

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff and Respondent,

v.

RUBEN PHILLIP FRANCO,

Defendant and Appellant.

S233973

(Court of Appeal No. B260447)

(Los Angeles County
Superior Court
No. VA125859)

**SUPREME COURT
FILED**

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Deputy

Hon. Roger Ito, Judge

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

"For the purpose of the distinction between felony and misdemeanor forgery, is the value of an uncashed forged check the face value (or stated value) of the check or only the intrinsic value of the paper it is printed on?" (Order of June 15, 2016.)

SUMMARY OF ARGUMENT

The answer to the question presented is it depends. The "value" of a forged check is its monetary worth, which can vary depending on the circumstances. In this case, because there was no evidence that the uncashed non-guaranteed forged check was

likely to be honored or worth anything more than the paper on which it was printed, its value is the intrinsic worth of its paper.

Defining value in section 473, subdivision (b) as monetary worth is supported by the applicable rules of statutory construction, including: (1) the plain and ordinary meaning rule; (2) the rule of examining the statutory landscape; (3) examination of the drafters' intent and the purpose of the statute; (4) the rule of lenity, and (5) the rules against surplusage and absurd consequences.

STATEMENT OF THE CASE

Pursuant to a negotiated plea bargain, appellant pled guilty to forgery by possession or receipt (count 1 – Pen. Code¹ 475, subd. (a)) and receiving stolen property (count 2 - § 496, subd. (a)), and admitted a prior prison term. (1CT 26, 35-38; 1CT 48, 51; 1RT 2-5, 10.) A four-year felony prison term was imposed with execution of sentence suspended, and appellant was placed on three years' formal probation. (1RT 2-9; 1CT 51, 63.) On August 11, 2014, appellant failed to appear for a probation violation hearing and a bench warrant was issued. (1CT 57.)

On November 19, 2014, after the voters enacted Proposition 47, appellant's probation was revoked (1CT 62; 1SRT² 305-307)

¹ Further undesignated statutory references are to the Penal Code.

² "SRT" refers to the Supplemental Reporter's Transcript filed on April 13, 2015.

and the trial court denied his petition to reclassify his forgery offense to a misdemeanor under Proposition 47 and sections 1170.18 and 473, subdivision (b) ³. (1CT 61-62; 1SRT 301-302.) The trial court denied appellant's motion to reclassify his forgery conviction because the face value of the uncashed check in his wallet was \$1,500.

THE COURT: . . . I am disinclined to believe that because the victim was not actually – or the check was not actually tendered, it was just possessed, that it is not a felony. If it is owed more than 950, it looks like it is a felony.

. . .
. . . I think under these circumstances, if the check – maybe in the future he should have a check for 950 or less, or 949, but it is 1500, so it makes it a felony. So the request for reclassification as a misdemeanor is at this juncture denied

(1SRT 302.)

In a published opinion filed March 14, 2016, the Court of Appeal affirmed, agreeing with the trial court that the \$1,500 face value of the personal check in appellant's wallet satisfied the \$950 or more value element required for felony punishment of check

³ Section 1170.18, which was added by Proposition 47, provides that persons who are serving felony sentences for offenses that would now be misdemeanors under Proposition 47 may petition for a recall of the sentence before the trial court, to request resentencing under the amended statutes, including the amended version of section 473. (§ 1170.18, subd. (a).) The Court of Appeal found appellant's oral motion at sentencing was sufficient to constitute a petition under section 1170.18. (Appendix, p. 4.)

forgery under section 473, subdivision (b) as amended by Proposition 47. (Opinion, Appendix A, p. 4.)

This Court granted review on June 15, 2016.

STATEMENT OF FACTS

The parties stipulated to a factual basis for the plea. (1RT 5-6.) On July 17, 2012, Jeni Muniz went into a Rite Aid in Whittier, and left her purse in the car. (1CT 20.) When she returned, her purse was missing, along with a checkbook. (1CT 14, 21.) None of the checks were signed, and she had not given anyone permission to sign a check on her behalf. (1CT 22, 39.)

On July 21, 2012, police searched appellant and found in his wallet a "blank check" made out for \$1,500, with the payee left blank. (1CT 5-6, 10, 39.) The check was dated July 17, 2012, and bore the purported signature of Jeni Muniz. (1CT 7, 39.) Appellant told police that his employer owed him \$200 for a cleaning job and had given him the \$1,500 check, stating it was a bad check, but if appellant could cash it, he could keep the money. (1CT 11-12, 14-19, 39.) The record does not indicate whether Muniz's checkbook was backed by an active bank account, or how much money was in any such account, or whether there was an active and available secondary market from which to obtain any money for the check.

ARGUMENT

FOR PURPOSES OF DISTINGUISHING BETWEEN MISDEMEANOR AND FELONY FORGERY UNDER PENAL CODE SECTION 473(b), THE VALUE OF ANY FORGED CHECK IS ITS MONETARY WORTH

A. Introduction

This Court should hold that the value of any forged check is its worth in terms of market value. Under this definition, an uncashed, non-guaranteed forged check is worth only the paper on which it is printed, i.e., it has intrinsic value but no significant monetary worth. The value of an uncashed forged check which is guaranteed by the issuer is equal to its guaranteed face value, unless the forgery is of such poor quality that the guarantee would be inoperable. The value of a cashed forged check is the monetary worth for which it was exchanged. Defining value as worth satisfies the applicable rules of statutory construction, including plain meaning, harmony with other statutes, harmony with the electorate's intent and purpose, the rule of lenity, and the rules against surplusage and absurd consequences.

B. Relevant Statutory Provisions

The issue presented involves section 473, subdivision (b) (punishment of forgery), as amended by Proposition 47, and section 475 (possession or receipt of a forged check, bond, bank

bill, note, cashier's check, traveler's check, or money order, plus other enumerated items that are punished under § 473, subd. (a) instead of subd. (b).)

Appellant pled guilty to violating section 475, subdivision (a), which states that *possession or receipt* of a forged check or similar item, with knowledge and intent to pass or facilitate passage of the check, and intent to defraud, is a forgery.

Every person who possesses or receives, with the intent to pass or facilitate the passage or utterance of any forged, altered, or counterfeit items, or completed items contained in subdivision (d) of Section 470 with intent to defraud, knowing the same to be forged, altered, or counterfeit, is guilty of forgery.

(§ 475, subd. (a).)

Possession or receipt of a forged instrument in section 475, subdivision (a), may be based on cashed or uncashed forged personal checks, as well as cashed or uncashed cashier's checks, traveler's checks, money orders, bonds, and currency.

Before Proposition 47 was passed, section 473 made all forgeries wobblers, giving trial courts broad discretion to treat any forgery conviction as a misdemeanor or a felony. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977.) The forgery statute did not mention value.

Proposition 47 ended that discretionary sentencing scheme. Proposition 47 "reduced the penalties for a number of offenses" and "makes certain drug- and theft-related offenses misdemeanors,

unless the offenses were committed by certain ineligible defendants.”⁴ (*People v. Martinez* (2016) 5 Cal.App.5th 234, 239, quoting *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089, 1091.)

All forgery crimes, including sections 470, 475 and 476, are now punished under section 473, subdivision (a) or subdivision (b). Subdivision (a) makes forgeries wobblers except as provided in subdivision (b) which provides in relevant part that forgeries are misdemeanors “. . . where the *value* of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950). . . .” (Italics added.) So, where the value of the check is \$950 or more, the crime is a wobbler, punishable as a misdemeanor or felony in the trial court’s discretion. (§ 473, subd. (a).) Where the value of the forged check is less than \$950, the crime is always a misdemeanor.

Thus, for the first time in California’s history, the term *value* is now associated with forgery. (Compare *Buck v. Superior Court of Orange County* (1965) 232 Cal.App.2d 153, 162 [value is immaterial in crime of forgery].)

⁴ Section 473, subdivision (b) also provides that a forgery conviction must be punished as a wobbler under subdivision (a) if the defendant was also convicted of identity theft (§ 530.5) or has previously been sentenced and has disqualifying prior convictions as outlined in section 1170.18. These provisions have no application in this case, and thus are not discussed further.

C. The Rules of Statutory Construction and the Electorate's Intent Support Defining Section 473(b)'s Term "Value" as "Worth"

When interpreting voter initiatives, the reviewing court applies "the same principles governing statutory construction." (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

1. The Plain and Ordinary Meaning of Value is Worth

Review of an initiative begins with its language, with words given their "ordinary meaning" and construed "in the context of the statute and initiative as a whole." (*People v. Superior Court (Pearson)*, *supra*, 48 Cal.4th at p. 571.) If the language is not ambiguous, the reviewing court "may not add to the statute or rewrite it to conform to some assumed intent not apparent from that language." (*Ibid.*) Under this rule, the word value in section 473 should not be modified by placing "face," "apparent," or "nominal" in front of it. Value should be interpreted plainly, as worth.

Popular dictionaries define value primarily as worth, so worth is the ordinary definition of value. There is a secondary, specialized, and, hence, *extraordinary* definition of value used in mathematics, and that is: an assigned quantity.

The Merriam-Webster Dictionary defines value as:

1 : a fair return in goods, services, or money for something exchanged. 2 : the amount of money something is worth. 3 : worth, utility, or importance in

comparison with something else. 4 : a numerical quantity that is assigned or is found by calculation or measurement <find the value of x>

(Merriam-Webster Dict.: <http://www.wordcentral.com/cgi-bin/student?value>, as of Feb. 28, 2017.)

Dictionary.com defines value as:

1. relative worth, merit, or importance: the value of a college education; the value of a queen in chess.
2. monetary or material worth, as in commerce or trade: This piece of land has greatly increased in value.
3. the worth of something in terms of the amount of other things for which it can be exchanged or in terms of some medium of exchange.
4. equivalent worth or return in money, material, services, etc.: to give value for value received.
5. estimated or assigned worth; valuation: a painting with a current value of \$500,000.
6. denomination, as of a monetary issue or a postage stamp.
7. Mathematics. magnitude; quantity; number represented by a figure, symbol, or the like: the value of an angle; the value of x ; the value of a sum. a point in the range of a function; a point in the range corresponding to a given point in the domain of a function: The value of x^2 at 2 is 4.

(<http://www.dictionary.com/browse/value>, as of Feb. 28, 2017.)

Based on the ordinary dictionary definition, the value of a forged check is its monetary worth in dollars and cents, i.e., its actual value, not its assigned (face) value. At best, face value is relevant evidence that can be used to establish value (worth), as explained in *People v. Lowery* (2017) 8 Cal.App.5th 533.

In *Lowery*, the Court of Appeal held the plain meaning of value in section 473, subdivision (b) is "worth." (*People v. Lowery*,

supra, 8 Cal.App.5th at p. 536.) The defendant tried to cash a forged check with a face value of \$1,047.85, but the cashier determined it was forged and refused to cash it. (*Ibid.*) The defendant pled guilty to possession of a forged check (§ 476) and later filed a Proposition 47 petition to designate the offense a misdemeanor under section 473, subdivision (b). (*Ibid.*) The prosecutor agreed, but the trial court rejected the prosecutor's stipulation, ruling that the value of the uncashed forged check was its face value, and that was over \$950. (*People v. Lowery, supra*, 8 Cal.App.5th at pp. 536-537.)

The Court of Appeal disagreed. It reversed and remanded the case for an evidentiary hearing, holding value in section 473 "refers to the actual monetary worth of the check, not the amount for which it is written." (*People v. Lowery, supra*, 8 Cal.App.5th at pp. 536, 542.)

The *Lowery* court reasoned that face value may be substantial *evidence* of a check's worth, but it was not, as a matter of law, the definition of value to be applied in every case. (*People v. Lowery, supra*, 8 Cal.App.5th at pp. 536, 541.) Face value as "worth" may be rebutted, for example, by evidence that the check was uncashed and was not likely to be cashed. (*People v. Lowery, supra*, 8 Cal.App.5th at p. 536.) So, rather than re-write section 473 to add "face," "written," or "nominal" before the word value,

the *Lowery* court determined that value is worth, and face value is relevant evidence having a tendency to prove worth.

Lowery relied on the plain and ordinary meaning of value within the “economic context,” which is: “actual monetary worth . . . typically as measured by fair market value.” (*People v. Lowery, supra*, 8 Cal.App.5th at p. 539, italics added, citing Black’s Law Dict. (8th ed. 2004) p. 1586, col. 2 [value is the “*monetary worth* or price of something; the amount of goods, services, or money that something will command in an exchange”], italics in *Lowery; Manhattan Sepulveda, Ltd. v. City of Manhattan Beach* (1994) 22 Cal.App.4th 865, 870 [“The ordinary and commonly understood meaning of ‘value’ is fair market value”]; *People v. Cook* (1965) 233 Cal.App.2d 435, 437 [value of stolen property (§ 487) is fair market value, not value to a particular individual]; and § 484, subd. (a) [value of property obtained by theft is reasonable and fair market value].) *Lowery* concluded: “For the above reasons, we hold the term ‘value’ in Penal Code section 473 refers to the actual monetary worth of the check – that is, the amount the defendant could obtain for the check, not the amount for which it was written.” (*People v. Lowery, supra*, 8 Cal.App.5th, at p. 541.)⁵

⁵ *Lowery* offered additional reasons for its opinion, and those are set forth in other subsections of this brief.

Lowery determined that a defendant seeking Proposition 47 relief should be able to request an evidentiary hearing in order to prove the worth of a forged check is less than its face value, based on expert testimony about street value (*People v. Lowery, supra*, 8 Cal.App.5th, at p. 541), or evidence tending to show it was unlikely he would cash the check, for example because the forgery was of poor quality or of an outlandish face value (*ibid.*)

So, the value of a forged check is its worth, and that depends on the circumstances. Some of the circumstances to consider are: the face value of the check, whether it was cashed or uncashed, and whether it was likely to be cashed, based on the quality of the forgery or whether it was made out for an outlandish amount, and expert testimony on market or street value. (*People v. Lowery, supra*, 8 Cal.App.5th, at p. 541.)

Appellant would add that another relevant circumstance is whether the check or other item covered by section 473, subdivision (b) (check, bond, bank bill, note, cashier's check, traveler's check, or money order) is guaranteed or non-guaranteed.

The face value of a personal check ordinarily is not backed up by any guarantee from the issuing institution. "Unlike a certified check, a personal check does not offer any guarantees that it will be honored and thus the proffer of a personal check is not the equivalent of cash or a certified check." (*DCC Constructors, Inc. v.*

Yacht Club Southeastern, Inc. (Fla. Dist. Ct. App. 2003) 839 So.2d 731, 734; compare *People v. Bullwinkle* (1980) 105 Cal.App.3d 82, 90, fn. 4 [some banks have agreements with merchants to honor personal checks that are presented along with "check guarantee cards"].)

In contrast, the actual value of a cashier's check is its face value because it is guaranteed by the issuing financial institution. "Since a cashier's check is a bank's primary obligation, a cashier's check is presumed to have been issued for value." (*Gentner & Co. v. Wells Fargo Bank* (1999) 76 Cal.App.4th 1165, 1172.) The bank becomes both the drawer and drawee; and the check becomes a promise by the bank to draw the amount of the check from its own resources and to pay the check upon demand. (*Ibid.*)

"Cashier's checks . . . are readily negotiable and come with a bank's guarantee of payment." (*California Golf, L.L.C. v. Cooper* (2008) 163 Cal.App.4th 1053, 1072.) "Cashier's checks are preferred because they are as good as cash. . . . because of provisions such as Commercial Code section 3312." (*Ibid.*; see also *Bank of America Nat'l Trust & Sav. Assn. v. Cranston* (1967) 252 Cal.App.2d 208, 216-218.) Although a bank's guarantee of a cashier's check is not absolute, as it is subject to some defenses, the general rule is that the holder of a cashier's check is a holder in

due course who "takes the instrument for value." (*Tokai Bank of Cal. v. First Pac. Bank* (1986) 186 Cal.App.3d 1664, 1669.)

Traveler's checks are generally accepted as cash equivalents, even if they do not meet the strict technical requirements of negotiable instruments found in Article 3 of the Uniform Commercial Code. (*Xanthopoulos v. Thomas Cook, Inc.* (S.D.N.Y. 1985) 629 F.Supp. 164, 171-172; *Ashford v. Thos. Cook & Son* (1970) 52 Hawaii 113, 117-118.) The Official Comment 4 to UCC § 3-104 makes clear that "traveler's checks in the usual form . . . are negotiable instruments under this Article when they have been completed by the identifying signature."

A money order is a "thing of value" for purposes of "selling a product," and "the issuer of a money order renders a service by holding itself ready to pay the face value to the holder of the instrument whenever he presents it." (*Los Angeles Check Sellers Asso. v. United States Nat'l Bank* (1969) 275 Cal.App.2d 570, 573.) So a money order, like a cashier's check, is guaranteed.

Likewise, currency (a bank bill) is guaranteed to have a value (worth) equal to face value. A five-dollar bill in a person's wallet is worth five dollars, equal to its face value, because currency is "legal tender" as money. (*Legal Tender Cases* (1870) 79 U.S. 457, 529 [20 L.Ed. 287, 305].) Congress has the power to make money and regulate its value. (*Ibid.*) The face value definition of value may be

applied to "bank bills," i.e., currency, because "The federal government is unique in that it has the power to print money, which means it can take a thing of nominal intrinsic value, paper, place its imprimatur upon it and turn it into a valuable commodity, currency." (*United States v. Kroesser* (11th Cir. 1984) 731 F.2d 1509, 1517.)

In sum, popular dictionaries and the recent *Lowery* decision provide persuasive support for the conclusion that value in section 473, subdivision (b) means "worth" and that this may vary according to the circumstances. In appellant's case, an uncashed, non-guaranteed personal check with a face value of \$1,500 had no payee and therefore was not yet likely to be cashed. The absence of any evidence that the check was drawn on an active bank account with sufficient funds further supports a conclusion that the check was unlikely to be cashed. Given the totality of the circumstances, the check was worthless, or worth no more than its intrinsic paper value.

2. The Electorate is Presumed Aware of the Entire Scheme of the Penal Code. Its Choice to Use the Simple Word "Value" Instead of "Nominal Value" or "Face Value" Indicates It Meant to Use Value as Worth.

Statutes must not be read in isolation, but must be harmonized with the "entire scheme of law of which they are a part." (*People v. Jones* (2001) 25 Cal.4th 98, 111-112.) The

electorate, like the Legislature, is presumed to be aware of existing statutory provisions. (*People v. Cordova* (2016) 248 Cal.App.4th 543, 545 [“The adopting body is presumed to be aware of existing laws and judicial construction thereof”]; see also *People v. Hernandez* (2003) 30 Cal.4th 835, 867 [“We assume the electorate is aware of relevant judicial decisions when it adopts legislation by initiative”].)

The term value played no part in forgery law before the passage of Proposition 47. Historically, “Whether the instrument forged has independent value is unimportant; the crime is complete when the act is done with the requisite intent.” (*Buck v. Superior Court of Orange County, supra*, 232 Cal.App.2d at p. 162 [“proof of loss or detriment is immaterial”], citing *People v. McAffery* (1960) 182 Cal.App.2d 486, 493; *People v. Morgan* (1956) 140 Cal.App.2d 796, 800.) So, the drafters of the amendment to section 473 were writing on a clean slate as to forgery, but they must have been aware of the rest of the statutory landscape. Although there is historical precedent elsewhere in the Penal Code for using terms such as “face value,” “nominal value,” “apparent value,” and “total amount,” the drafters chose not to use those terms, electing instead to use “value.”

The *Lowery* court cited for comparison Penal Code section 482 which criminalizes altering a cancelled train or boat ticket, to

make it appear to restore its “nominal value.” (*People v. Lowery*, *supra*, 8 Cal.App.5th at pp. 539-540.) Thus, *Lowery* suggests that if the electorate wanted to use the term “nominal value” in section 473, it could have done so.

Section 476a, criminalizing the uttering of insufficient funds checks, uses the term “total amount” with a meaning of total face value. (See *People v. Salmorin* (2016) 1 Cal.App.5th 738, 747 [“total amount” refers to the aggregated face value of the checks].) The drafters of the amendment to section 473 could have used the same term, “total amount,” for the crime of check forgery, but chose not to do so.

The California legislature used “face value” in former Penal Code section 396 (“ . . . guilty of a misdemeanor if the *face value* of the food stamps or the authorizations to participate is four hundred dollars (\$ 400) or less”), but then eliminated the phrase in the replacement statute, Welfare and Institutions Code section 10980 (“ . . . If the total amount of such aid *obtained or retained* is four hundred dollars (\$ 400) or less”). (*People v. Levels* (1989) 209 Cal.App.3d 410, 417, italics added.) The amendment to Welfare and Institutions Code section 396 evidenced legislative intent to stop using an assigned face value and start using actual worth as measure of the seriousness of the offense.

Section 1298 provides: "In lieu of a deposit of money, the defendant or any other person may deposit bonds of the United States or of the State of California of the *face value* of the cash deposit required, and such bonds shall be treated in the same manner as a deposit of money. . . ." (Italics added.) The drafters of Proposition 47 must have been aware of section 1298's use of the term "face value" in the case of state bonds. The fact they chose to use only "value" in section 473, subdivision (b) makes sense because section 473, subdivision (b) may apply to non-guaranteed, uncashed, and unlikely-to-be-cashed personal checks in addition to bonds. Thus, the omission of "face" or "nominal" in front of value appears to be a conscious decision.

"[I]dentical words used in different parts of the same act are intended to have the same meaning." (*People v. Lowery, supra*, 8 Cal.App.5th, at p. 540, citing *Department of Revenue of Oregon v. ACF Industries, Inc.* (1994) 510 U.S. 332, 342 [114 S. Ct. 843, 127 L. Ed. 2d 165].) Based on this rule of identical meanings, the *Lowery* court found that value in other parts of the Penal Code means the monetary worth of property taken or received, not face value or nominal value. (*Ibid.*, citing § 495.5 [shoplifting punished based on the "value of the property that is taken or intended to be taken"], 490.2, subd. (a) [petty theft is the "value of the money, labor, real or personal property taken"], and 496 [receipt of stolen

property punished based on value of property obtained or received].)

The drafters are also presumed aware of existing cases, including *People v. Cuellar* (2008) 165 Cal.App.4th 833, which stated that for purposes of grand theft person (§ 487), an uncashed forged check has only intrinsic paper value. The drafters of the amendment to section 473 could have used the term “face value” if they wanted to prevent application of the *Cuellar* rule to check forgeries. The fact the electorate chose the simple word “value” indicates a choice to adopt the plain and ordinary meaning of value as worth.

3. The Electorate’s Intent and Proposition 47’s Purpose Are Satisfied By Defining Section 473(b)’s Value as Worth

If this Court decides that value does not have a plain and ordinary meaning in the economic context, it should still conclude that value means worth after examining the electorate’s intent and the purpose of Proposition 47. “If the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters’ intent and understanding of a ballot measure.” (*People v. Superior Court (Pearson)*, *supra*, 48 Cal.4th at p. 571; *People v. Goodliffe* (2009) 177 Cal.App.4th 723, 728-732.) “Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation.”

(*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387.)

The *Lowery* court supported its holding that value means worth with evidence that the electorate used the word “worth” in the Voter Information Guide to Proposition 47. (*People v. Lowery, supra*, 8 Cal.App.5th at p. 540, citing Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35 “[u]nder this measure, forging a check worth \$950 or less would always be a misdemeanor [unless combined with identity theft],” italics added by *Lowery*.) This provides solid voters’-intent support for defining value as worth.

Proposition 47 included a provision requiring that it “be liberally construed to effectuate its purposes.” (Prop. 47, § 18, eff. Nov. 5, 2014; Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, p. 74; *People v. Tidwell* (2016) 246 Cal.App.4th 212, 219.) One of the purposes of Proposition 47 was to reduce the number of nonviolent offenders in state prisons and to reserve prison sentences for the most serious offenders. (See Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 2, p. 70; *People v. Montgomery* (2016) 247 Cal.App.4th 1385, 1389-1390.)

Examining the Proposition 47 materials in the 2014 voter information guide reveals that both proponents and opponents focused mainly on the portion aimed at people who were currently incarcerated, by changing the classification of their crimes from felonies to misdemeanors. The

proposition's proponents praised this feature as a way of saving money by releasing petty criminals from prisons (in addition to not putting them there in the first place).

(*People v. Montgomery, supra*, 247 Cal.App.4th at p. 1390.)

The "Official Title and Summary" of Proposition 47 printed in the ballot materials included the following statement: "*Requires misdemeanor sentence* instead of felony for the following crimes when amount involved is \$950 or less: petty theft, receiving stolen property, and forging/writing bad checks." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) official title and summary of Prop. 47, p. 34, italics added.) The Legislative Analyst described Proposition 47 as having three main functions: (1) *reducing* penalties for certain offenders convicted of nonserious and nonviolent property and drug crimes; (2) allowing certain offenders previously convicted of such crimes to apply for *reduced* sentences; and (3) requiring state *savings* resulting from the measure be spent to support public services such as truancy prevention, mental health and substance abuse treatment, and victims' services. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35, italics added.)

In sum, saving money by limiting sentencing discretion through application of a rule requiring misdemeanor sentencing for crimes of small financial effect is the express intent of the measure. The desired result is best achieved by defining value as worth, so

that most uncashed forged checks are essentially worthless and most cashed forged checks are worth the dollar amount for which they were exchanged.

4. The Rule of Lenity Requires Defining Value as Worth

When statutory language is ambiguous, the rule of lenity requires courts to “resolve doubts as to the meaning of a statute in a criminal defendant’s favor.” (*People v. Avery* (2002) 27 Cal.4th 49, 57; see *People v. Mutter* (2016) 1 Cal.App.5th 429, 436 [rule of lenity applied to § 470 requires adopting modern definition of “bank bill” as “currency”].) The rule of lenity applies if the statute in question is ambiguous, meaning susceptible of two reasonable meanings that “stand in relative equipoise, i.e., that resolution of the statute’s ambiguities in a convincing manner is impracticable.” (*People v. Avery, supra*, 27 Cal.4th at p. 58, quoting *People v. Jones* (1988) 46 Cal.3d 585, 599.)

“As Witkin explains, ‘The rule [of lenity] applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule.’” (*People v. Avery, supra*, 27 Cal.4th at p. 58, quoting 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53; accord *People v. Nuckles* (2013) 56 Cal.4th 601, 611.)

Any ambiguity in the statutory language should be construed "as favorably to the defendant as its language and the circumstances of its application may reasonably permit." (*People v. Garcia* (1999) 21 Cal.4th 1, 10; see § 4 ["The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice."].) Under the rule of lenity, the reviewing court gives the defendant the benefit of every reasonable doubt on questions of interpretation. (*People v. Soria* (2010) 48 Cal.4th 58, 65.)

Defining value as worth gives defendants the benefit of the reasonable doubt as to whether value means worth or face value.

5. The Rules Against Surplusage and Absurd Consequences Are Not Offended By Defining Value as Worth

The rules against surplusage and absurdity limit use of the rule of lenity. "Courts should give meaning to every word of a statute if possible, and avoid a construction making any word surplusage." (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 22.) The definition favoring the defendant should not be adopted if it will lead to absurd consequences. (*People v. Cruz* (1996) 13 Cal.4th 764, 783.) Defining value as worth complies with the rule against

surplusage because *some* forged checks will be worth \$950 or more.

Many section 475 check forgeries will be misdemeanors because *possession or receipt* of a forged instrument (§ 475, subd. (a)) is a lesser, necessarily included offense of *uttering* a forged check (§ 476). (See *People v. Reisdorff* (1971) 17 Cal.App.3d 675, 678-680 [forgery by possession is a lesser, necessarily included offense of forgery by uttering].) So, possessing an uncashed forged check made out for \$950 is a lesser included offense of writing it or cashing it. Defining value as worth will result in most possessed uncashed forged checks being essentially worthless (or worth only the value of the paper on which they are written), but some uttered and cashed forged checks will be worth the money for which they are exchanged. That seems fair and reasonable. Uttering a forged check may more often correlate with a large monetary worth than merely possessing an uncashed check. But section 473, subdivision (b) does not insist that check forgeries (§§ 470, 475, or 476) be evenly distributed in terms of value under or over \$950. As long as some check forgeries will involve checks worth \$950 or more, the rule against surplusage is satisfied.

As an analogy, the aggravated white collar enhancement, section 186.11, is not absurd even though it may be difficult to achieve many prosecutions under it. Section 186.11 provides an

increased punishment in theft crimes involving a loss of more than \$100,000. Even if most theft crimes in California involve less than \$100,000 monetary loss, once in a while, a theft offense involving over \$100,000 occurs, triggering the section 186.11 white-collar enhancement.

Similarly, even if most uncashed forged personal checks are practically worthless, once in a while a forged check will be worth \$950 or more, because it was cashed, or because it was guaranteed or similar circumstances show it is so likely to be cashed that it has such a large worth. Still, almost "always" (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35), check forgery will be a misdemeanor, in keeping with the electorate's intent and the rule of lenity. This results in no violation of the rules against surplusage or absurdity.

In the Court of Appeal below, appellant relied on *People v. Cuellar*, *supra*, 165 Cal.App.4th at p. 835, which held that, for purposes of grand theft person (§ 487), an uncashed forged check has only intrinsic paper value. For defendant Cuellar, who had stolen a forged check, that meant there was sufficient evidence to support a grand theft/person conviction (§ 487, subd. (c)), which has as an essential element, "intrinsic value." (*People v. Cuellar*, *supra*, 165 Cal.App.4th at p. 837.) The *Cuellar* court agreed with the defendant that the forged check was not worth its face value.

(*People v. Cuellar, supra*, 165 Cal.App.4th at p. 838, citing *U.S. Rubber Co. v. Union Bank & Trust Co.* (1961) 194 Cal.App.2d 703, 708-709 [“The check was never rightfully endorsed and was not a bearer instrument; it was merely an order to pay ([Civ. Code] § 3207) and is of no value unless accepted. The forged instrument was in effect a nullity ([Civ. Code] § 3104) and worthless and could not be the subject of conversion as contemplated in this proceeding”].)

The *Cuellar* court cited *People v. Caridis* (1915) 29 Cal.App. 166, where the defendant had stolen a winning illegal lottery ticket with a face value of \$1,250. (*People v. Cuellar, supra*, 165 Cal.App.4th at pp. 838-839.) The *Caradis* court affirmed a larceny conviction, holding the ticket was not worth face value because it was an illegal ticket, but it had “some slight intrinsic value” sufficient to satisfy the larceny statutes’ definition of “value.” (*People v. Caridis, supra*, 29 Cal.App. at p. 168.) Relying on *Caridis, Cuellar* upheld the defendant’s grand theft/person charge, concluding that a forged check, like an illegal lottery ticket, has “slight intrinsic value by virtue of the paper it was printed on.” (*People v. Cuellar, supra*, 165 Cal.App.4th at p. 839.)

To avoid the rule against surplusage, the *Lowery* opinion provides a reasonable application of the rule of lenity: the value of any check is its worth. Thus, the value of a cashed forged check is

the monetary value for which it was exchanged, which is a fair market value. The value of an uncashed but guaranteed check would be face value, unless the circumstances indicate it is not likely to be cashed, such as when it is ineptly or poorly forged. (See *People v. Lowery, supra*, 8 Cal.App.5th, at p. 541.) And the value of an uncashed, non-guaranteed check, in most cases is worthless, or worth only intrinsic paper value, unless the circumstances indicate it is likely to be cashed. (*Ibid.*)

Lowery found that a forged check *may* have a monetary value equal to its face value. When a forged check is actually cashed for face value, this is “overwhelming evidence” that the check is worth its face value. (*People v. Lowery, supra*, 8 Cal.App.5th at p. 541.) But face value does not always equal monetary worth. “For example, a check may be so ineptly forged that even the most credulous clerk would refuse to honor it.” (*Ibid.*) Because such a check is “unlikely to be cashed,” it “makes little sense to assign the written value to such a check.” (*Ibid.*)

Here, the only evidence of the check’s worth was the amount written on it. There was no evidence of a connected, active bank account containing sufficient funds, or an existing secondary market, or what the check’s worth might be there. Because appellant possessed an incomplete check, with the payee left blank, he held an “incomplete and inchoate” check (*People v. Rendon*

(2016) 5 Cal.App.5th 422, 426), of which the face value represented mere potential value. Under the facts presented, it was not likely that the check would be cashed for the full face amount. Thus, it was worth only the value of the paper on which it was printed, so long as it remained uncashed.

D. People v. Salmorin Cited No Authority for Its Contrary Dictum Using Face Value for Purposes of Section 473(b)

People v. Salmorin, supra, 1 Cal.App.5th 738, 741-742, adopts "face value" for purposes of determining the value of forged checks under section 473. But its adoption of face value was dicta, unnecessary to the issue at bar, and not supported by any citation to authority. The issue in *Salmorin* was whether the value of multiple checks could be aggregated to find the \$950 value. The face value of the checks totaled less than \$950, and the intrinsic value of the checks also was less than \$950. (*Id.* at p. 744.) *Salmorin* explained that section 473 value depends on each individual check, because the electorate used the plain singular term "check" rather than "checks." (*Id.* at p. 746.) Unnecessarily, the *Salmorin* opinion went further and, without any citation to authority, decided to use the face value of the checks and to reject *Cuellar's* approach. (See *id.* at pp. 744-745, citing *People v. Cuellar, supra*, 165 Cal.App.4th 833.) *Salmorin* did not consider or anticipate defining value as worth, as in the subsequent *Lowery*

opinion. *Lowery* is better reasoned than *Salmorin*, better supported by authority, and, unlike *Salmorin*, is a direct and persuasive holding on the specific issue presented here.

CONCLUSION

Under Proposition 47, public policy concerns and punishment were balanced, so that a large number of non-serious crimes could avoid state prison time. Check forgery is not a crime of violence or a serious crime. It deserves punishment, but usually as a misdemeanor.

For the purpose of distinguishing between misdemeanor and felony check forgery under section 473, subdivision (b), defining value as worth is faithful to the plain and ordinary meaning of the word value in the economic context. This definition is harmonious with other provisions of the Penal Code. It satisfies the purpose and intent of the initiative measure by reducing punishments for check forgery in general and passing the cost savings onto other social programs. It is consistent with the rule of lenity, and the rules against surplusage and absurd consequences.

Appellant's uncashed forged check was not guaranteed, had no payee, and was not shown to be linked to an active bank account containing sufficient funds. There was no evidence of an existing and active secondary market or what the check would be

worth there. For these reasons, the judgment should be reversed in full and with prejudice, as no evidentiary hearing is required.

Dated: **March 11, 2016**

Respectfully submitted,

Allison H. Ting
Counsel for Appellant
Ruben Philip Franco

WORD-COUNT CERTIFICATE

I, Allison H. Ting, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is **6,702** words, excluding the tables, this certificate, and any attachment permitted under rule 8.360(b). This document was prepared with Word, and this is the word count generated by the program for this document. I certify that the foregoing is true and correct. Executed at Los Angeles, California, on: **March 11, 2017.**

Allison H. Ting
Attorney for Appellant

APPENDIX

Filed 3/14/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RUBEN PHILLIP FRANCO,

Defendant and Appellant.

B260447

(Los Angeles County
Super. Ct. No. VA125859)

COURT OF APPEAL – SECOND DIST.

FILED

Mar 14, 2016

JOSEPH A. LANE, Clerk

James Renteria Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Roger Ito, Judge. Affirmed and remanded with instructions.

Allison H. Ting, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Ruben Franco appeals the denial of his oral petition for resentencing on his convictions for forgery and receiving stolen property. We affirm the judgment but remand for correction of the abstract of judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 17, 2012, Franco was charged with forgery (Pen. Code,¹ § 475, subd. (a)) and receiving stolen property (§ 496, subd. (a)). It was alleged that he had served five prior prison terms within the meaning of section 667.5, subdivision (b). Franco pleaded guilty to the charged offenses and admitted the five prior prison terms. The court struck four of the five prior prison term allegations, suspended the execution of a four-year felony state prison sentence, and placed Franco on three years' formal probation.

On August 11, 2014, Franco failed to appear for a probation violation hearing. The trial court revoked his probation and issued a bench warrant. On November 4, 2014, Franco was taken into custody.

On November 19, 2014, the trial court found that Franco had violated his probation and imposed the previously suspended four-year sentence. Franco made an oral petition for resentencing that the court denied. Franco appeals.

DISCUSSION

I. Proposition 47 Resentencing Petition

“On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)” (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*)). “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).” (*Id.* at p. 1091.)

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

Proposition 47 amended the law regarding forgery to provide, in relevant part, that “any person who is guilty of forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950), shall be punishable by imprisonment in a county jail for not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.” (§ 473, subd. (b).)

Section 496, subdivision (a), regarding receiving stolen property, was also amended by Proposition 47. It now provides, “Every person who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the value of the property does not exceed nine hundred fifty dollars (\$950), the offense shall be a misdemeanor, punishable only by imprisonment in a county jail not exceeding one year, if such person has no prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.” (§ 496, subd. (a).)

“Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person ‘currently serving’ a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be ‘resentenced to a

misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.’ (§ 1170.18, subd. (b).)” (*Rivera, supra*, 233 Cal.App.4th at p. 1092.) Franco argues that the trial court should have resentenced him, treating his forgery and his receiving stolen property convictions as misdemeanors, based on his oral petition.

A. Petition Requisites

The Attorney General argues that Franco was ineligible for resentencing because his request was oral and not written. Although some language in the statute suggests that its drafters anticipated that petitions would be in written form, section 1170.18 contains no express requirement that a resentencing petition be made in writing. We therefore agree with the court in *People v. Amaya* (2015) 242 Cal.App.4th 972 at page 975, that there is “no statutory requirement for the filing of a written petition.” Moreover, the Attorney General has not demonstrated that the prosecutor objected in the trial court to Franco’s petition on the ground that it was oral rather than written. ““An appellate court will ordinarily not consider procedural defects or erroneous rulings, in connection with relief sought or defenses asserted, where an objection could have been, but was not, presented to the lower court. . . .”” (*People v. Saunders* (1993) 5 Cal.4th 580, 589-590.)

B. Forgery Conviction

Franco’s argument for resentencing is premised on his view that the \$950 value amount set forth in section 473, subdivision (b) corresponds not to the stated amount on the face of the forged instrument but to the intrinsic value of the instrument itself. He relies upon *People v. Cuellar* (2008) 165 Cal.App.4th 833 (*Cuellar*), in which the Court of Appeal concluded that there was sufficient evidence to support a conviction for grand theft from the person of another where the defendant took what was described as a “bogus check” from the hand of a department store salesperson. The *Cuellar* court reasoned that the check did not have a value equal to the amount for which it had been written, but that for the purposes of a grand theft conviction, it nonetheless had some

intrinsic value by virtue of the paper it was printed on and as a negotiable instrument that, if legally drawn, would entitle its holder to payment on demand. (*Id.* at pp. 838-839.) Franco reasons that the forged check he possessed, because it was illegally drawn and was not exchanged for value, had no actual value despite the check's face value being \$1,500, and that the court therefore should have resentenced him for forgery as a misdemeanor..

We are not persuaded that the trial court interpreted section 473, subdivision (b) incorrectly. While *Cuellar, supra*, 165 Cal.App.4th 833 and similar cases stand for the principle that a forged check does not have an actual value corresponding to the face value of the check, section 473, subdivision (b) does not specify that it is the actual value of the check, as opposed to the face value of that instrument, that is the value that is used to determine whether the offense is a felony or a misdemeanor. The value of forged checks, bonds, bank bills, notes, cashier's checks, traveler's checks, and money orders, the items listed in section 473, subdivision (b), may or may not correspond to the face value of the instrument, depending on the existence of a secondary market or other evidence of value. When viewed in the context of forgery, however, the word "value" as used in section 473, subdivision (b) must correspond to the stated value or face value of the check in order to avoid absurd consequences. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 578 [courts avoid statutory constructions that would produce absurd consequences].) The trial court did not err in declining to resentence him on the forgery conviction.

Franco argues that even if we "do not follow" *Cuellar, supra*, 165 Cal.App.4th 833 and similar cases concerning the value of the forged check, at the time he committed his offenses he "had a federal constitutional due process right to rely on" this line of cases such that we must consider the forged check here to have had only a nominal value and may only apply our reasoning prospectively. Our conclusion that section 473, subdivision (b) refers to the face value of the forged instrument is not a departure from those cases holding that the actual value of a forged instrument is *de minimis*, and we are therefore not failing to follow *Cuellar* and similar authority such that our decision may

only be applied prospectively. Moreover, at the time that Franco committed his offenses, Proposition 47 had not been enacted and all forgery was punishable as a felony regardless of the value of the instrument in question. Therefore, even if our understanding of *Cuellar* and related cases could be considered as constituting a change in interpretation, this change could not have had any impact on Franco's pre-Proposition 47 decision to plead guilty.

C. Receiving Stolen Property Conviction

Franco argues that he should have been resentenced on his conviction for receiving stolen property as a misdemeanor based upon the same argument concerning value that he made in the context of his forgery conviction. Franco, however, has not demonstrated on this record that he petitioned the trial court to resentence him on this offense. Franco's petition for resentencing was made orally and off the record, and the record lacks any description of what counsel sought when he made this request. The argument and the decision of the court contained in the reporter's transcript concern solely the question of whether the forgery conviction was subject to resentencing as a misdemeanor. Neither the court nor either party mentioned the conviction for receiving stolen property. As there is no indication that Franco petitioned the court to resentence him on his felony conviction for receiving stolen property as a misdemeanor, Franco has not established any error by the trial court in failing to resentence him for this offense.

II. Abstract of Judgment

Both Franco and the Attorney General agree that the abstract of judgment contains a typographical error in the representation of the date of Franco's sentencing hearing. The first page of the abstract of judgment states that the sentencing hearing was held on November 19, 2013, when in fact the hearing occurred on November 19, 2014. We may correct this clerical error on appeal. (*People v. Mitchell* (2001) 26 Cal.4th 181, 186-187.)

DISPOSITION

The judgment is affirmed. The superior court is ordered to prepare an amended abstract of judgment as set forth in this opinion and to forward a copy to the Department of Corrections and Rehabilitation.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.

DECLARATION OF SERVICE

RE: People v. RUBEN PHILLIP FRANCO, Case No. S233937

I, Allison H. Ting, declare I am over 18 years of age, and not a party to the within cause; my business address is 1158 26th Street, # 609, Santa Monica, CA 90403; I served a copy of the attached:

APPELLANT'S OPENING BRIEF ON THE MERITS

on each of the following, by placing same in envelope(s) addressed as follows:

**Randy Kaplan, DPD
Office of Public Defender
7500 Imperial Highway,
Suite 224
Downey, CA 90242**

**RUBEN PHILLIP FRANCO
19859 Vista Hermona
Walnut, CA 91789**

**Clerk for Delivery to:
Hon. Roger Ito Judge
Los Angeles County
Superior Court
12720 Norwalk Blvd.
Norwalk, CA 90650**

**California Appellate Project
520 S. Grand Ave -4th Fl.
Los Angeles, CA 90071**

Each said envelope was then, on **March 11, 2017**, sealed and deposited in the United States Mail at Los Angeles, California, with the postage thereon fully prepaid. Furthermore, I, Allison H. Ting, declare I electronically served from my electronic notification address of ting164933@gmail.com, the same referenced above document on **March 11, 2017, at _____ a.m./p.m.**, to the following entities and electronic addresses: **capdocs@lacap.com (EXTRA COPY for C.A.P.)**, and **docketingLAAWT@doj.ca.gov (SERVICE COPY for Attorney General)**, , and I electronically served the Court of Appeal on the website www.courts.ca.gov/8872.htm#tab17043 (Court of Appeal, Second Appellate District). I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **March 11, 2017**, at Los Angeles, California.

Declarant