S249397

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, vs. MIGUEL ANGEL JIMENEZ, Defendant and Respondent.	COURT NO. Court of Appeal No. B283858 Ventura County Superior Court No. 2016041618

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Real Party in Interest, the People of the State of California, by and through Gregory D. Totten, District Attorney of the County of Ventura, respectfully petitions for review following the published decision of the Court of Appeal of California, Second Appellate District, Division 6, holding that a felony violation of section 530.5 of the Penal Code is subject to reclassification as shoplifting pursuant to section 459.5 of the Penal Code[1] enacted by Proposition 47. The opinion, filed on May 8, 2018, was certified for publication and became final on June 7, 2018. A copy of the opinion is attached to this Petition.

ISSUES PRESENTED FOR REVIEW

Does use of the personal identifying information of another in violation of section 530.5, subdivision (a), constitute theft subject to reclassification as a shoplifting (§459.5) pursuant to Proposition 47?

NECESSITY FOR REVIEW

In November 2014, California voters enacted Proposition 47 effecting numerous changes to the criminal justice system. The act expressly reduced certain drug and theft offenses from felonies to misdemeanors, redefined petty theft (§ 490.2) and created a new misdemeanor shoplifting crime. (§ 459.5.) As

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[1] Further statutory references are to the Penal Code unless otherwise designated.

the full ramifications of Proposition 47 are being developed in the courts of this state, decisions addressing identity theft have created an intractable split of authority regarding the treatment of identity theft in violation of section 530.5. While two opinions of the Court of Appeal have explicitly ruled identity theft is not a theft offense, the Court of Appeal in this case held otherwise, finding the violation was a theft offense and thus subject to reclassification as shoplifting. Review is therefore necessary to secure uniformity of decision and to settle important questions of law. (Cal. Rules of Court, rule 8.500(b)(1).)

Recognizing that "[b]y its plain terms, section 530.5 addresses harms much broader than theft," (*People v. Liu* (2018) 21 Cal.App.5th 143 [229 Cal.Rptr.3d 889], review granted June 13, 2018, No. S248130 [*Liu*].), Division 8 of the Second District Court of Appeal on March 9, 2018, held in a published opinion, that a violation of subdivision (c) of section 530.5 is not subject to reclassification as shoplifting: "section 530.5 is not defined as grand theft, and does not proscribe 'obtaining property by theft.'" (*Liu, supra*, 21 Cal.App.5th at p. 152.) Shortly thereafter, on April 17, 2018, Division 1 of the Fourth District Court of Appeal, in a published opinion, similarly was "satisfied that section 530.5, subdivision (a) is not a theft-based offense," and so held it is not subject to reclassification as a petty theft pursuant to section 490.2 as enacted by Proposition 47. (*People v. Sanders* (2018) 22 Cal.App.5th 397, 403 [231 Cal.Rptr.3d 477, 480–481] [*Sanders*].)[2]

As this case along with *Liu* and *Sanders* demonstrate, the interplay between sections 459.5 and 530.5 is a recurring issue which often yields dissimilar results. In Ventura County alone, the issue arises repeatedly in routine

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[2] On May 18, 2018, a petition for review was filed in *People v. Sanders* (S248775).

matters such as search warrant review, charging decisions, arguments for holding orders, motions to dismiss, sentencing determinations, and petitions for resentencing. Prosecutors and courts alike require a clear and unified answer.

In the present matter, Division 6 of the Second Appellate District, in a published opinion, held to the contrary finding that section 530.5, subdivision (a) is a theft offense subject to reclassification as shoplifting pursuant to section 459.5. In so deciding, the Court of Appeal found the opinion in *Sanders*, *supra*, "inapposite" for not dealing squarely with section 459.5. (*People v. Jimenez* (2018) 22 Cal.App.5th 1282 [232 Cal.Rptr.3d 386].) But this characterization ignores the plain language of section 459.5, subdivision (b) which extends the reach of the shoplifting charge only to other theft or burglary offenses. By deciding identity theft must be reclassified as shoplifting, the Court of Appeal in this case was, by necessity, determining that a violation of subdivision (a) of section 530.5 is a theft offense. In so doing, the Court of Appeal in this case put itself at odds not only with *Liu* and *Sanders*, but also with *People v. Thuy Le Truong* (2017) 10 Cal.App.5th 551, 561 [216 Cal.Rptr.3d 246, 255], which held that a defendant could be convicted for violations of both sections 530.5 and 496 without violating the prohibition against dual convictions because identity theft is not, by definition, a theft offense.

The nature of identity theft and how it is impacted by Proposition 47 are important issues of law for which there is no uniform agreement. Especially as this court has recently granted review in the related case of *People v. Liu*, *supra*, 21 Cal.App.5th 143 (S248130), the decision of the Court of Appeal in this case should be reviewed to settle this important issue of law and ensure uniformity of decisions in this area.

FACTUAL BACKGROUND

Real Party in Interest, Miguel Angel Jimenez ("defendant") was charged by Information with two felony counts of the unauthorized use of the personal identifying information of another, in violation of section 530.5, subdivision (a)(§ 530.5(a)). It was further alleged that defendant had suffered a prior strike conviction for assault with a deadly weapon and a prison prior.

On two separate occasions, defendant went to a check cashing company in Oxnard. On each occasion, he presented a check allegedly issued from the corporation known as OuterWall, Inc. The checks were made payable to defendant. He utilized the corporation's account information on both checks. He did not have the permission or authorization to do so. Neither check was issued by the company in defendant's name. Defendant was not charged with second degree commercial burglary. (§ 459.) He was not charged with theft from the check cashing company. He was charged with the willful acquisition of the personal identifying information (bank account number) of OutWall, Inc. and its unconsented to use for an unlawful purpose. (§530.5(a).)

A jury convicted defendant of both counts and defendant admitted the special allegations. Defendant filed a motion to reduce the offenses to misdemeanor shoplifting pursuant to Proposition 47 and *People v. Gonzales* (2017) 2 Cal.5th 858 [216 Cal.Rptr.3d 285, 392 P.3d 437] (*Gonzales*). At the time of sentencing, over the People's objection, the court granted the motion and reclassified the felony 530.5 convictions to misdemeanor shoplifting.

The People appealed.[3] The Court of Appeal affirmed. The People did not seek rehearing. This petition follows.

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[3] *People v. Miguel Angel Jimenez* (B283858), opinion certified for publication is attached to this petition.

ANALYSIS

I.

THE OPINION OF THE COURT OF APPEAL CONSTRUES THE PLAIN LANGUAGE OF SECTION 459.5 IN A MANNER THAT IS INCONSISTENT WITH THE DECISIONS OF OTHER CALIFORNIA COURTS

No other court that has considered the implementation of section 459.5 has ruled that a charge other than burglary should be reclassified pursuant to its provisions. (See, e.g., *Sanders*, *supra*, 22 Cal.App.5th 397, 403 [identity theft, § 530.5 (a), is not petty theft; second degree burglary reduced to shoplifting]; *People v. Segura* (2015) 239 Cal.App.4th 1282 [191 Cal.Rptr.3d 904] [conspiracy to commit theft, § 182, not reduced; second degree burglary reduced to shoplifting]; *Gonzales*, *supra*, 2 Cal.5th 858 [second degree burglary reduced to shoplifting]; *People v. Bunyard* (2017) 9 Cal.App.5th 1237 [215 Cal.Rptr.3d 628] [same]; *People v. Huerta* (2016) 3 Cal.App.5th 539 [207 Cal.Rptr.3d 637] [same]; *People v. Garrett* (2016) 248 Cal.App.4th 82 [203 Cal.Rptr.3d 369] [same].) Even this court in *Gonzales* considered only whether a charged violation of second degree burglary should be reclassified as shoplifting. By determining that a non-burglary and non-theft offense should be reclassified as shoplifting, the Court of Appeal in this case has put itself in conflict with every other California court to consider the application of section 459.5.

As defined by subdivision (a) of section 459.5, "[t]he crime of shoplifting has three elements: (1) entry into a commercial establishment, (2) while the establishment is open during regular business hours, and (3) with intent to commit larceny of property valued at $950 or less. (§ 459.5, subd. (a).)" (*In re J.L.* (2015) 242 Cal.App.4th 1108 [195 Cal.Rptr.3d 482].) Offenses other than shoplifting may be reclassified as shoplifting only as provided in subdivision (b)

which sets two unambiguous charging parameters. It states first that "[A]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting," and second that "[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property."

The first requirement in subdivision (b) is directed only at an act that constitutes the crime of shoplifting. Identity theft is not shoplifting. Its elements are: "(1) that the person willfully obtain personal identifying information belonging to someone else; (2) that the person use that information for any unlawful purpose; and (3) that the person who uses the personal identifying information do so without the consent of the person whose personal identifying information is being used." (*People v. Barba* (2012) 211 Cal.App.4th 214, 223 [149 Cal.Rptr.3d 371, 377].) None of these elements overlaps with the elements necessary to prove shoplifting because identity theft is meant to protect an entirely different class of victims from a distinct type of harm. "[S]ection 530.5 addresses disruptions caused in victims' lives when their personal identifying information is used, even if those victims may not have been financially harmed as a result of the defendant's conduct." (*Id.*, at p. 226.) "[T]he harm suffered by identity theft victims [extends] well beyond the actual property obtained through the misuse of the person's identity." (*Ibid.*, citing *People v. Valenzuela* (2012) 205 Cal.App.4th 800, 807-808, [141 Cal.Rptr.3d 34].)

The second requirement of subdivision (b) forecloses only *burglary* or additional *theft* charges *related to the same property*. "Burglary" and "theft" both have specific definitions in the criminal justice system. The electorate is presumed to have understood "the ramifications of its choice of language." (*Gonzales*, *supra,* 2 Cal.5th at p. 871.) For this reason, this Court in *Gonzales*, held that the electorate understood that cashing a forged check is a form of

larceny such that the defendant's *entry* into a commercial establishment to cash the forged check could not, consistent with subdivision (b) be charged as *burglary.* (*Gonzales*, *supra,* 2 Cal.5th at p. 871, 876.) Defendant in this case, however, was not charged with burglary, but only with identity theft.

One ramification of foreclosing only other burglary or theft offenses is the exclusion of identity theft from the reach of section 459.5. In contrast to a violation of section 484e, which this court considered in *People v. Romanowski* (2017) 2 Cal.5th 903 [215 Cal.Rptr.3d 758, 391 P.3d 633], "a section 530.5 offense is outside the statutory scheme governing theft offenses." (*People v. Thuy Le Truong*, *supra*, 10 Cal.App.5th at pp. 561-562; see *Sanders*, *supra*, 22 Cal.App.5th at p. 405; *People v. Valenzuela*, *supra*, 205 Cal.App.4th at p. 808.) Moreover, section 530.5(a) does not require the "unconsented to taking" nor the intent to "permanently deprive" which are hallmarks of theft. (See *People v. Page* (2017) 3 Cal.5th 1175, 1182 [225 Cal.Rptr.3d 786, 789, 406 P.3d 319, 322]; *People v. Romanowski*, *supra*, 2 Cal.5th at p. 912; *Liu*, *supra*, 21 Cal.App.5th at p. 152.)

Nevertheless, the only way to interpret the conclusion of the Court of Appeal in this case is to find that the court determined identity theft in violation of section 530.5(a) is a theft charge related to the same property. In this way the decision below diverges with *Liu* and directly conflicts with *Sanders*. The opinion in this case also creates a split of reasoning with another recent Court of Appeal opinion, *People v. Soto* (May 24, 2018, D072319) __ Cal.App.5th __ [2018 Daily Journal D.A.R. 4982, 2018 WL 2355274, at *5](*Soto*).

In *Soto*, the Court of Appeal considered a defendant's prior conviction for theft from an elder in violation of section 368. (*Soto*, *supra*, 2018 WL 2355274, at *5.) The court considered the approach taken by this court in *Romanowski*

and *Page* to determine whether the offense was rendered a misdemeanor pursuant to section 490.2. (*Id.*, at *6.) In so doing, the court observed that neither of these prior decisions had "occasion to consider Proposition 47 eligibility for what we will call a pure 'theft-plus' offense, i.e., one that is not identified as grand theft and requires *additional necessary elements* beyond the theft itself." (*Ibid.* [italics in original].) The *Soto* court concluded section 490.2 did not extend to the "theft-plus" offenses.

> A different conclusion would lead to absurd results. "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Theft is a lesser included offense of robbery. (Citations.) A robber might take property by larceny worth less than $950. (Citations.) An over-expansive reading of *Romanowski* and *Page* might construe that "theft-plus" offense as petty theft under section 490.2. Such a construction would thwart Proposition 47's objective to reduce sentences for *nonviolent* crimes while shifting spending toward *more serious* offenses.

(*Soto*, *supra*, 2018 WL 2355274, at *6].)

The opinion of the Court of Appeal in this case did not consider the "theft-plus" nature of a violation of section 530.5(a), and so determined the charge should be reclassified as a shoplifting offense, wherein the listed victim would be a commercial establishment rather than the individual entity or person whose identifying information was appropriated. The opinion in this case thus presents a reading of *Gonzales* that could lead to equally absurd results as those identified in *Soto*: a defendant entering a commercial establishment intending to steal a $200 watch, could only be charged with shoplifting even if the defendant used force against a loss prevention officer to escape from the establishment.

Because the opinion of the Court of Appeal in this case veers from the authority of this court as well as the authority and reasoning of its sister divisions of the Court of Appeal, review by this court is necessary to establish uniformity of opinions.

II.

THE OPINION BELOW VEERS FROM THE DECISIONS OF THIS COURT WHICH HAVE GIVEN GREAT WEIGHT TO INDICIA OF VOTER INTENT

The opinion below does not address the information provided to the voters regarding the impact Proposition 47 would have on identity theft. The omission is a significant departure from the decisions of this court which have emphasized: "'In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration.'" (*Gonzales*, *supra*, 2 Cal.5th at p. 868, citing *In re Lance W.* (1985) 37 Cal.3d 873, 889 [210 Cal.Rptr. 631, 694 P.2d 744].)

Nothing in Proposition 47 or its history provides any reason to suppose the voters intended to impact the penalties associated with identity theft. That the voters enacted Proposition 47 to reduce prison expenses is insufficient proof of an intent to impact section 530.5. "[T]he purpose of saving money does not mean we should interpret the statute in every way that might maximize any monetary savings." (*People v. Morales* (2016) 63 Cal.4th 399, 408 [203 Cal.Rptr.3d 130, 136, 371 P.3d 592, 597].) In *People v. Valencia* (2017) 3 Cal.5th 347, 364 [220 Cal.Rptr.3d 230, 245, 397 P.3d 936, 949](*Valencia*), this Court looked to the voters' guide to determine whether "unreasonable risk of danger to public safety" found in section 1170.18 enacted by Proposition 47, also applied to petitions filed under section 1170.126, enacted by Proposition 36. This

court found that "Nothing in the materials accompanying the text of Proposition 47 suggested that the initiative would alter the resentencing criteria under the previously enacted Three Strikes Reform Act..." (*Ibid.*) The same is true in the present case, nothing in the voters' materials suggests Proposition 47 applies to identity theft.

Though the Legislative Analyst is duty bound to analyze and explain the impact of the proposed measure on existing law (Elec. Code, § 9087, subds. (a), (b); see *Valencia, supra,* 3 Cal.5th at pp. 365-366), the analysis for Proposition 47 did not explain that identify theft would be subject to the provisions enacted by the initiative. The omission is critical: a court "'cannot presume that...the voters intended the initiative to effect a change in the laws that was not expressed or strongly implied in either the text of the initiative or the analyses and arguments in the official ballot pamphlet.'" (*Ibid.; Farmers Ins. Exchange v. Superior Court* (2006) 137 Cal.App.4th 842, 857–858 [40 Cal.Rptr.3d 653, 664].)

No part of the voter information pamphlet for Proposition 47 informed the electorate that identity theft would be subject to reduction or dismissal. Instead the voters were told Proposition 47 would "'reduce[ ] penalties for *certain' but not all* 'offenders convicted of nonserious and nonviolent property and drug crimes.' (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), analysis of Prop. 47 by Legis. Analyst, p. 35.)'" (*People v. Acosta* (2015) 242 Cal.App.4th 521, 526-527 [195 Cal.Rptr.3d 121, 124] [italics added].) The Legislative Analyst specifically listed the offenses which would receive reduced penalties: "grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession." (*Valencia, supra,* 3 Cal.5th at p. 366; citing Voter Information Guide, *supra,* analysis of Prop. 47, pp. 35-36.) The uncodified

portion of the initiative includes a statement that "in enacting this act, it is the purpose and intent of the people of the State of California to: . . . . (4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses *listed herein* that are now misdemeanors." (*People v. Bush* (2016) 245 Cal.App.4th 992, 1004 [200 Cal.Rptr.3d 190, 198], citing Stats. 2014, ch. 861, §1, eff. Jan. 1, 2015 [italics in *Bush*].)

Unauthorized use of personal identifying information is not on the list of impacted crimes. In the portion explaining the new shoplifting crime, voters were informed that "[u]nder current law, shoplifting property worth $950 or less (*a type of petty theft*) is often a misdemeanor." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), analysis of Prop. 47 by Legis. Analyst, p. 35 [italics added].) The voters were presumed to know that identity theft is not a "type of petty theft." Therefore, based on the information presented to the voters, a similar conclusion can be made here as was in *Valencia* – "there is no indication that the Legislative Analyst or the Attorney General were even aware that the measure might" impact section 530.5(a). (See *Valencia, supra*, 3 Cal.5th at p. 366.) To the contrary, the voters were informed under the caption "Check Forgery," that "[u]nder this measure, forging a check worth $950 or less would always be a misdemeanor, except that it would remain a wobbler crime if the offender commits identity theft in connection with forging a check." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), analysis of Prop. 47 by Legis. Analyst, p. 35.) This is the only thing the voters were told about identity theft: that the commission of identity theft would elevate check forgery to a wobbler. The voters could not possibly have gleaned from this explanation that identity theft itself would otherwise be relegated to misdemeanor status.

The Court of Appeal's omission of any consideration of voter intent is inconsistent with the approach of this court which has repeatedly looked at the available information regarding the voters' intentions to guide its conclusions. In *People v. Martinez*, this court relied on the fact that neither the initiative language nor the voters' guide discussed drug transportation offenses as support for the conclusion that such offenses were not reduced by Proposition 47. (*People v. Martinez* (2018) 4 Cal.5th 647, 653–654 [230 Cal.Rptr.3d 673, 678, 413 P.3d 1125, 1129].)

In *People v. Page*, this court found support for its conclusion by reference to the words of the Legislative Analyst who explained to the voters "that under existing law, theft of property worth $950 or less could be charged as a felony 'if the crime involves the theft of certain property (such as cars).'" (*People v. Page*, *supra,* 3 Cal.5th at p. 1187; citing Voter Information Guide, Gen. Elec. (Nov. 4, 2014), analysis of Prop. 47 by Legis. Analyst, p. 35.) In contrast, the voters were only informed that identity theft would elevate check forgery to a felony when the two crimes were committed together. (*Ibid.*; § 473, subd. (b).) The Court of Appeal in this case should have followed this court's lead and analyzed the existing indicia of voters' intent. Following the logic this court used in *People v. Page*, if the indicia of voters' intent as to vehicles supports an 'inclusive interpretation" then it must also be true that the indicia of voters' intent as to identity theft supports only an interpretation that excludes identity theft from the reach of Proposition 47.

CONCLUSION

The present case has created inconsistency in the legal authority interpreting Proposition 47 as it pertains to identity theft. Review is necessary to secure uniformity of decision and settle this important question of law.

We respectfully request this court grant review.

Respectfully submitted,

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County of Ventura, State of California

DATED: June 14, 2018

By: _____
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CERTIFICATE OF WORD COUNT

According to the word count of the computer program used to prepare the brief, this answer is less than 3,510 words long.

DATED: June 14, 2018

By: 

LISA O. LYYTIKAINEN
Senior Deputy District Attorney

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Appellant,

v.

MIGUEL ANGEL JIMENEZ,

Defendant and Respondent.

2d Crim. No. B283858
(Super. Ct. No. 2016041618)
(Ventura County)

The People appeal the trial court's order reducing Miguel Angel Jimenez's felony convictions for identity theft under Penal Code section 530.5, subdivision (a)[1] to misdemeanor shoplifting under section 459.5, subdivision (a). They contend that section 459.5, which was enacted as part of Proposition 47 (§ 1170.18), does not apply to section 530.5 identity theft offenses, even when the amount involved does not exceed $950.

In *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales*), the defendant cashed two stolen checks valued at less than $950 each. (*Id.* at p. 862.) Our high court determined that the

[1] All statutory references are to the Penal Code.

defendant's "act of entering a bank to cash a stolen check for less than $950, traditionally regarded as theft by false pretenses . . . , now constitutes shoplifting under [section 459.5]." (*Ibid.*) Section 459.5, subdivision (b) states that any act of shoplifting "shall be charged as shoplifting," and that no one "charged with shoplifting may also be charged with burglary or theft of the same property." (*Gonzales*, at p. 876 ["A defendant must be charged only with shoplifting when [section 459.5] applies"].)

Like the defendant in *Gonzales*, Jimenez cashed two stolen checks valued at less than $950 each. These acts constitute misdemeanor shoplifting under section 459.5, subdivision (a) and must be charged as such. (§ 459.5, subd. (b); *Gonzales*, *supra*, 2 Cal.5th at p. 876.) The trial court correctly reduced Jimenez's felony convictions for identity theft to misdemeanors pursuant to Proposition 47. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

On two different occasions, Jimenez entered Loan Plus, a commercial check-cashing business, and cashed a check from Outer Wall, Inc., made payable to himself. The checks were valued at $632.47 and $596.60, respectively. Outer Wall, Inc. did not issue the checks in Jimenez's name.

The People filed an information charging Jimenez with two felony violations of section 530.5, subdivision (a) -- the unauthorized use of the personal identifying information of another.[2] They further alleged that Jimenez had suffered a prior

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[2] Section 530.5, subdivision (a) provides, in relevant part: "Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful

strike conviction for assault with a deadly weapon plus a prison prior.

After a jury convicted Jimenez of both charges, Jimenez admitted the special allegations. He also moved to reduce the convictions to misdemeanors pursuant to Proposition 47 and *Gonzales*, *supra*, 2 Cal.5th 858. Jimenez asserted his conduct constituted misdemeanor shoplifting under section 459.5, subdivision (a), as interpreted by our Supreme Court in *Gonzales*.

The trial court granted Jimenez's motion over the People's objection. It stated that it had reviewed *Gonzales*, *supra*, 2 Cal.5th 858, and *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), and concluded that under the reasoning and holding of those two cases, the "[c]ourt's hands have been somewhat tied." The court explained: "It appears indicated that when there's conduct that results in the theft, which was here theft of property when it was used to derive on two separate instances money less than $950, the Court is mandated to reduce those to misdemeanors. Those are the rulings put forth by the Supreme Court." The court further stated: "And even though [this case] involves a different charge, it appears to be somewhat of a theft charge which was the focus of *Gonzale*[*s*] and *Romanowski* . . . . And based on the Court's review of those two recent rulings, the Court feels it is obligated . . . to grant the defense motion and reduce Count 1 and Count 2 to misdemeanors as it appears to be that conduct that has been described in Proposition 47 as a shoplifting type of offense."

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purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense . . . ."

Following reclassification of the convictions, the trial court sentenced Jimenez to two consecutive six-month terms. The court awarded Jimenez presentence credits, and his sentence was deemed served. The People appeal.

DISCUSSION

Proposition 47

On November 4, 2014, California voters enacted Proposition 47, "The Safe Neighborhoods and Schools Act," which became effective the next day. (Cal. Const., art. II, § 10, subd. (a).) Proposition 47 reduced certain theft-related offenses from felonies or wobblers to misdemeanors, unless the offenses were committed by certain ineligible offenders. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Under Proposition 47, a defendant may be eligible for misdemeanor resentencing or redesignation under section 1170.18 if he or she would have been guilty of a misdemeanor under Proposition 47, and if the offense would have been a misdemeanor had Proposition 47 been in effect at the time of the offense. (§ 1170.18, subds. (a) & (f); *Gonzales*, *supra*, 2 Cal.5th at pp. 863, 875.) Resentencing or redesignation under Proposition 47 is "required unless 'the court, in its discretion, determines that resentencing the petitioner [or reclassifying the conviction as a misdemeanor] would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)" (*Gonzales*, at p. 863.)

Proposition 47 directs that the "act shall be broadly construed to accomplish its purposes."[3] One such purpose of

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[3] Cal. Voter Information Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47 (Voter Information Guide), p. 74, § 15, at <http://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf> [as of May 2, 2018].

Proposition 47 is "'to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative.' [Citations.] [Proposition 47] also expressly states an intent to '[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.'" (*Gonzales*, *supra*, 2 Cal.5th at p. 870, citing *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992, and the Voter Information Guide, *supra*, text of Prop. 47, §§ 2-3, par. (3), p. 70.)

"Shoplifting"

Proposition 47 added several new provisions, including section 459.5, which created the crime of shoplifting. Section 459.5, subdivision (a) provides: "Notwithstanding [s]ection 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary." "Shoplifting is punishable as a misdemeanor unless the defendant has previously been convicted of a specified offense." (*Gonzales*, *supra*, 2 Cal.5th at p. 863; § 459.5, subd. (a).) Section 459.5, subdivision (b) explicitly limits charging with respect to shoplifting: "'Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.'" (*Gonzales*, at p. 863.)

No Error in Reducing Jimenez's Felony Convictions to Misdemeanor Shoplifting

The People contend Jimenez is ineligible for reduction of his felony convictions to misdemeanor shoplifting because his offenses constitute identity theft (§ 530.5, subd. (a)), which remains a felony under Proposition 47. We disagree.

The first published decision to discuss the interplay between felony identity theft (§ 530.5) and section 459.5 is *People v. Garrett* (2016) 248 Cal.App.4th 82 (*Garrett*).[4] Garrett entered a store and attempted to buy gift cards with a stolen credit card. (*Garrett,* at p. 84.) He pled no contest to commercial burglary and later petitioned for resentencing under Proposition 47. (*Garrett,* at p. 86.) The trial court denied the petition. (*Ibid.*) The Court of Appeal reversed, rejecting the Attorney General's argument that because Garrett intended to commit felony identity theft (§ 530.5), section 459.5 did not apply. (*Garrett*, at pp. 86-90.) The court reasoned: "[E]ven assuming [Garrett] intended to commit felony identity theft, he could not have been charged with burglary under . . . section 459 if the same act -- entering a store with the intent to purchase merchandise with a stolen credit card -- also constituted shoplifting under [s]ection 459.5." (*Id.* at p. 88.) Based on this reasoning, the court held that the use of a stolen credit card to purchase merchandise

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[4] The California Supreme Court granted review in *Garrett* and held the case (No. S236012) pending its decision in *Gonzales*. After *Gonzales* was decided, the Court dismissed its grant of review and remanded the matter to the Court of Appeal for issuance of the remittitur. The *Garrett* decision is now final and citable as precedent. (Cal. Rules of Court, rule 8.528(b).)

valued at less than $950 constitutes shoplifting under section 459.5. (*Garrett,* at p. 90.)

Shortly thereafter, our Supreme Court issued *Gonzales*. Gonzales had stolen his grandmother's checkbook and, on two separate occasions, entered a bank and cashed a check he had made out to himself for $125. (*Gonzales*, *supra*, 2 Cal.5th at p. 862.) Gonzales was charged with the felonies of second degree burglary and forgery. He pled guilty to burglary, and the forgery count was dismissed. (*Ibid.*) Gonzales petitioned for misdemeanor resentencing under Proposition 47. (*Gonzales*, at p. 862.) The trial court denied his petition, the Court of Appeal affirmed, but the Supreme Court reversed, holding that the electorate "intended that the shoplifting statute apply to an entry to commit a nonlarcenous theft. *Thus, [Gonzales's] act of entering a bank to cash a stolen check for less than $950, traditionally regarded as a theft by false pretenses rather than larceny, now constitutes shoplifting under the statute.* [Gonzales] may properly petition for misdemeanor resentencing under . . . section 1170.18." (*Ibid*, italics added.)

The Attorney General argued that even if Gonzales did engage in shoplifting, he was ineligible for resentencing because he also entered the bank intending to commit felony identity theft under section 530.5, subdivision (a). (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) The Attorney General's position was that Gonzales's felony burglary conviction could have been based on his separate intent to commit felony identity theft. (*Ibid.*) Relying on *Garrett*, Gonzales responded that section 459.5 precluded such alternate charging because his conduct also constituted shoplifting. (*Gonzales*, at p. 876.) Noting that Gonzales "has the better view," the Supreme Court concluded

that "[s]ection 459.5, subdivision (b) requires that any act of shoplifting '*shall be charged* as shoplifting' and no one charged with shoplifting 'may also be charged with burglary or theft *of the same property*.' (Italics added.) A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct." (*Ibid.*)

The court further explained that the use of the phrase "'the same property'" in section 459.5, subdivision (b) "confirms that multiple burglary charges may not be based on entry with intent to commit different forms of theft offenses if the property intended to be stolen is the same property at issue in the shoplifting charge. Thus, the shoplifting statute would have precluded a burglary charge based on an entry with intent to commit identity theft here because the conduct underlying such a charge would have been the same as that involved in the shoplifting, namely, the cashing of the same stolen check to obtain less than $950. A felony burglary charge could legitimately lie if there was proof of entry with intent to commit a nontheft felony or an intent to commit a theft of other property exceeding the shoplifting limit." (*Gonzales*, *supra*, 2 Cal.5th at pp. 876-877.)

Here, Jimenez's conduct is identical to Gonzales's conduct. They both entered a commercial establishment during business hours for the purpose of cashing stolen checks valued at less than $950 each. Both defendants committed "theft by false pretenses," which "now constitutes shoplifting under [section 459.5, subdivision (a)]." (*Gonzales*, *supra*, 2 Cal.5th at pp. 862, 868-869 [shoplifting as defined in section 459.5, subdivision (a) encompasses all thefts, including theft by false pretenses].)

Section 459.5, subdivision (b) makes it clear that "'[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting,'" and that "'[n]o person who is charged with shoplifting may also be charged with burglary *or* theft of the same property.'" (*Gonzales*, at p. 863, italics added.) The trial court properly concluded that Jimenez's acts of shoplifting could not be charged as felony identity theft under section 530.5, subdivision (a). (*Gonzales*, at p. 862.) Under section 495, subdivision (b), they could be charged only as misdemeanor shoplifting. (*Gonzales*, at pp. 862, 876-877; see 2 Couzens, Bigelow & Prickett, Sentencing Cal. Crimes (The Rutter Group 2017) § 25:4, p. 25-29 ["If section 459.5 applies, the defendant may not be alternatively charged with burglar[y] or identity theft"].)

In addition, the Supreme Court has rejected the view that obtaining a person's identifying information in the course of a theft is excluded from Proposition 47. In *Romanowski*, the Attorney General argued that the crime of theft of an access card was enacted to protect consumers and therefore should be exempt from section 490.2, the petty theft statute under Proposition 47.[5] (*Romanowski*, *supra*, 2 Cal.5th at pp. 913-914.) The court disagreed, stating: "The People's argument about 'the statute's broad consumer protection' . . . overlooks the fact that Proposition 47 expressly reduced the punishment for another set of crimes

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[5] Section 490.2, subdivision (a) provides, with some exceptions, that "[n]otwithstanding [s]ection 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ."

that serve to protect consumers. Proposition 47 reduces punishment for 'forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of [such document] does not exceed nine hundred fifty dollars ($950).' (§ 473, subd. (b).) Section 473 also protects consumers from fraud and identity theft. In fact, a check can contain some of the same information that is found on an access card, along with the owner's address and other details that would facilitate identity theft. Given that Proposition 47 specifically created a $950 threshold for check forgery, we see no reason to infer (against [section] 490.2's plain meaning) that voters implicitly intended to exempt theft of access information simply because this criminal prohibition serves to protect consumers." (*Id.* at p. 913.)

Proposition 47 is interpreted broadly to accomplish its purpose of reducing the number of nonviolent offenders in state prisons. (*Gonzales*, *supra*, 2 Cal.5th at p. 870; Voter Information Guide, *supra*, text of Prop. 47, § 15.) Just as *Romanowski* declined to exempt theft of an access card from the ambit of section 490.2, we reject the People's request to exempt identity theft under section 530.5, subdivision (a) from the purview of shoplifting under section 459.5. That Jimenez committed identity theft in the course of the shoplifting does not alter the fact that he committed shoplifting. "A given act may constitute more than one criminal offense. It follows that a person may enter a store with the intent to commit more than one offense -- e.g., with the intent to commit both identity theft and larceny." (*Garrett*, *supra*, 248 Cal.App.4th at p. 88, italics omitted.) Section 459.5, subdivision (b) explicitly addresses this situation by curtailing the prosecution's charging discretion when

the conduct qualifies as shoplifting. (See *Gonzales*, at p. 876 ["A defendant must be charged only with shoplifting when [section 459.5] applies"].) In sum, section 459.5, subdivision (b) barred the People from charging Jimenez with identify theft under section 530.5, subdivision (a) when his underlying conduct constituted shoplifting. (*Gonzales,* at pp. 862, 876-877; 2 Couzens, Bigelow & Prickett, *supra*, at § 25:4, p. 25-29.)

We are not persuaded by the People's reliance on either *People v. Huerta* (2016) 3 Cal.App.5th 539 (*Huerta*), or *People v. Segura* (2015) 239 Cal.App.4th 1282 (*Segura*), both of which predate *Gonzales* and *Romanowski.* Moreover, *Huerta* does not aid the People's position. The District Attorney in that case argued that Huerta was not eligible to have her burglary conviction redesignated as misdemeanor shoplifting because she committed felony conspiracy during the offense. (*Huerta,* at pp. 544-545.) The Court of Appeal determined that under the plain text of section 459.5, "the prosecutors would have been required to charge [Huerta] with shoplifting and could not have charged her with burglary predicated on conspiracy had Proposition 47 been in effect at the time of her offense." (*Huerta,* at p. 545.) As a result, Huerta was entitled to have her burglary conviction reclassified as misdemeanor shoplifting. (*Ibid.*)

The defendant in *Segura* sought relief under Proposition 47 for his conviction of conspiracy to commit a petty theft. (*Segura, supra*, 239 Cal.App.4th at p. 1284.) The Court of Appeal determined that Proposition 47 does not apply to convictions for conspiracy. (*Ibid.*) The court, however, did not discuss section 459.5 and what effect it has on the prosecution's discretion to charge persons with felony conspiracy for purposes of avoiding the benefits of Proposition 47. "[I]t is axiomatic that

cases are not authority for propositions not considered." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176; *People v. Superior Court (Rodas)* (2017) 10 Cal.App.5th 1316, 1323.)

Nor are we persuaded by two recent decisions cited by the People: *People v. Liu* (2018) 21 Cal.App.5th 143 (*Liu*) and *People v. Sanders* (Apr. 17, 2018, D072875) _ Cal.App.5th _ [2018 Cal.App. Lexis 342] (*Sanders*). Not only are the cases distinguishable, but they also do not address *Gonzales*.

The court in *Liu* determined that Liu's conviction for obtaining the identifying information of 10 or more people under section 530.5, subdivision (c) did not qualify for resentencing under Proposition 47. (*Liu, supra*, 21 Cal.App.5th at pp. 150-153.) Liu did not argue, however, that her offense fell within the ambit of section 459.5, and it does not appear that the offense qualifies as shoplifting. The applicable count did not charge Liu with entering a commercial establishment during regular business hours with the intent to commit larceny by taking or intending to take property worth $950 or less. (§ 459.5, subd. (a).) Instead, she was charged with possession of the driver's licenses, social security cards and other personal information of 10 different victims. (*Liu*, at p. 147.)

Although *Liu* broadly suggests that any conviction under section 530.5 is not subject to Proposition 47 relief (*Liu, supra*, 21 Cal.App.5th at pp. 150-153), the only issue before it was the classification of a conviction under section 530.5, subdivision (c). The court had no occasion to consider whether a conviction under section 530.5, subdivision (a) may qualify as shoplifting under section 459.5, subdivision (a). Once again, "cases are not authority for propositions not considered." (*People*

v. Alvarez, *supra*, 27 Cal.4th at p. 1176; *People v. Superior Court (Rodas)*, *supra*, 10 Cal.App.5th at p. 1323.)

. In *Sanders*, the defendant was convicted of two counts of commercial burglary (§ 459) and two counts of identity theft (§ 530.5, subd. (a)). (*Sanders*, *supra*, _ Cal.App.5th at p. _ [2018 Cal.App. Lexis 342, at p. *1].) The trial court reclassified Sanders's burglary convictions, reasoning they qualified as shoplifting under section 459.5, but denied her petition to reclassify her identity theft convictions. (*Sanders*, at p. _ [p. *1].) On appeal, Sanders did not contend that the identity theft convictions qualified as shoplifting under section 459.5, subdivision (a). (*Sanders*, at p. _ [pp. *1-2].) Instead, she argued that the section 530.5 offenses must be deemed petty thefts since the value of the money or merchandise taken during the thefts was less than $950. (*Sanders*, at p. _ [pp. *1-2].)

The Court of Appeal rejected Sanders's argument, holding that identify theft offenses under section 530.5 are not actually theft offenses. (*Sanders*, *supra*, _ Cal.App.5th at p. _ [2018 Cal.App. Lexis 342, at p. *6].) But the case *Sanders* primarily relies upon for this proposition states that "the retention of personal identifying information of another is not a possession crime, but is a *unique theft crime*." (*People v. Valenzuela* (2012) 205 Cal.App.4th 800, 808, italics added; see also *Gonzales*, *supra*, 2 Cal.5th at p. 862.) In any event, *Sanders* is inapposite because it did not consider whether Sanders's identity theft convictions are subject to reclassification under section 459.5.

We conclude, based on *Gonzales*, *Romanowski* and *Garrett*, that the trial court properly granted Jimenez's motion to reduce his felony identity theft convictions to misdemeanors.

Jimenez met his burden of establishing that his convictions qualified under Proposition 47 as misdemeanor shoplifting offenses.[6]

DISPOSITION

The order granting Jimenez's motion for reduction of his two felony convictions is affirmed.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

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[6] Because we agree with Jimenez that the trial court correctly granted his motion for the reasons stated in its ruling, we need not reach Jimenez's alternative argument that each identity theft charge constituted petty theft under section 490.2.

Manuel J. Covarrubias, Judge
Superior Court County of Ventura

Gregory D. Totten, District Attorney, Lisa O. Lyytikainen, Senior Deputy District Attorney, and Michelle Contois, Deputy District Attorney, for Plaintiff and Appellant.

Todd W. Howeth, Public Defender, William M. Quest, Senior Deputy Public Defender, for Defendant and Respondent.

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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