In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **SI H. LIU,** **Defendant and Appellant.**	Case No. S248130

Second Appellate District, Division Eight, Case No. B279393
Los Angeles County Superior Court, Case No. GA090351
The Honorable Robert P. Applegate, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED FOR REVIEW

In *People v. Romanowski* (2017) 2 Cal.5th 903, this Court determined that a conviction for theft of access card information in violation of Penal Code section 484e, subdivision (d), may be reduced to a misdemeanor under Proposition 47 if a petitioner establishes that the "reasonable and fair market value" of the access card information is less than $950. The issue presented here is whether a trier of fact, when determining fair market value, may consider the value of property or services a defendant obtained by the use of the access card information.

INTRODUCTION

A trier of fact determining the value of stolen access card information must use the "reasonable and fair market value test" required by this Court in *Romanowski*. (*Romanowski*, *supra*, 2 Cal.5th at pp. 905, 914, 917.) Under that test, a trier of fact should be permitted to consider the value of property or services a defendant obtained by the use of the access card information—i.e., the amount of any fraudulent charges—because such evidence "relates to the possibility of illegal sales" and "can help establish 'reasonable and fair market value.'" (*Id.* at p. 915.) There is an obvious correlation between the charges on an access card account and the spending power of that account. It stands to reason that the greater the spending power of a particular account, the more valuable the information giving access to that account. Because spending power can shed light on the value of the account information, a trier of fact should be permitted to consider fraudulent purchase amounts—and any other value-related evidence such as balances in bank accounts linked to access cards, expert testimony, or prices that a defendant asked for or agreed to for the information—when determining the "reasonable and fair market value" of stolen access card information.

In the instant case, Liu used stolen access card information from several accounts to make thousands of dollars' worth of charges on each card's account. Such evidence could support a trier of fact's conclusion that the fair market value of the access card information for each corresponding account exceeds the $950 threshold under Proposition 47. But the trial court ruled on Liu's petitions without the guidance of *Romanowski*, and the record does not reveal whether it assessed the value of the stolen access card information at all, let alone whether it did so under the "reasonable and fair market value test." Accordingly, the matter should be remanded to the trial court for further proceedings.

STATEMENT OF THE CASE

Si Liu engaged in a scheme to defraud immigrants by advertising loan services in Chinese language newspapers. When victims responded to the advertisements and sought Liu's assistance obtaining loans, she took their personal identifying information, including their existing credit cards, and made thousands of dollars' worth of unauthorized charges on the victims' credit card accounts. (*People v. Liu* (2018) 21 Cal.App.5th 143, 146-147; see 2RT (case number B254655) 635-649, 655-661, 672-709, 904-916, 931-939, 943-948, 961-986; 3RT 1224-1227.)

A Los Angeles County jury convicted Liu of first degree residential burglary (Pen. Code,[1] § 459; count 1), two counts of second degree commercial burglary (§ 459; counts 8 and 10), three counts of grand theft by means of illegally obtained access card information (§ 484g, subd. (a); counts 3 through 5), 13 counts of grand theft of access card information (§ 484e, subd. (d); counts 2, 6, 11 through 16, 18 through 21, and 23), two counts of grand theft of personal property (§ 487; counts 7 and 9), one

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

count of petty theft (§ 488; count 17), and one count of multiple identifying information theft (§ 530.5, subd. (c)(3); count 25). (1CT 1-12, 19-24.) The trial court sentenced Liu to 10 years in state prison. (1CT 30-52.)

Liu appealed. The Court of Appeal reversed her conviction in count 3 and modified her sentence on counts 12, 13, 15, and 16 to reflect a stay pursuant to section 654, but otherwise affirmed the judgment. (See *People v. Liu* (Oct. 30, 2014, B254655) 2015 WL 6601318 [nonpub. opn.].)

In 2016, Liu filed a series of petitions in the trial court pursuant to Proposition 47, seeking reclassification of her felony convictions for theft of access card information in counts 2, 6, 14, 21, and 23, as misdemeanors. (1CT 53-80.) The trial court denied her petitions, finding that she was "not eligible" for relief.[2] (1CT 81-82.)

Liu appealed the denial of her petitions, asserting that pursuant to this Court's opinion in *Romanowski*, the only method for determining the fair market value of stolen access card information is by determining its value on the black market, and that remand was necessary because the record contained no evidence in that regard. The Court of Appeal disagreed, concluding that the value of stolen access card information may be determined by ascertaining the value of goods or services a defendant obtained with the information. (*Liu, supra*, 21 Cal.App.5th at p. 149.) The court thus rejected Liu's claim as to counts 2, 6, and 14, finding, "Where, as here, the access card information was actually used to procure goods or services, common sense tells us that the unauthorized charges are proof of at least the minimum value of the access card information." (*Ibid.*) Because the evidence as to counts 2, 6, and 14 showed that Liu had used

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[2] Liu also petitioned for the reduction of her identity theft conviction in count 25, which the trial court denied. (1CT 77-78, 81-82.) The trial court's resolution of that count is not before this Court.

the access card information to obtain goods or services well in excess of $950, the Court of Appeal affirmed the trial court's denial of the petitions as to those counts.[3] (*Id.* at p. 149.) The appellate court reversed the trial court's order as to counts 21 and 23, however, and remanded the matter for further proceedings, finding that the record "does not establish whether the value of the access card information exceeded $950" as to those counts. (*Id.* at pp. 149-150.)

This Court granted Liu's petition for review.

ARGUMENT

THE VALUE OF PROPERTY OR SERVICES ACQUIRED WITH STOLEN ACCESS CARD INFORMATION MAY BE CONSIDERED IN DETERMINING THE "REASONABLE AND FAIR MARKET VALUE" OF THE STOLEN INFORMATION

Liu correctly contends that value of stolen access card information must be determined by the "reasonable and fair market test" articulated by this Court in *Romanowski*. (AOB 10.) But she errs in suggesting that the value of property or services acquired with stolen access card information is irrelevant to that inquiry. (AOB 11-15.) When stolen access card information has actually been used to purchase goods or services, a trier of fact should be permitted to consider the value of those fraudulent charges—along with any other relevant evidence pertaining to value—in determining the reasonable and fair market value of the stolen access card information.

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[3] As to counts 2, 6, and 14, the record established that Liu had made charges of "nearly $7,000," $2,500, and $8,000, respectively. Liu was ordered to pay restitution to each of her victims as a result of the unauthorized charges. (*Liu*, *supra*, 21 Cal.App.5th at p. 147.)

A. The value of stolen access card information must be determined by the reasonable and fair market value test

1. Proposition 47 and *Romanowski*

Enacted by the electorate in 2014, Proposition 47 (the Safe Neighborhoods and Schools Act) "reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies." (*People v. Page* (2017) 3 Cal.5th 1175, 1179.) As relevant here, Proposition 47 added sections 490.2 and 1170.18 to the Penal Code. (*Ibid.*) Section 490.2 defines the crime of "obtaining any property by theft" as petty theft, and—subject to exceptions not relevant here—limits the punishment for that conduct to a misdemeanor, if the value of the property taken is $950 or less. (§ 490.2, subd. (a).) Section 1170.18 is an ameliorative provision. It entitles persons who are currently serving felony sentences and "who would have been guilty of a misdemeanor" under Proposition 47 had the Act "been in effect at the time of the offense" to have their sentences recalled, and to be resentenced to misdemeanors unless the trial court finds that resentencing would pose an "unreasonable risk of danger to public safety." (§ 1170.18, subds. (a), (b).) Individuals who meet those criteria and have completed their sentences are similarly entitled to have their crimes redesignated as misdemeanors. (§ 1170.18, subds. (f), (g).)

In *Romanowski*, this Court concluded that theft of access card information, in violation of section 484e, subdivision (d), is eligible for reduced punishment under Proposition 47 where a defendant establishes that the value of the stolen information is less than $950. (*Romanowski, supra*, 2 Cal.5th at pp. 905-914.)

Having held the defendant's offense was eligible for resentencing, this Court addressed how to value the stolen access card information. This

Court noted that section 484e, subdivision (d) "punishes the theft of an access card or access card information itself, not of whatever property a defendant may have obtained using a stolen access card or stolen information." (*Romanowski*, *supra*, 2 Cal.5th at p. 914.) A defendant thus can be convicted of violating section 484e, subdivision (d), "even if he or she never uses the stolen account information to obtain any money or other property." (*Ibid.*) "So," this Court explained, "the $950 threshold for theft of access card information must reflect a reasonable approximation of the stolen information's value, rather than the value of what (if anything) a defendant obtained using that information." (*Ibid.*) This Court held that trial courts must determine the value of stolen access card information by ascertaining its "reasonable and fair market value," and that this test "requires courts to identify how much stolen access card information would sell for." (*Id.* at p. 915.) In so doing, "courts may consider evidence relating to the possibility of illicit sales" (*id.* at p. 906), because such evidence "can help establish 'reasonable and fair market value'" (*id.* at p. 915).

Lastly, this Court confirmed that a petitioner always bears the ultimate burden to prove eligibility under Proposition 47, which in theft cases requires proof that the value of the stolen property is less than $950. (See *Romanowski*, *supra*, 2 Cal.5th at p. 916.) "In some cases," the opinion explained, "the uncontested information in the petition and record of conviction may be enough for the petitioner to establish this eligibility." (*Ibid.*) But this Court recognized that in other cases, "eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be 'required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court

finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends on the resolution of an issue of fact.'" (*Ibid.*)

2. Liu and Caretto

Applying *Romanowski*, the Court of Appeal rejected Liu's contentions that the only method for the valuation of stolen access card information is the fair market value of the information on the black market, and that remand was necessary because the record contained no evidence of fair market value.[4] (*Liu*, *supra*, 21 Cal.App.5th at p. 149.) The Court of Appeal reasoned that the fraudulent charge amounts were relevant to the valuation of the stolen access card information, explaining:

> Where, as here, the access card information was actually used to procure goods or services, common sense tells us that the unauthorized charges are proof of at least the minimum value of the access card information.

(*Id.* at p. 149, internal citations omitted.)

Accordingly, the court affirmed the trial court's denial of Liu's petitions as to counts 2, 6, and 14, because Liu had obtained thousands of dollars' worth of goods or services with the access card information at issue in each count. (*Liu*, *supra*, 21 Cal.App.5th at p. 149.) The court reversed and remanded counts 21 and 23 for further proceedings, however, finding that the record "does not establish whether the value of the access card information exceeded $950" as to those counts. (*Id.* at pp. 149-150.)

After this Court granted review, the Court of Appeal, in a different opinion, revisited and clarified its holding in *Liu*. (See *Caretto v. Superior Court of Los Angeles County* (2018) 28 Cal.App.5th 909, ___ [239

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[4] *Romanowski* was decided after the trial court denied Liu's Proposition 47 petitions, but before the Court of Appeal issued its opinion. (1CT 81-82.)

Cal.Rptr.3d 568, 574-577]). In *Caretto*, the trial court denied the petitioner's Proposition 47 petition seeking reduction of his conviction for receiving stolen property—two stolen debit cards—because it concluded that the value of the access card information was greater than $950 as measured by the amounts in the victim's bank accounts linked to the cards. (*Id.* at pp. 570-571.) The Court of Appeal rejected Caretto's contention that the reasonable and fair market value "cannot be based on the amount of money in the linked accounts because, in his view, 'that is not how much the stolen cards would sell for.'" (*Id.* at p. 574.) The court determined that while "*Romanowski* approved of the use of illegal sales or an illegal market to determine the value of stolen access card information, it did not purport to limit the evidence to that category. The basic question is simply fair market value, which has been defined as the highest price obtainable in the marketplace." (*Ibid.*, citing *Romanowski*, *supra*, 2 Cal.5th at p. 915.) The court explained why the amount of money accessible with a stolen access cards may, in fact, be an important consideration when fixing a fair market value:

> Here, we have no doubt evidence of the balances in linked accounts could be relevant to fixing the highest price in the marketplace for stolen access cards. Indeed, the value of stolen access cards may very well turn on the amount of money accessible with the card—it stands to reason that the higher the balance in the account, the more valuable the card giving access to that balance. So a court (or perhaps an expert witness) would likely need to know the amount of money available to an illicit buyer in order to place the highest value on access cards in an illegal market.

(*Ibid.*)

The Court of Appeal then took "a moment to clarify our language in [] *Liu*[, *supra*,] 21 Cal.App.5th 143 [], an opinion we recently issued dealing with similar valuation issues under Proposition 47 and *Romanowski*." (*Caretto*, *supra*, 239 Cal.Rptr.3d at pp. 574-575.) The court reaffirmed that

the fair market value test set forth in *Romanowski* is controlling, and that fraudulent charges may be relevant to that calculation:

> Under our decision today, the outcome in *Liu* was correct, as was our reasoning. Fraudulent charges could be highly probative of the value of the stolen cards themselves. Where we spoke imprecisely was suggesting or implying that a valuation based on fraudulent charges is an alternative to the fair market valuation test set out in *Romanowski* or that the fair market value test is optional. It is not. The fair market value test from *Romanowski* is the controlling test for valuing stolen access card information for Proposition 47 purposes.

(*Id.* at pp. 576-577.) The court noted that although *Romanowski* "did say that 'the $950 threshold for theft of access card information must reflect a reasonable approximation of the stolen information's value, rather than *the value of what (if anything) a defendant obtained using that information*,' it did so because fraudulent use of access card information is a separate crime from acquisition and possession of access card information." (*Id.* at p. 576, italics added by *Caretto* court, quoting *Romanowski*, *supra*, 2 Cal.5th at p. 914.) The Court of Appeal stated, "We do not interpret this statement to preclude the use of evidence of fraudulent charges to fix the value of the stolen card itself, so long as that evidence is introduced with the goal of determining the card's fair market value." (*Ibid.*)

The court concluded that the fair market value test announced in *Romanowski* allowed for all manner of evidence relevant to valuation:

> In short, consistent with *Romanowski* and *Liu*, a host of evidence could be relevant to the fair market value of stolen access cards, from actual fraudulent charges and the balances in linked accounts to expert testimony on the illegal markets for stolen cards. We merely reiterate that the proper analysis under *Romanowski* is the fair market value test, whatever evidentiary components might go into that determination in any given case.

(*Caretto*, *supra*, 239 Cal.Rptr.3d at p. 576.)

Because the evidence in *Caretto* included the victim's statement that he had $1,500 to $1,800 in the two bank accounts linked to the stolen debit cards, the Court of Appeal concluded that the trial court was entitled to infer that the stolen cards would have been valued in the marketplace at or near the balances in the linked accounts. (*Caretto*, *supra*, 239 Cal.Rptr.3d at p. 576.) However, because *Romanowski* was decided after the trial court proceedings "and provided critical guidance on how to value the stolen debit cards at issue here, we think *Caretto* should be given an opportunity to present evidence consistent with *Romanowski* in order to rebut the People's showing." (*Id.* at p. 577.) The Court of Appeal thus remanded the matter to the trial court for further proceedings consistent with its opinion. (*Ibid.*)

B. A trier of fact determining the fair market value of stolen access card information may consider the actual fraudulent charges a defendant has made in determining the value of the information

Respondent does not dispute that the proper method for determining the value of stolen access card information is the reasonable and fair market value test. (*Romanowski*, *supra*, 2 Cal.5th at pp. 905, 914, 917; *Caretto*, *supra*, 239 Cal.Rptr.3d at pp. 574-577.) However, a trier of fact applying that test may consider, among other evidence, any actual fraudulent charges a defendant has made with the access card information in determining the value of the information. This Court contemplated as much in *Romanowski*, noting that "evidence *related to the possibility* of illegal sales can help establish 'reasonable and fair market value'" of stolen access card information. (*Romanowski*, *supra*, 2 Cal.5th at p. 915, italics added.) The amount of money, property, or services that one could obtain with a particular account is evidence relating to the possibility of an illegal sale of information granting access to that account, as any buyer would want to

know the purchasing power of the information before agreeing to a price for that information.

Not all access cards are created equal, and not all access card information will have the same value in the marketplace. Liu does not dispute this fact. (AOB 12.) A defendant like Liu, who personally knows her victims and possesses not only their credit cards but their personal identifying information as well, possesses information with a greater value than information belonging to unknown victims, without additional identifying information. (See Peretti, *Data Breaches: What the Underground World of "Carding" Reveals* (2009) 25 Santa Clara Computer & High Technology L.J. 375, 387-391; see also Civ. Code, § 1747 et seq. [prohibiting retailers from recording personal identifying information in conjunction with credit card transactions]; *Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 139-140 [prohibition on recording personal information during credit card transactions is designed to promote consumer protection and prevent undue risk of fraud]; *Lewis v. Jinon Corp.* (2015) 232 Cal.App.4th 1369, 1374-1375 [same].) Similarly, a defendant like Liu, who has possession of an access cardholder's CCV2 number (a secondary security code listed on the back of credit cards) possesses far more valuable information than one who does not possess this information. (Peretti, *supra,* 25 Santa Clara Computer & High Technology L.J. at pp. 387-391.)

In the context of placing value on stolen account information, evidence of fraudulent purchases is analogous to evidence about credit limits and account balances. A credit card's credit limit or a debit card's account value would also make a particular access card more or less valuable in the marketplace. (*Caretto*, *supra*, 239 Cal.Rptr. at pp. 574-576.) As this Court explained in *Romanowski*, "other jurisdictions have long used this approach to measure the value of stolen credit cards (see,

e.g., *Miller v. People* (1977) 193 Colo. 415, 566 P.2d 1059, 1060)" on the black market. (*Romanowski*, *supra*, 2 Cal.5th at p. 915-916.) In *Miller*, Colorado's high court held that "[e]vidence of the dollar amount which may be purchased by using the credit card without card company approval provides an objective means of evaluating the illegitimate market value of credit cards." (*Miller*, *supra*, 566 P.2d at p. 1061.) Thus, as this Court signaled in *Romanowski*, via its citation to *Miller*, a reasonable and fair market valuation of stolen access card information may be predicated on the credit line connected to a stolen credit card or the balance of a linked bank account. As Liu concedes, credit card information enabling an individual to obtain $25,000 worth of property or services is more valuable than information that would enable the same individual to obtain $1,000 worth of goods or services. (AOB 12; see also *Caretto*, *supra*, 239 Cal.Rptr.3d at p. 574.)

Liu's case involves record evidence even more conclusive as to reasonable and fair market value than a credit line—thousands of dollars' worth of actual charges made on each victim's credit cards in counts 2, 6, and 14. These charges are "highly probative of the value of the stolen cards themselves." (*Caretto*, *supra*, 239 Cal.Rptr.3d at p. 575.) As in *Miller*, the value of goods or services purchased with stolen access card information provides an "objective means of evaluating the illegitimate market value of the credit cards." (*Miller*, *supra*, 566 P.2d at p. 1061; see also *People v. Franco* (Dec. 10, 2018, S233973) ___ Cal.5th ___ [2018 WL 6442660, *4] [the value of a forged check is established by the amount written on its face, which "reflects the severity of the intended fraud, [and] is also a readily ascertainable amount"]; *United States v. Bullock* (5th Cir. 1971) 451 F.2d 884, 890 [trier of fact may consider what stolen money orders "actually fetched when fraudulently negotiated through legitimate channels" in determining their value].)

It may well be, as the Court of Appeal noted below, that unauthorized charges made with stolen access card information are an indication of the minimum value of that information in a particular case. (*Liu*, *supra*, 21 Cal.App.5th at p. 149.) When a defendant has used stolen access cards to make actual purchases, such purchases would demonstrate the minimum value that could be obtained by a purchaser of such information, and would suggest that the information could be used to make even more purchases, above and beyond those already made by the defendant. Even without the ability to make additional purchases, the purchases already made by a defendant are probative of the value of the card at the time the defendant acquired the information. For example, some individuals in possession of stolen access card information "engage in a practice known as 'gift card vending,' which involves purchasing gift cards from retail merchants at their physical stores using counterfeit credit cards and reselling such cards for a percentage of their actual value." (Peretti, *supra*, 25 Santa Clara Computer & High Technology L.J at pp. 390-391.) The gift cards themselves can be resold for anywhere from 60 to 92 percent of their value. (See < https://www.giftcards.com/gcgf/where-to-sell-giftcards> [as of December 13, 2018].) Accordingly, actual purchases with any particular stolen access card can be a reasonable indicator of the card's minimum capacity and of its value. (*Caretto*, *supra*, 239 Cal.Rptr.3d at p. 575; *Miller*, *supra*, 566 P.2d at p. 1061.)

Evidence of purchases made with stolen access card information is not necessarily determinative of an access card's value as a matter of law. Yet such evidence is certainly relevant in determining the value of the information, along with any other evidence bearing on its reasonable and fair market value, such as balances in linked bank accounts, expert testimony regarding valuation, or evidence that a defendant asked for or agreed to a specific price for the information. (See *Caretto*, *supra*, 239

Cal.Rptr.3d at p. 576; see also *United States v. Hynes* (6th Cir. 2006) 467 F.3d 951, 967 [black market value of narcotics may be established by expert testimony]; *People v. Colasanti* (1974) 35 N.Y.2d 434, 436 [322 N.E.2d 269] [a defendant's asking price for narcotics was relevant to establish valuation]; *Churder v. United States* (8th Cir. 1968) 387 F.2d 825, 832-833 [value of stolen money orders may be established by evidence concerning the amount defendant expected to sell the money orders for].)

Liu suggests that the black market value of stolen credit card information would necessarily be less than the value of the purchases she made using those cards. She asserts that the Court of Appeal's "notion that the value of a stolen access card is at least the amount of unauthorized charges makes no sense," because a "thief who purchased stolen cards for the maximum amount possible to extract from them would soon be out of business." (AOB 12.) Liu has confused the actual value of the purchases made with the maximum value of the access card's information. But the maximum value of the information remains undetermined, as the card could conceivably be used to make additional purchases into the future. Even if a buyer would be unwilling to pay the precise amount that Liu was able to charge on those cards, and offered a fraction of the value of property or services she had obtained with that information, a trier of fact could still conclude that each count at issue would still exceed the $950 threshold. (See *Colasanti, supra*, 322 N.E.2d at p. 270 [valuation proved where asking price for narcotics on the black market was more than 10 times the minimum value required by statute].) More importantly, evidence showing that Liu had already made charges of nearly $7,000, $2,500, and $8000 on her victims' respective credit card accounts in counts 2, 6, and 14 is relevant to the reasonable and fair market value of the information at the time Liu possessed it, even if that value is less than the charges made,

because it is "evidence *related to the possibility* of illegal sales." (*Romanowski*, *supra*, 2 Cal.5th at p. 915, italics added.)

In support of her claim that the fraudulent purchases are irrelevant to the fair market value inquiry, Liu relies on this Court's statement in *Romanowski* that section 484e, subdivision (d) "punishes the theft of an access card or access card information itself, not of whatever property a defendant may have obtained using a stolen access card or stolen information" so "the $950 threshold for theft of access card information must reflect a reasonable approximation of the stolen information's value, rather than the value of what (if anything) a defendant obtained using that information." (*Romanowski*, *supra*, 2 Cal.5th at p. 14; see AOB 11.)

Liu contends that this passage suggests that the Court of Appeal's conclusion—that her use of the access cards to obtain thousands of dollars' worth of goods or services could be relied upon to establish the value of the access card information—"defies logic and conflicts with *Romanowski*." (AOB 11.) But this Court did not preclude the consideration of evidence pertaining to the value of goods or services a defendant may have obtained using stolen access card information in evaluating the reasonable and fair market value of such evidence; it merely noted that value and use of access card information are different things, punishable by different statutes (§§ 484e, subd. (d), 484g). (*Romanowski*, *supra*, 2 Cal.5th at p. 14.) Because the former does not require that the information be used at all to obtain anything of value, the value of purchases made by a defendant with an access card cannot be synonymous with the reasonable and fair market value of the card's information. (*Ibid.*) Thus, as the court in *Caretto* reasonably concluded, "We do not interpret this statement [in *Romanowski*] to preclude the use of evidence of fraudulent charges to fix the value of the stolen card itself, so long as that evidence is introduced with the goal of

determining the card's fair market value." (*Caretto*, *supra*, 239 Cal.Rptr.3d at p. 576.)

Liu also relies upon a report published by McAfee, a cybersecurity company, to suggest that "the black-market value of an online payment account ranges from about 3 percent to 5 percent of the available balance," and she posits that "it stands to reason that the street value of payment cards themselves will be similarly discounted." (AOB 12, citing McAfee, *The Hidden Data Economy, The Marketplace for Stolen Digital Information* (Dec. 2015) at p. 5.) Liu errs in relying on a report dealing solely with large scale data breaches of online payment accounts to estimate valuation of the stolen access card information in the instant case. Where, as here, access card information is not part of a large scale cybersecurity breach, but is obtained through a discrete and more penetrating fraud that also misappropriates the victims' actual credit cards, their CVV2 codes, and their personal identifying information, it naturally has a greater fair market value than information collected en masse from online hackers and sold to faceless buyers over the internet. (See Peretti, *supra*, 25 Santa Clara Computer & High Technology L.J at pp. 387-391.)

Even so, the McAfee report notes that its valuation of payment accounts stemming from data breaches are fluctuating "estimations," and that "[w]e have seen many examples of services for sale that fall outside of these price ranges." (*The Hidden Data Economy*, *supra*, at p. 7.) Because fair market value is predicated on the highest price obtainable in the open market for a particular item, the McAfee report provides little support for limiting valuation in the manner suggested by Liu. (See *People v. Pena* (1977) 68 Cal.App.3d 100, 104 [defining fair market value]; CALCRIM No. 1801 ["Fair market value is the highest price the property would reasonably have been sold for in the open market at the time of, and in the general location of, the theft"].) The McAfee report does, however, support

respondent's basic premise that access card information with higher purchasing potential will fetch a greater sum in the black market than access card information with less purchasing potential. (*The Hidden Data Economy*, *supra*, at pp. 6-7.)

Because the value of a defendant's purchases with stolen access card information is an indication of the information's purchasing potential at the time it was acquired, and because this is "evidence related to the possibility of illegal sales" (*Romanowski*, *supra*, 2 Cal.5th at p. 915), this Court should hold that a trier of fact may consider those purchases, along with other relevant evidence, in determining the reasonable and fair market value of the information (*Caretto*, *supra*, 239 Cal.Rptr.3d at p. 576).

C. A limited remand for further proceedings is appropriate in pre-*Romanowski* cases where, as here, the record is unclear as to whether the trial court made the required determination of reasonable and fair market value

As set forth previously, *Romanowski* clarified not only that a defendant convicted of theft of access card information is eligible for relief under Proposition 47 where the value of the information is less than $950, but it also explained that trial courts have a "duty" to ascertain the reasonable and fair market value of the information, and are "require[d]" to do so by "identify[ing] how much the stolen access card information would sell for." (*Id.* at p. 915.) Here, the trial court denied Liu's petitions prior to this Court's opinion in *Romanowski*, and did so on the grounds that Liu "is not eligible." (1RT 1-2; 1CT 82.) From this record, it is impossible to determine whether the trial court believed that Liu was not eligible because it thought that Proposition 47 precluded relief for violations of section 484e, subdivision (d), or because it determined that the value of the information involved in the offenses was greater than $950. However, given that the trial court denied relief as to counts 21 and 23, for which respondent

previously conceded that a remand was required based on valuation (*Liu, supra*, 21 Cal.App.5th at pp. 149-150), it does not appear that the trial court's denial of relief on counts 2, 6, and 14 was predicated on its ascertainment of the access cards' value, let alone on the reasonable and fair market value test mandated by this Court's subsequent opinion in *Romanowski*.

On this ambiguous record, therefore, and because the trial court ruled on Liu's petitions without the benefit of *Romanowski*, it cannot be presumed that the trial court conducted the required determination of reasonable and fair market value expressly dictated therein. (Compare *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [in the absence of contrary evidence, an appellate court is entitled to presume the trial court '"properly followed established law'"] with *People v. Esparza* (2015) 242 Cal.App.4th 726, 742-743 [rejecting presumption because "at the time of defendant's hearing it cannot be said that it was 'established law' that the prosecution had the burden of proof in a recall and resentencing hearing"].) The matter should be remanded for a limited hearing at which the trial court may make findings regarding the reasonable and fair market value of the access card information under the test mandated by *Romanowski*. (*Caretto, supra*, 239 Cal.Rptr.3d at pp. 576-577.)

CONCLUSION

This Court should hold that a trier of fact determining the reasonable and fair market value of stolen access card information may consider, along with other evidence, the value of property or services obtained by the use of the information. The Court should also remand the matter to permit the trial court to make findings regarding the reasonable and fair market value of the access card information relating to counts 2, 6, 14, 21, and 23, as mandated by *Romanowski*.

Dated: December 14, 2018 Respectfully submitted,

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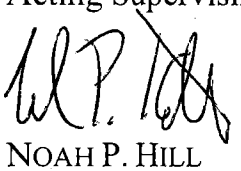

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains 5,599 words.

Dated: December 14, 2018

XAVIER BECERRA
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DECLARATION OF SERVICE

Case Name: **People v. Si H. Liu**
Case No.: **S248130**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On **December 14, 2018**, I served the attached **Respondent's Answer Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On **December 14, 2018**, I caused the original and 13 copies of the **Respondent's Answer Brief on the Merits** in this case to be delivered to the California Supreme Court at 350 McAllister Street, Room 1295, San Francisco, CA 94102-4797 by **FedEx, Tracking # 8112 8216 7442**.

On **December 14, 2018**, I caused one electronic copy of the **Respondent's Answer Brief on the Merits** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **December 14, 2018**, at Los Angeles, California.

K. Amioka	K. Amioka
Declarant	Signature

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