§ 245, subd. (a)(1)).

(*People v. Milward* (2011) 52 Cal.4th 580, 585.)

These revisions were also made in conjunction with the same legislative session's amendment to the section 12022.5 enhancement for personal use of a firearm, to impose even greater punishment for those assaults committed with firearms. (*People v. Harper* (2000) 82 Cal.App.4th 1413, 1418.)

Firearms are in a class by themselves because they are extremely dangerous to public safety. (*People v. Bell* (1989) 49 Cal.3d 502, 544.)

Accordingly, the revisions of section 245 and 12022.5 for purposes of increasing the punishment for assaults with firearms is irrelevant to the 2011 revisions, which the Legislature also made clear were not intended to create any new felonies, or increase any punishment. (*People v. Brunton* (2018) 23 Cal.App.5th 1097, 1107 (*Brunton*).)

Nonetheless, the state concludes that categorizing two subdivisions as part of a single offense would undermine the Legislature's intent for three reasons: first, because it would not be necessary to plead the subdivision, the verdict would not show the subdivision upon which the conviction was based; second, because failing to allege the subdivision would require an amendment of the pleadings, it would not be possible to instruct on any uncharged subdivision; and third, a defendant could be convicted of all four subdivisions based on one act. (RSBM pp. 48-49.)

As an initial observation, Ms. Aguayo points out that the state's framing of the issue as "two subdivisions as part of a single offense" is inaccurate. The state omits "different" as the modifier of "statements of the same offense" in section 954. The rest of the state's arguments appear to be red herrings, unsupported by any authority. For example, the state does not explain why and/or under what authority the subdivision could not or would not be pleaded. Sections 950 and 952 set forth the requirements for a charging document, and they do not require the identification of any

specific statute by section or subdivision. Section 952 explicitly allows the charging document to describe the offense in the language of the statute. The charging deputy should, however, see the benefit of including the subdivision violated for ease of identification of strike priors in future prosecutions. In any event, the lack of a specific code section and subdivision could be remedied by identifying them in the jury instructions and verdict forms. Anticipating this claim, the state argues that an amendment of the pleading would be required before this could be done. Once again, that does not follow because pleading the offense in the language of the statute would cure any ambiguity as to the statute and subdivision involved, and would therefore not require an amendment of the pleadings. Moreover, the state fails to support its claim with any authority indicating that an amendment would be required, or that any motion to amend, based on the exercise of prosecutorial discretion by the charging deputy, would be denied, where the purpose would be to correctly instruct the jury, and to present the jury with an accurate verdict form.

Lastly, the state claims that a single act of shooting someone has the potential to sustain charges and convictions of all four subdivisions. (RSBM p. 49.) Because this claim is belied by the language of the statute itself, the state's new hypothetical once again yields an absurd result. First, subdivision (a)(1) specifically excludes assaults committed with firearms

["Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm . . . ."] Second, this Court has limited (a)(4) FLPGBI to body parts, and held that it excludes the use of anything extrinsic to the body. (*People v. Aguilar* (1997) 1 Cal.4th 1023, 1037.)

Nonetheless, the state champions the use of dual convictions as insurance that a defendant, whose conviction is overturned on appeal, will still be convicted of something. (RSBM p. 50.) Here, the authorities the state relies on are over 50 years old and do not reflect the extant law on lesser-included offenses (LIOs) in California. If a defendant is convicted of a greater offense, the jury will not reach a verdict on the lesser offense–the jury is only to return a verdict on the lesser offense in the event that it acquits on the greater offense. (CALCRIM No. 3517.) Accordingly, if the conviction for the greater offense were reversed on appeal, the lesser included offense may be revived by operation of law, and the prosecutor has the option to retry the greater offense, or accept a reduction to the lesser included offense. (*People v. Medina* (2007) 41 Cal.4th 685, 702.) The state is correct, however, that if the evidence of the greater offense were found to be insufficient on appeal, due process considerations would prevent the prosecutor from retrying the greater offense. But if the evidence found to be insufficient did not affect the necessary elements of the LIO, the

prosecutor could still elect to retry, or accept a conviction of the LIO:

> This court has long recognized that under Penal Code sections 1181, subdivision 6, and 1260, an appellate court that finds that insufficient evidence supports the conviction for a greater offense may, in lieu of granting a new trial, modify the judgment of conviction to reflect a conviction for a lesser included offense.

(*People v. Navarro* (2007) 40 Cal.4th 668, 671.)

The dichotomy the state posed is a false one: the state has no interest in "insuring" a conviction against reversal based on insufficient evidence.

The state points out that in *People v. Vidana* (2016) 1 Cal.5th 632, 650 (*Vidana*), the Legislature joined crimes that had previously been separate, while in *White*, the Legislature intended to separate what was formerly interpreted as one crime. (RSBM p. 16.) Again, the state implies this is anomalous. It is not. In *White* this Court inferred Legislative intent, based on the consistency of treatment for the major sex crimes in the structure and text of a different but parallel sex offense statute. (*White, supra*, 2 Cal.5th at pp. 358-359.) Here, (a)(1) and (a)(4) are similar, not parallel, and do not deal with sex crimes requiring special treatment.

The dispositive factor for the separation of (a)(1) and (a)(4) here, however, ***is*** shown in the legislative history, and it reflects the singular purpose for amending the statute: making it easier to show the conviction was for a serious felony. At the same time, the legislative history also

evidences the Legislature's intent to leave the crimes and punishments otherwise unchanged, when it disavows any intent to change the crimes or punishments:

> Yet, the Legislature made clear it was making only "technical, nonsubstantive changes" to section 245 (Legis. Counsel's Dig., Assem. Bill No. 1026 (2011–2012 Reg. Sess.)) to provide clarity for purposes of recidivist enhancements —it was not "'creat[ing] any new felonies or expand[ing] the punishment for any existing felonies'" (Sen. Com. on Public Safety, Analysis of Assem. Bill No. 1026 (2011–2012 Reg. Sess.) as introduced Feb. 18, 2011, p. 3).

(*Brunton*, *supra*, 23 Cal.App.5th at p. 1107.)

In relying on the structure, elements and punishment in the 2011 revision to section 245 to show (a)(1) and (a)(4) to be separate for purposes of section 954, the state seeks to have this Court ignore the uncontroverted expressed legislative intent contained in the legislative history, in favor of an analysis in which legislative intent is inferred, and to do so without any showing that the statutory scheme reflected in (a)(1) and (a)(4) is structurally and textually similar to the sex offense statutes construed in *White* and *Gonzalez*. (RSBM pp. 17-18.) In addition, the subtext underlying the state's argument suggests that "separate" means distinct and necessarily preludes finding (a)(1) and (a)(4) to be "alternative" statements of the same offense.

This is a hard sell in light of the legislative history of the 2011 amendments, and the 1ength of time the previous statute maintained these "alternative" ways of committing an aggravated assault. Moreover, the state's reliance on *Gonzalez* and *White* as a means of determining legislative intent is misplaced here, where the legislative history so clearly and undeniably shows a singular declared legislative intent.

The state, nonetheless, insists that these legislative materials do not evidence an intent to treat (a)(1) and (a)(4) as different statements of a single offense because it splits "an ambiguous code section into two distinct parts." The state omits "merely" from the statement of legislative intent (RSBM p. 44.) Moreover, any claimed "ambiguity" that existed before the 2011 amendments existed outside the statute and arose in the collateral use of the conviction for purposes of deciding it qualified as a strike prior. The "distinctiveness" referred to in the bill analysis is not the distinctiveness of section 954. The distinctiveness in the legislative history refers to what will make clear which type of assault occurred. (A.B. 1026 Bill Analysis.)

The evidence of legislative intent must be evaluated by this Court in the context of a statute that retained DW and FLPGBI in one code section as alternative statements of the same offense for well over a century. The state asserts that when the Legislature divided one subparagraph into two in 2011, "it must be presumed to have adopted this Court's longstanding

construction" because it retained the "deadly weapon or instrument" language in (a)(1) without change. (RSBM pp. 21-22.) Although the longstanding construction to which the state refers is unclear, Ms. Aguayo's rejoinder to the inference of legislative acquiescence was included in her supplemental brief. (ASBM p. 27.) She has also relied on this Court's rejection of legislative inaction as an indication of legislative intent in *White*. (*White, supra*, 2 Cal.5th at p. 360.) In addition, *In re C.D.* (2017) 18 Cal.App.5th 1021-1025 has also recognized the Legislature's intent in refusing to split the two alternative ways of committing an aggravated assault against a police officer into separate subdivisions. Because either alternative would be a serious felony, there was no reason to split them. The state acknowledges this point. (RSBM p. 29.)

The state attaches great significance to the reorganization in which the two crimes have different elements and separate punishments, and asserts that the punishments are different. (RSBM p. 29.) Ms. Aguayo has previously presented the similarity in elements in her LIO analysis. (ARBM pp. 10-14.) For purposes of evaluating the imposition of separate punishments as an indication of the separateness of the offenses, the state again relies on *Gonzalez* and *White*. While in these cases the punishments placed in separate subdivisions were for different terms, here the base term punishments provided in (a)(1) and (a)(4) convictions are identical. This

further supports the view that (a)(1) and (a)(4) are alternative statements of the same offense. The state here has simply confused collateral future consequences with the direct punishment this Court considered in *Gonzalez* and *White.* (Cf. *People v. Bouzas* (1991) 53 Cal.3d 467, 478-479.)

C. For Purposes of Section 954, (a)(1) and (a)(4) Are Alternative Statements of the Same Offense

After this Court decided *Gonzalez* and *White* without reaching the section 954 issue, this Court did address whether section 954 allows convictions for different statements of the same offense in *Vidana*, *supra,* 1 Cal.5th at p. 650. This Court not only held that multiple convictions for different statements of the same offense are prohibited, but such multiple convictions are also prohibited when based on the same course of conduct.

In *Vidana*, this Court considered whether larceny by an employee and embezzlement by an employee would support convictions for two separate crimes based on the Legislature's intent. In its determination of legislative intent, this Court also recognized that it would not give effect to a statute's literal terms if it would yield an "unreasonable or mischievous result." (*Vidana, supra*, 1 Cal.5th at pp. 638-639.) This Court then concluded, based on the legislative intent, that sections 484, subdivision (a), and 503 are different statements of the same offense. (*Id*. at p. 649.)

> Although the terms of section 490a are awkward in their literal application, the obvious

> intent of this statute—enacted at the same time section 484 was amended to include embezzlement—was to create a single crime of theft.

(*Id*. at p. 648.)

Just as sections 484, subdivision (a), and 503 are based on the single crime of theft, so are (a)(1) and (a)(4) based on the single crime of assault, not involving a firearm.

D. The Trial Court's Factual Determination That Ms. Aguayo's Convictions Under (a)(1) and (a)(4) Are Based on the Same Course of Conduct Is Supported by Substantial Evidence

De novo review should apply to the determination of the legislative intent expressed in (a)(1), (a)(4), and section 954. In *Vidana*, however, this Court did not reach the issue of how a trial court is to consider separate convictions based on the same course of conduct as an exception to the multiple convictions permitted under section 954. How the "course of conduct" should be made under section 954 falls squarely within the purview of the request for supplemental briefing. As an issue of first impression, this Court must first determine how this inquiry should proceed.

For section 954 purposes, it is Ms. Aguayo's position that it is for the trial court to make a factual determination of whether the separate verdicts are based on a single course of conduct. Analogizing to the section 654 review process, this Court should then apply the substantial evidence rule to

a trial court's actual finding. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The trial court here did not make any such finding under section 954. However, for purposes of section 654, the trial court did make a finding that Ms. Aguayo engaged in a single course of conduct, and that (a)(1) and (a)(4) were the same offense. (1 R.T. pp. 106-107; 5 R.T. p. 694-695.) In fact, even the prosecutor agreed, pretrial, that this was a correct assessment. (1 R.T. p. 106.)

Here, Ms. Aguayo expressed her anger at her father for turning on the sprinklers and getting her cell phone or charger wet. Her father responded that this was his house and she should not talk to him like that. They argued and a physical altercation ensued, which Mr. Aguayo described as lasting 2-3 minutes during which Ms. Aguayo struck him 50 times. (AOBM pp. 14-15, 56-57.) These facts are substantial evidence that support the trial court's finding that Ms. Aguayo was engaged in a single course of conduct for its section 654 analysis.

The state has conceded that there is no basis on which to distinguish between the two acts Ms. Aguayo admitted. (RSBM pp. 51-52.) Moreover, the state has identified no significant temporal separation between the two times Ms. Aguayo admitted she struck her father. The state's "separate acts" showing would therefore be both incomplete and insufficient to challenge the trial court's findings on the single course of conduct for

purposes of section 654.

The state relies on *Gonzalez* as the basis for excluding a course of conduct from the showing of an exception to the multiple convictions otherwise permitted by section 954. However, this Court in *Vidana* demonstrated why *Gonzlez* is not controlling. In *Vidana*, this Court cited *Gonzalez* multiple times, but concluded that larceny and embezzlement were indeed different statements of the same offense:

> In deciding whether larceny and embezzlement are different offenses, our focus is on the Legislature's intent. "[I]f the Legislature meant to define only one offense" in amending section 484 in 1927, "we may not turn it into two." (*Gonzalez, supra*, 60 Cal.4th at p. 537.)

(*Vidana, supra*, 1 Cal.5th at p. 648.)

Finally, the *Vidana* Court's last reference to *Gonzalez* was only to acknowledge that it had not reached the different statement question under section 954 there, but had answered it in *Vidana*. (*Vidana, supra,* 1 Cal.5th at p. 649.) Because *Gonzalez* did not reach the section 954 issue, and was decided before this Court first recognized the exception to the multiple conviction authorization in section 954 in *Vidana,* it has nothing to contribute to the application of the *Vidana* holding here.

Moreover, *Gonzalez* is inconsistent with *Vidana's* recognition that section 954 does not permit multiple convictions based on a course of

conduct, rather than a single act:

> 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." (See *People v. Coyle* (2009) 178 Cal.App.4th 209, 211, 217–218 [defendant improperly convicted of three counts of murder for killing one person].)

(*Vidana*, *supra*, 1 Cal.5th at p. 650.)

While the purposes of sections 654 and 954 differ, even the imperfect analogy provided by section 654 permits this Court to find substantial evidence from the trial court's section 654 finding that there was a single course of conduct for section 954 purposes here. (But see also Arguments II and III, *post*, re: Sixth Amendment limitations on multiple conviction findings.) Under section 954, this Court can affirm only one conviction here. But in order to affirm only one conviction under section 954, this Court must remand to the trial court for further proceedings to allow the trial court to make this determination under section 954, unless

this Court is satisfied that the findings the trial court made under section 654 are sufficient. In either case, this Court should remand to the trial court to permit it to determine which conviction to vacate, based on its assessment as to which conviction is a better reflection of the culpability that the evidence showed.

If, on the other hand, this Court adopts a standard for the course-of-conduct finding for section 954 that differs significantly from that employed under section 654, such as a "totality of the circumstances" test, then it should remand to the trial court with instructions to apply that test to the totality of facts it has found or will find.

The state has made two cursory arguments to support its claim that both convictions can be upheld, but neither addresses the situation in which both convictions were based on a single course of conduct. The first argument is based on Ms. Aguayo's admission that she struck her father twice. According to the state, this means she committed two separate acts, one punishable under (a)(1), and the other under (a)(4), and that it does not matter if both were committed pursuant to a single objective and intent. The state again relies on *Gonzalez* as its sole support for this argument. (RSBM pp.51-52.) But the state has acknowledged that there is no basis to distinguish between the two acts Ms. Aguayo admitted. (*Ibid*.)

The state also dismisses the trial court's failure to give a unanimity

instruction as "harmless under any standard" and cites Ms. Aguayo's brief, and authorities from her brief, as its support for this claim. (RSBM p. 52.) Once again, the state mischaracterizes Ms. Aguayo's position. Ms. Aguayo has made no claim of error based on the failure to give a unanimity instruction. Ms. Aguayo's point is that because no such instruction was given, the jury's verdict does not contain any findings to support the state's separate acts claim.

Ms. Aguayo has also cautioned that if this Court were to determine that these convictions were based on separate acts and therefore were not an exception to the multiple convictions permitted under section 954 (or if the trial court were to reach such a conclusion), such a determination may rely only on the jury's verdict to uphold these convictions as separate acts that are not part of a course of conduct. As explained in Argument II, that follows, to do otherwise would constitute judicial factfinding, in violation of Ms. Aguayo's Sixth Amendment right to a jury trial. (*Descamps v. United States* (2013) 570 U.S. 254 (*Descamps*) and *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*).) Under principles of judicial restraint, making a decision that only one conviction is permitted under section 954 avoids the Sixth Amendment question that would be implicated by a finding that the (a)(1) and (a)(4) convictions are based on separate acts. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178.)

II. Ms. Aguayo Has A Sixth Amendment Right to Have the Jury Decide the Facts that Would Permit Both Convictions to Stand Under section 954

To affirm the imposition of both the (a)(1) and (a)(4) convictions under the appellate court's finding that Ms. Aguayo struck her father with a bike chain and lock and chiminea, respectively, or under the state's claim that Ms. Aguayo struck her father twice with the bike chain and lock in two separate acts during the course of conduct, this Court would have to engage in a form of judicial fact-finding that violates the Sixth Amendment to the U.S. Constitution, as informed by the U.S. Supreme Court's decisions in *Descamps, Mathis v. United States* (2016) 579 U.S. — [195 L.Ed.2d. 604, 136 S.Ct. 2243 (*Mathis*), and its own opinion in *Gallardo*. In these cases, the courts have applied the holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 (*Apprendi*): other than a fact of a prior conviction, any fact that increases the statutorily authorized penalty for a crime must be found by a jury beyond a reasonable doubt:

> With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "It is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." [Citations]

(*Apprendi*, *supra,* 530 U.S. at p. 490.)

This Court wholly endorsed this prohibition of judicial fact-finding in *Gallardo* and rejected the view that a court could rely on its own independent review of the record to determine what conduct "realistically" led to the conviction:

> The cases make clear that when the criminal law imposes added punishment based on findings about the facts underlying a defendant's prior conviction, "[t]he Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." (*Descamps, supra*, 570 U.S. at p. 269.) While a sentencing court is permitted to identify those facts that were already necessarily found by a prior jury in rendering a guilty verdict or admitted by the defendant in entering a guilty plea, the court may not rely on its own independent review of record evidence to determine what conduct "realistically" led to the defendant's conviction.

(*Gallardo, supra*, 4 Cal.5th at p. 124.)

Admittedly, what is involved in finding the exception to the multiple convictions allowed under 954 does not involve an enhancement which would expose Ms. Aguayo to additional punishment above the statutory maximum. Instead, it exposes her to a separate conviction as well as the additional punishment for that additional conviction. While the punishment for the additional conviction would not exceed the maximum provided in the statute violated in the second conviction, that is not how this should be viewed. It should be viewed as a judicial finding of "additional facts"

about the (a)(4) conviction which will determine whether it can be sustained because it was based on separate acts, or must be vacated under section 954.

The violation of the Sixth Amendment here is more compelling than that found in *Gallardo*: upholding an entire second conviction under section 954 requires the jury to have made findings that the acts supporting the (a)(1) and (a)(4) convictions were not the same. The jury verdict does not reflect any such finding.

A. *Apprendi* Applies to the Judicial Factfinding on Which A Second Conviction for the Same Act Rests

Upholding two convictions, when only one is permitted under section 954, based on findings of fact made by the court and not the jury, necessarily violates the Sixth Amendment under *Apprendi* and its progeny.

Apprendi has most frequently been applied when a prior conviction is used in a subsequent prosecution to impose additional punishment beyond the statutory limit, such as under the strikes law. Often times section 245 convictions obtained before the 2011 legislative revision failed to include any special findings in the jury's verdict in order to show whether the conviction had been based on DW or FLPGBI. As the former finding was essential to treating the conviction as a strike prior, the courts have held that judicial findings of fact, speculating as to what the jury may have found, violate the Sixth Amendment. The U.S. Supreme Court has

concluded that judicial factfinding does not extend "beyond the recognition of a prior conviction." (*Descamps, supra*, 570 U.S. at p. 269.)

This Court has therefore concluded that it may not determine the nature or basis of a prior conviction, based on what facts or conduct "realistically" supported the conviction. This would invade the province of the jury by permitting the court to determine "what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct." (*Descamps, supra*, 570 U.S. at p. 269.) (*Gallardo*, 4 Cal.5th at p. 136.)

In order to uphold Ms. Aguayo's convictions of both the (a)(1) and (a)(4) offenses, this Court has defined its limited role under the Sixth Amendment:

> The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.

(*Gallardo, supra*, 4 Cal.5th at p. 136.)

It is unclear how this Court would identify facts supporting the elements of the offense and that were not pleaded or reflected in the verdict without engaging in a form of judicial factfinding. However, even if the less limited role this Court defined in *Gallardo* is applied here, the facts necessary to uphold two separate convictions based on the same course of

conduct, when the two subdivisions are different or alternative statements of the same offense, would still require additional judicial factfinding that would violate the Sixth Amendment.

B. The Jury Here Did Not Make the Factual Findings Necessary to Uphold Both Convictions As Permitted Under section 954

What the jury did not find is that the (a)(1) offense was committed only with the bike chain and lock, and that the (a)(4) offense was committed only with the chiminea. Nonetheless, the appellate court made that finding, as if the substantial evidence test, or the "what-the-jury-most-likely-found" standard was controlling. (*People v. Aguayo* (2019) 31 Cal.App.5th 758, 768.) But in *Gallardo*, this Court disapproved the latter standard that had been established in *People v. McGee* (2006) 38 Cal.4th 682. (*Gallardo*, *supra*, 4 Cal.5th at p. 125.)

Raised for the first time on appeal, the state claims that the first of the two blows Ms. Aguayo admitted supported the (a)(1) conviction, and the second supported the (a)(4) conviction. Even without a Sixth Amendment analysis, the *Cota* court's rejection of a similar claim is apropos here : "In theory yes, but that is not how the prosecutor argued the case to the jury." (*People v. Cota* (2020) 44 Cal.App.5th 720, 729 (*Cota*).)

The state's "separate acts" theory was not presented to the jury. Moreover, in support of this claim, the state cites case law decided under

the substantial evidence test. But the substantial evidence test applies to the trial court's finding that the (a)(1) and (a)(4) convictions were part of a course of conduct. It does not apply to the Sixth Amendment view of the verdict mandated here.

When the Legislature separated the (a)(1) offense and strike from the non-strike prior relegated to (a)(4), in order to sustain convictions for each count, the Sixth Amendment required the prosecution to take additional prophylactic steps to ensure that the jury made the factual findings required to avoid section 954 problems, and to avoid the attendant encroachment of Ms. Aguayo's Sixth Amendment rights. A special finding or separate verdict form would be the most obvious remedy, and this Court recognized that option in *Vidana*. (*Vidana, supra*, 1 Cal.5th at p. 649.)

For purposes of the Sixth Amendment analysis, *Brunton* is distinguishable. In *Brunton*, an inmate choked his cellmate with a tightly rolled towel. The jury convicted the inmate under both (a)(1) and (a)(4). Because there was only one act involved, the appellate court easily concluded that:

> . . . when based on a defendant's single act of using a noninherently dangerous object in a manner likely to produce great bodily injury, section 245(a)(1) and (4) are merely different statements of the same offense such that the defendant may not be convicted of violating both subparts of the subdivision.

(*Brunton, supra*, 23 Cal.App.5th at p. 1107.)

Accordingly, there was no Sixth Amendment issue in *Brunton* because there was only one act involved upon which the jury must have based its verdict.

In *Cota*, however, the state argued on appeal that there were two acts that could support the two separate (a)(1) and (a)(4) convictions.

> The Attorney General asserts the jury could have convicted defendant of assault with force likely to cause great bodily injury based on his act of punching Morales in the face. In theory yes, but that is not how the prosecutor argued the case to the jury. Although the prosecutor did not explicitly argue the factual basis for the charge of assault with force likely to cause great bodily injury, looking at the prosecutor's closing and rebuttal arguments as a whole, *it is clear to us, and would have been clear to the jury*, that the prosecutor was relying on defendant's act of hitting Morales with the chair as the basis for both assault charges.

(*Cota*, *supra,* 44 Cal.App.5th at p. 729, emphasis added.)

Even though the court in *Cota* did not consider the Sixth Amendment implications of making a judicial finding of fact as to what the jury would have found, it still rejected the separate acts claim. The appellate court made a record-based determination of what the jury necessarily found, and concluded that it was clear to the court, and "would have been clear to the jury" that the prosecutor was relying on the single act

of striking the victim with a chair as the basis for both the (a)(1) and (a)(4) convictions.

Rather than engaging in a *McGee*-type speculation regarding what the jury "most likely" found here, and violating Ms. Aguayo's Sixth Amendment right to have the jury make this determination, this Court should find the (a)(1) and (a)(4) verdicts here to be alternative statements of the same offense, based on the same course of conduct. But even without the Sixth Amendment analysis, the reasoning of *Cota* applies with equal force here where the jury was not presented with either version of the separate acts found by the appellate court, or the separate acts claimed by the state.

III. Under Principles of Judicial Restraint, This Court Should Resolve the Course-of-Conduct Determination Under State Statutory Law

In its supplemental brief, the state has failed to acknowledge what Ms. Aguayo recognizes: that the prime directive here should be to avoid judicial factfinding that violates the Sixth Amendment. This can be accomplished by deciding this issue based purely on state statutory law. If this Court were to find the jury's verdicts were based on alternative statements of the same offense under section 954, and uphold only one conviction, the Sixth Amendment jury trial right would not be implicated. (ASOB pp. 15-16.) (*Descamps, supra,* 570 U.S. 254; *Gallardo, supra,* 4

Cal.5th at p. 136.)

But to determine that the (a)(1) and (a)(4) convictions were based on separate acts would require this Court to engage in the judicial factfinding prohibited by *Descamps, Mathis,* and *Gallardo, supra,* 4 Cal.5th at p. 136.

The state has failed to recognize that Ms. Aguayo's constitutional right to a jury trial would be violated if it persuaded this Court to uphold the (a)(1) and (a)(4) convictions based on judicial factfinding, rather than on the jury's verdict.

The Sixth Amendment claim will apply to any finding that the (a)(1) and (a)(4) verdicts are based on separate acts and will prevent this Court from considering what the jury must have accepted as the theory of the crime, rather than what the jury actually found. If the jury verdicts do not reflect that it found separate acts to support separate convictions, upholding both convictions would violate Ms. Aguayo's Sixth Amendment right to a jury trial.

Whether this Court decides the "separate acts" issue by upholding the trial court's finding that the (a)(1) and (a)(4) convictions were based on the same course of conduct, or under the limited Sixth Amendment review of the jury's verdicts, the outcome will be the same.

Here, substantial evidence supports the trial court's finding that the (a)(1) and (a)(4) jury verdicts were based on a course of conduct that

included the same acts. (4 R.T. pp. 641, 648.) Both before and after the trial, the court found the (a)(1) and (a)(4) convictions were based on the same course of conduct. (1 R.T. pp. 106-107; 5 R.T. pp. 694-695.) (See Argument ID, *ante*, at pp. 26-34.)

Under the appellate court's theory, this Court must find the jury necessarily found the blow struck with the chiminea alone was the factual basis for the (a)(4) verdict, and the blow struck with the bicycle chain/lock alone was the basis for the (a)(1) verdict. There is no basis, in what the jury necessarily found, or under any other inquiry, for this Court to reach that conclusion.

First, the (a)(4) charging allegation and the verdict form were non-specific. The (a)(4) charge in the amended information did not identify the force used, and neither did the jury instructions or the verdict form. (1 C.T. pp. 29, 79-80, 143.) The prosecution did allege the (a)(1) assault as having been committed with the bike chain/lock under section 1192.7, subdivision (c)(23), but the (a)(1) allegation did not charge the (a)(1) assault as having been committed only with the bike chain/lock. (1 C.T. p. 29.) The jury instructions on the (a)(1) charge did not identify any specific instrument used. (1 C.T. pp. 76-77.) The jury instruction on the serious felony allegation did not identify any specific instrument used. (1 C.T. p. 78.)

To affirm the appellate court's opinion, this Court would have to

agree that the jury necessarily found the blow struck with the chiminea alone was the basis for the (a)(4) verdict, and the blow struck with the bicycle chain alone was the basis for the (a)(1) verdict. There was no basis in the charging document, the jury instructions, or the verdicts forms to reach such a conclusion.

Second, the appellate court's finding does not reflect how the prosecutor argued the case to the jury. The prosecutor's summation relied on Ms. Aguayo's hitting her father with the bicycle chain and with the chiminea, to support the (a)(4) conviction. In her opening summation, the prosecutor relied on the evidence of assault with both of these objects as proof of elder abuse. (4 R.T. pp. 578, 581, 594.) The prosecutor then relied on the use of the bike chain and lock as a deadly weapon to support the (a)(1) assault. (4 R.T. p. 597.) But for the (a)(4) assault, the prosecutor relied on the lump on Mr. Aguayo's head, without identifying the instrument used to strike him in the head, which, according to Mr. Aguayo at trial, was caused by being hit with the pot and the bike chain and lock. (2 R.T. pp. 159, 165-166; 4 R.T. pp. 606, 608.) Then, in her closing summation, the prosecution relied on both instruments as used to inflict the assaults. (4 R.T. pp. 641, 648.)

Third, the jury was free to base its (a)(4) aggravated assault on the entire altercation, and using either or both instruments, as the prosecution

presented to the jury in its closing summation. (AOBM pp. 58-59.)

The state does not take the appellate court's position, but instead has parsed the record so finely as to eliminate the "course of conduct" portion of the *Vidana* exception explicitly included in section 954. The state's claim is that the appropriate test here is not whether the two acts arose during a single course of conduct, but instead whether the greater offense was completed before the lesser offense was committed. (RABM p. 49.) Of course, as the state has admitted, there is no basis on which to distinguish between the blows inflicted. (RSBM pp. 51-52.) Moreover, *Vidana* recognizes that the course of conduct determination is part of the 954 analysis. (*Vidana*, *supra*, 1 Cal.5th at p. 650.)

The state, nonetheless, surmises that the jury would have concluded that two separate aggravated assaults occurred during this 2-3 minute course of conduct. (RABM p. 55.) The state's claim that the jury found two separate acts of Ms. Aguayo striking her father finds no support in the verdict. Moreover, it finds no support in the charging document, in the jury verdict forms, in the jury instructions, in the prosecution's opening statements, or in the prosecutor's opening and closing summations. The use of the bicycle chain/lock and chiminea appear to have been the only force the evidence showed that Ms. Aguayo applied.

The state has recognized that convicting a defendant of both a

greater and lesser offense would be to convict twice of the lesser. (RABM p. 50.) For that reason, if the greater and lesser offenses arise out of the same course of conduct, the LIO must be reversed. (*People v. Sanders* (2012) 55 Cal.4th 731, 736.) The same logic applies to multiple convictions based on a single course of conduct where the convictions are alternative statements of the same offense. (*Vidana*, 1 Cal.5th at p. 650.)

Even if this Court finds (a)(4) is not an LIO of (a)(1), or that they are separate offenses, in order to sustain the dual convictions, the verdicts must show that the jury necessarily found: (1) the (a)(4) conviction was based on a separate and second act of either striking Mr. Aguayo with the bicycle chain/lock, after the first strike with the bicycle chain/lock was completed, or that the second blow was struck only with the chiminea; and (2) the (a)(1) conviction was based only on the striking with the bike chain/lock, and not with the chiminea.

The state's evidentiary sufficiency claim as to Ms. Aguayo's admission to striking her father twice with the bicycle chain/lock is irrelevant. The issue is whether the jury's verdict was based on this admission. Accordingly, the sum total of what the state has shown is reflected in its assertion that: "[B]ased on appellant's admission of two separate strikes with the chain, the jury would have concluded that two separate aggravated assaults occurred." (RABM p. 55.) The state draws

this conclusion by applying the standard prohibited by *Gallardo*, and without reference to the multitude of factors which Ms. Aguayo has identified and which show that the verdict fails to establish that the jury found (a)(1) and (a)(4) were based on distinctly separate acts.

The prosecutor added count three, the (a)(4) assault, on the eve of trial. It is reasonably likely this was done to provide a backup option for the jury. If the jury failed to return a verdict on (a)(1) because the bicycle chain/lock was not found to be a deadly weapon or for some other reason, the jury could still convict Ms. Aguayo under (a)(4). If this was not the intent of the prosecution, then it failed to convey it in its opening statement and in its summations, failed to request pinpoint instructions to the jury and to request that the trial court include special findings in the verdict forms. (*Vidana*, 1 Cal. 5th at p. 649.) Without a verdict showing that the jury based its verdicts on separate acts, no court can constitutionally uphold both convictions.

Conclusion

If there is any ambiguity in the interpretation of (a)(1), (a)(4) and/or 954, the rule of lenity applies to any reasonable interpretation that is more favorable to the defendant. (AOBM pp. 24-25)

> "'[W]e have repeatedly stated that when a statute *defining a crime or punishment* is susceptible of two reasonable interpretations,

> the appellate court should ordinarily adopt that interpretation more favorable to the defendant.' (*People v. Avery* (2002) 27 Cal.4th 49, 57 [115 Cal.Rptr.2d 403, 38 P.3d 1], italics added.)"

(*White, supra*, 2 Cal.5th at p. 360.)

Ms. Aguayo has shown that the 2011 revisions to section 245 reveal the legislative intent that (a)(1) and (a)(4) remain different statements of the same offense. Moreover, this Court has already declared in *Vidana* that under section 954, alternative statements of the same offense cannot support two convictions based on acts committed in a single course of conduct.

Under the rule of lenity, and for the other foregoing reasons, Ms. Aguayo requests that this vacate Ms. Aguayo's (a)(1) and (a)(4) convictions as alternative statements of the same offense, based on a course of conduct, and remand to the trial court to permit it to determine which conviction should be vacated, or that this Court vacate the (a)(4) conviction as an LIO of (a)(1), either of which is an exception to the separate convictions authorized under section 954.

Dated: July 1, 2020

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I, Linnéa M. Johnson, appointed counsel for Ms. Aguayo, certify pursuant to rule 8.520(d)(2) of the California Rules of Court, that I prepared this Supplemental Brief on the Merits on behalf of my client, as requested by this Court, and that the word count for this brief is 8,981 words, less than the 10,000 word limit imposed by this Court in its Order of June 10, 2020.

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Dated: July 1, 2020

/s/ Linnéa M. Johnson
Linnéa M. Johnson
Attorney for Appellant

Re: *The People v. Aguayo,* Case No. S254554

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I certify that the foregoing is true and correct. Executed on **July 1, 2020**, at Auburn, California.

/s/ *Linnéa M. Johnson*

STATE OF CALIFORNIA
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