IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Appellant, vs. MIGUEL ANGEL JIMENEZ, Defendant and Respondent.	Case No. S249397 Ct. Appeal. 2/6 B283858 Ventura Co. Superior Court Case No. 2016041618

The Honorable Manuel J. Covarrubias, Judge

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ISSUE PRESENTED

Does appellant retain unfettered discretion to charge respondent with felony identify theft for conduct that constitutes shoplifting under Penal Code section 459.5 after the passage of Proposition 47?

Introduction

A jury found that on two separate occasions Miguel Jimenez went to a check-cashing company and cashed checks from Outer Wall, Inc. payable to himself for $632.47 and $596.60. After trial, the trial court relied on *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales*) and determined that respondent's conduct constituted shoplifting under Penal Code section 459.5.[1] The trial court reasoned

[1] All further statutory references are to the Penal Code unless otherwise specified.

that although Mr. Jimenez was charged and convicted of felony identity theft, section 459.5 required the court to reduce the identity theft counts to misdemeanor shoplifting offenses.

In a published decision, the Court of Appeal affirmed the trial court's order. (*People v. Jimenez* (2018) 22 Cal.App.5th 1292, review granted July 26, 2018 (*Jimenez*).) The *Jimenez* court concluded that respondent's conduct was identical to the defendant's conduct in *Gonzales,* which this Court held was shoplifting under section 459.5. (*Id.* at p. 1289.) Consequently, under section 459.5, subdivision (b), respondent Jimenez could only be charged with misdemeanor shoplifting. (*Id.* at p. 1290.) As discussed more fully below, the *Jimenez* opinion correctly interpreted the shoplifting statute in a manner faithful to *Gonzales* and, perhaps more importantly, consistent with the stated purpose of Proposition 47.

Statement of the Case and Facts

The prosecution charged respondent Jimenez with violating two counts of identity theft – section 530.5. On February 2, 2017, a jury found Mr. Jimenez guilty of both counts. (CT: 83-84.) His conduct consisted of the following: on June 16, 2016 and again on June 20, 2016, he entered Loans Plus, a commercial check-cashing establishment. On each occasion, he cashed a check from Outer Wall, Inc. made payable to himself. The check amounts were $632.47 and $596.60, respectively. (RT: 64-111; CT: 101.) On both counts, the jury was provided the following instruction with respect to the unlawful purpose element of identity theft: "*An unlawful purpose includes unlawfully obtaining or attempting to obtain money in the form of cash in exchange for a presented check without the consent of*

the other person." (CT: 75; CALCRIM 2040; § 530.5(a), emphasis added.)

On May 3, 2017, Mr. Jimenez filed a motion to reduce his convictions to misdemeanors based on this Court's opinion in *Gonzales,* which interpreted section 459.5, the shoplifting statute. (CT: 99-102.) The prosecution filed an opposition. (CT: 106-109.) On May 25th, the trial court granted respondent's motion. The court stated that it had reviewed *Gonzales* and *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*) and concluded that under the reasoning and holding of those two cases, the "court's hands have been somewhat tied." (RT: 228.)

> "An individual who did have two checks that were submitted to a check cashing establishment during daylight hours, and both of those checks were done during the normal working hours when the business was open. Those were the thefts of the money involved. And based on [*Gonzales* and *Romanowski*] I believe this court's hands are tied in that it must follow those rulings." (RT: 229-230.)

The court then sentenced Mr. Jimenez to credit for time served for the two misdemeanor counts of shoplifting. (RT: p. 232.) The prosecution appealed.

In a published opinion, the Court of Appeal affirmed the trial court's ruling. The opinion cited *People v. Garrett* (2016) 248 Cal.App.4th 82 (*Garrett*), and *Gonzales,* for the proposition that a defendant must only be charged with shoplifting when the statute applies, even if the conduct also constituted identity theft. (*Jimenez, supra,* 22 Cal.App.5th at 1289.) Relying extensively on *Gonzales,* the appellate court rejected appellant's contentions in a similar fashion to

this Court's rejection of the Attorney General's arguments in *Gonzales*:

> "The Attorney General argued that even if Gonzales did engage in shoplifting, he was ineligible for resentencing because he also entered the bank intending to commit felony identify theft under section 530.5, subdivision (a). (Citations omitted.) The Attorney General's position was that Gonzales's felony burglary conviction could have been based on his separate intent to commit felony identify theft. (Citations omitted.) Relying on *Garrett,* Gonzales responded that section 459.5 precluded such alternate charging because his conduct also constituted shoplifting. (Citations omitted.) Noting that Gonzales 'has the better view,' the Supreme Court concluded that '[s]ection 459.5, subdivision (b) requires that any act shoplifting "shall be charged as shoplifting" and no one charged with shoplifting "may also be charged with burglary or theft of the same property." . . . A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct.' (Citations omitted.)" (*Ibid.*)

On July 25, 2018, this Court granted review but denied appellant's request for depublication.

Discussion

I.

Standard of Review

The core question raised by this case involves the interplay between two statutory schemes – one enacted by the Legislature and the other by the public. Respondent was convicted under the first

statutory scheme, violating Penal Code, section 530.5, subdivision (a) – identity theft. The statutory scheme enacted by voters through Proposition 47 is Penal Code section 459.5, the new shoplifting statute which requires misdemeanor treatment for conduct covered by the statute.

The Court of Appeal's statutory interpretation of both schemes is reviewed de novo. (*People v. Gonzales* (2018) 6 Cal.5th 44, 49.) An interpretation of a ballot initiative is governed by the same principles that apply in construing a statute enacted by the Legislature. (*Ibid.*) The first principle is to look at the language of the statute, giving the words their ordinary meaning, and reading them in the context of the statute or initiative. The primary objective is to give effect to the initiative's intended purpose. (*In re Lance W.* (1985) 37 Cal.3d 873, 889.) If the language is unambiguous, there is no need for further construction. However, if the "language is susceptible of more than one reasonable meaning, we may consider the ballot summaries and arguments to determine how the voters understood the ballot measure and what they intended in enacting it." (*Gonzales, supra,* 2 Cal.5th at p. 868.)

II.

The plain language of Penal Code section 459.5 precludes a felony sentence for conduct that constitutes shoplifting.

Appellant contends that the plain language of section 459.5 allows for a felony sentence for shoplifting conduct, so long as the defendant is charged and convicted of the alternate charge of identity

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theft.[2] (OBM: 18-26.) Appellant is wrong.

On November 4, 2014, California voters resoundingly approved Proposition 47, also known as the "Safe Neighborhoods and Schools Act" (the Act).[3] The Act went into effect on November 5, 2014. (Calif. Const., art. 2, § 10(a).) The Act's primary purpose is the following: "[t]he People enact the Safe Neighborhoods and Schools Act to ensure that prison spending is focused on violent and serious offenses, maximize alternatives for non-serious, nonviolent crime, and invest the savings generated from this Act into prevention and support programs, victim services, and mental health and drug treatment." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.)

To accomplish this goal, the Act does two things. It first renders certain drug and theft-related offenses misdemeanors that were previously either felonies, or "wobblers," unless they were committed by certain ineligible defendants. The Act also created new statutes that specified misdemeanor treatment for misdemeanor conduct. In effect, the Act took away the prosecution's discretion to

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[2] The elements required to prove a violation of section 530.5(a) – identity theft – are: (1) defendant willfully obtained someone else's personal identifying information; (2) defendant willfully used that information for an unlawful purpose; and (3) defendant used the information without the consent of the person whose identifying information he was using. *The unlawful purpose in this case was attempting to obtain money in the form of cash in exchange for a presented check without the consent of the other person.* (CT: 75; CALCRIM 2040; § 530.5(a), emphasis added.)

[3] 4,033,570 voters, or 59.3% of the California voters, elected to pass Proposition 47. (http://vote.sos.ca.gov/returns/ballot-measures, 11/18/14.)

charge defendants with felonies for conduct the Act deems to be misdemeanor conduct.

The Act also provides resentencing to two classes of defendants: defendants who are currently serving a felony sentence, and defendants who have completed a felony sentence for offenses that are now misdemeanors. (See Section 1170.18, subdivision (a) – resentencing for a person currently serving a felony sentence – and Section 1170.18, subdivisions (f) and (g) – resentencing for a person who has completed his felony sentence.)

Section 15 of Proposition 47 provides that the Act shall be broadly construed to accomplish its purposes; section 18 states that the Act shall be liberally construed to effectuate its purposes. (Voter Inf. Guide, *supra,* p. 74.)

Penal Code section 459.5 is one of the newly enacted statutes that curtails prosecutorial discretion, and in so doing, proscribes felony punishment. Section 459.5, subdivision (a), defines shoplifting as "entering a commercial establishment with the intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred and fifty ($950)." It also provides that "[s]hoplifting *shall* be punished as a misdemeanor," except in the limited circumstances when a person has a prior super-strike conviction or is required to register as a sex offender pursuant to section 290. (*Ibid.*; emphasis added.) To ensure that shoplifters are only tried and sentenced as misdemeanants, the statute goes further and mandates that any act falling within its purview "*shall* be charged as shoplifting. No person who is charged with shoplifting may also be

charged with burglary or theft of the same property." (Pen. Code, § 459.5, subd. (b); emphasis added.)

Here, it is undisputed that respondent's conduct meets the elements of shoplifting as interpreted by *Gonzales*. In fact, Mr. Jimenez's conduct is identical to the conduct of Gonzales where Gonzales fraudulently used his grandmother's checks to obtain cash from a bank. (*Gonzales, supra,* 2 Cal.5th at p. 875 [entering a commercial establishment with intent to commit theft constitutes shoplifting under section 495.5.])

Appellant argues that identity theft is not really a theft type offense and therefore is distinct from shoplifting. (OBM: 9-18.) That argument fails for several reasons. The obvious purpose of the identity theft in this case was to unlawfully use stolen checks to steal money from Loans Plus. The use of the identifying information on the checks from Outer Wall, Inc. was the means to accomplish the theft. The fact that Outer Wall, Inc. is the named victim in counts one and two is simply due to the prosecution's filing decision to circumvent the charging limitations in Proposition 47. (See CT: 18.) The main conduct that underpins the identity theft was the theft from Loans Plus. The identity theft is therefore not distinct or separate from the theft. While it is true that not all identity thefts constitute shoplifting – i.e., use of another's personal identification to obtain a social security card – the unlawful use of another's check to obtain cash from a commercial establishment is a type of identity theft that constitutes shoplifting. (*Gonzales, supra,* 2 Cal.5th at 877.)

Appellant rightly concedes that merely designating the conduct as identity theft is not dispositive on whether the conduct

constitutes theft. For example, in *People v. Page* (2017) 2 Cal.5th 1175 (*Page*) this Court addressed whether a violation of Vehicle Code section 10851 – unlawful taking of a vehicle – could qualify as a theft offense under section 490.2, subdivision (a). The Attorney General argued that since Vehicle Code section 10851 does not designate the offense as a theft, it was not a theft offense within the meaning of section 490.2. This Court rejected that textual argument. "Moreover, while Vehicle Code section 10851 does not expressly designate the offense as theft, the conduct it criminalizes includes theft of a vehicle." (*Id.* at p. 1186)[4]

Identity theft, as charged in this case, likewise criminalizes shoplifting or theft from Loans Plus. The unlawful use element for the identity theft was the theft from Loans Plus. To prove a theft, the government must establish that when the defendant took the property, he or she did so with the intent to permanently deprive the owner of the property. (*People v. Avery* (2002) 27 Cal.4th 49, 57-58; CALCRIM No. 1800, element no. 3.) Respondent Jimenez intended to permanently deprive Loans Plus of cash by cashing a stolen check made payable to himself. Just as Vehicle Code section 10851 can be a misdemeanor if the vehicle theft is $950 or less, identity theft conduct constitutes shoplifting when a defendant steals from a business by using another's personal identification.

Appellant's contention that respondent's identity theft was divorced from the Loans Plus theft causes appellant to misconstrue this

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[4] Vehicle Code section 10851 encompasses both theft and nontheft conduct. Only the taking of a vehicle valued at $950 or less with the intent to permanently deprive the owner of title or possession is a theft offense within the meaning of section 490.2. (*Page, supra,* 2 Cal.5th at 1183.)

Court's *Gonzales* decision. (See *Gonzales, supra,* 2 Cal.5th at p. 858.) Appellant argues that *Gonzales* does not apply because Mr. Jimenez was convicted of identity theft, not forgery like the defendant in *Gonzales*. (OBM: 13.) That argument is a *non sequitur*.

The issue in this appeal is whether respondent's conduct qualifies for misdemeanor treatment under Proposition 47. Thus, for example, in *Gonzales,* the defendant stole his grandmother's checkbook and cashed two checks made out to himself in the amount of $125 each. (*Gonzales, supra,* 2 Cal.5th at p. 862.) Although Gonzales was convicted of forgery in that case, he could have been charged with and convicted of identity theft. He used his grandmother's personal identifying information – the checks – for the unlawful purpose of cashing the checks at a bank. (See § 530.5(a).) In fact, the Attorney General made the argument that defendant Gonzales's conduct constituted identity theft even though he was convicted of forgery.

This Court rejected that argument and held that his conduct constituted shoplifting and therefore could only be charged with shoplifting. "A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging and ensures only misdemeanor treatment for the underlying described conduct." (*Gonzales, supra,* 2 Cal.5th at p. 876.)

Section 459.5 applies because respondent's conduct constitutes theft by false pretenses.[5] Like the facts in *Gonzales,*

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[5] The elements for theft for false pretense are: (1) defendant intentionally deceived a property owner by false representation or pretense; (2) defendant did so intending to persuade the owner to let the defendant take possession of the property and (3) the owner let the defendant take the property because the owner relied on the false representation or pretense. (CALCRIM 1804; Pen. Code § 484.)

respondent used a stolen check made payable to himself to deceive Loans Plus into cashing the check. (See *Gonzales, supra,* 2 Cal.5th at 862 ["defendant's act of entering a bank to cash a stolen check for less than $950, traditionally regarded as a theft by false pretenses rather than larceny, now constitutes shoplifting under the statute"].) (*People v. Gonzales, supra,* 2 Cal.5th at 862.)

Prior decisions from this Court are consistent with this argument. (e.g., *People v. Williams* (2013) 57 Cal.4th 776.) In *Williams,* the defendant used either a MasterCard or a Visa payment card, which was re-encoded with a third party's credit card information, and bought a $200 Walmart gift card. Williams was then apprehended by loss prevention officers inside Walmart. This Court held that Williams's conduct constituted theft by false pretenses and the crime was completed once the defendant secured the gift card. (*Id.* at 787.) *Williams* fatally undercuts the assertion that respondent's conduct did not constitute theft by false pretenses.[6]

Appellant's reliance on *People v. Truong* (2017) 10 Cal.App.5th 551 for the proposition that respondent's conduct did not constitute shoplifting is misplaced. *Truong* addressed Penal Code,

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[6] Identity theft is located in the Penal Code, chapter 8 – False Personation and Cheats – of Title 13, Crimes against Property. Although identity theft, like theft by false pretenses, is considered a nonlarcenous theft, our High Court has held that nonlarcenous thefts are included in the ambit of shoplifting. "Here we hold the electorate similarly intended that the shoplifting statute apply to an entry to commit a nonlarcenous theft. Thus, defendant's act of entering a bank to cash a stolen check for less than $950, traditionally regarded as a theft by false pretenses rather than larceny, now constitutes shoplifting under the statute." (*People v. Gonzales, supra,* 2 Cal.5th at 862.)

section 530, subdivision (c)(3), which prohibits the acquisition of ten or more persons' personal identifying information with the intent to defraud. (*Id.* at pp. 561-562.) In contrast, respondent was convicted of identity theft under section 530.5, subdivision (a), which requires, in part, that the defendant use the personal information for an unlawful purpose.

The distinction between section 530, subdivision (c)(3), and section 530.5, subdivision (a), underscores the fact that not every identity theft constitutes shoplifting. However, when a defendant uses another person's identifying information for the unlawful purpose of obtaining store credit from a commercial establishment, that conduct constitutes shoplifting under section 459.5.

In sum, the trial court and the Court of Appeal correctly concluded that even though identity theft is different from either burglary or theft of an access card, "[i]t appears to be somewhat of a theft charge which was the focus of *Gonzales* and *Romanowski*." (RT: 230.)

Additionally, this Court has already rejected the notion that obtaining a person's identifying information in the course of a theft is excluded from Proposition 47. (*Romanowski, supra,* 2 Cal.5th at 913.["[W]e see no reason to infer (against section 490.2's plain meaning) that voters implicitly intended to exempt theft of access information simply because this criminal prohibition serves to protect consumers."].)

Just like *Romanowski* refused to exempt theft of an access card from the ambit of section 490.2, this Court should reject appellant's request to exempt identity theft from the purview of

shoplifting under section 459.5. The fact that Mr. Jimenez committed identity theft in the course of the shoplifting does not alter the fact that the conduct constituted shoplifting. "A given act may constitute more than one criminal offense. It follows that a person may enter a store with the intent to commit more than one offense – e.g., with the intent to commit both identity theft and larceny." (*Garrett, supra,* 248 Cal.App.4th at p. 88.)

III.

Section 459.5, subdivision (b), precludes a charge of identity theft for shoplifting conduct.

Section 459.5, subdivision (b), reads: "[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." Despite this clear language prohibiting alternate charging and felony treatment for misdemeanor shoplifting conduct, appellant incorrectly contends that identity theft is exempted from section 459.5, subdivision (b). (OBM: 26-29.)

The plain language in subdivision (b) is consistent with the well-established rule that where a general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute. (*In re Williamson* (1954) 43 Cal.2d 651, 654.) In this case, the general statute is section 530.5, subdivision (a) – identity theft. Identity theft prohibits the use of a person's identifying information for *any unlawful purpose.* Shoplifting, on the other hand, deals specifically with theft from a commercial establishment during normal business

hours. The only time identity theft conflicts with section 459.5 is when a defendant uses another's person's identifying information for the *unlawful purpose* of committing a theft from a commercial establishment. In such a case, the plain language of section 459.5, subdivision (b), and *Williamson,* dictates that "any act of shoplifting . . . shall be charged as shoplifting."

Appellant argues that subdivision (b) only precludes the charging of shoplifting and either burglary or theft, but not identity theft. This argument ignores subdivision (b)'s mandate that "[a]ny act of shoplifting . . . shall be charged as shoplifting." In addition, the conduct at issue here is theft by false pretenses from a commercial establishment, therefore, implicating subdivision (b). Respondent submits that to interpret subdivision (b) to not apply to the conduct in this case is inconsistent with the plain language and purpose of the Act.

The cases that have interpreted the interplay between felony identity theft and shoplifting concur that section 459.5, subdivision (b), prohibits the charging of felony identity theft. In *Garrett,* the defendant entered a convenience store with a stolen credit card and attempted to buy gift cards valued at $50. Garrett pleaded guilty to felony forgery; after Proposition 47 passed, he petitioned for resentencing. The trial court denied the petition. (*Garrett, supra,* 248 Cal.App.4th at p. 84.) On appeal, the Attorney General argued that because Garrett intended to commit identity theft in addition to intending to commit a theft of a commercial establishment, section 459.5 did not apply. (*Id.* at p. 87.) The appellate court rejected that argument. "Thus, even assuming defendant intended to commit felony identity theft, he could not have been charged with burglary under

Penal Code section 459 if the same act – entering a store with the intent to purchase merchandise with a stolen credit card – also constituted shoplifting under Section 459.5." (*Id.* at p. 88.)

Shortly thereafter, this Court decided *Gonzales.* The Attorney General argued that even if a defendant engaged in shoplifting, he also committed identity theft and is therefore ineligible for resentencing under Proposition 47. (*Id.* at p. 876.) The defendant relied on *Garrett* and argued that section 459.5 precluded such alternate charging. The Court stated:

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

The same Division from the Second District that decided *Jimenez* decided *People v. Brayton* (2018) 25 Cal.App.5th 734 (review granted October 10, 2018, S251122), another case involving the interplay between identity theft and shoplifting. In *Brayton*, the court reasoned:

> "[h]ere the facts of Brayton's identity theft crime are similar to *Gonzales, Garrett* and *Jimenez.* Brayton used a stolen driver's license belonging to another person obtain a $107.07 store credit. She obtained the credit by the false representation that she was the person named in that driver's license. In *Gonzales,* entering a bank to cash a stolen check fell

> within the purview of the resentencing provision. In *Garrett,* using another person's credit card to purchase property constituted misdemeanor shoplifting under Proposition 47. Similarly, here it was Brayton's use of another person's driver's license that allowed her to obtain the credit.
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> "The People claim the facts here and those of *Gonzales* and *Garrett* are not identical. But that is a distinction without a difference in result. Notwithstanding some factual differences, *Gonzales, Garrett* and the instant case all fall within Proposition 47's broad definition of 'shoplifting.'"
> [*People v. Garrett* (2016) 248 Cal.App.4th 82.]

(*Id.* at p. 739; see also *People v. Washington* (2018) 23 Cal.App.5th 948, 954 [shoplifting can include the offense of identity theft].)

Appellant posits that *Jimenez* (and presumably, *Brayton*) is wrongly decided because "respondent was never charged with burglary or theft." (OBM: 21.) According to appellant, what *matters is how the People charge the conduct.* Had the People charged Mr. Jimenez with burglary, then *Gonzales* compels "misdemeanor treatment for the underlying described conduct." (*Gonzales, supra,* 2 Cal.5th at p. 876.) Because the People elected to charge respondent with identity theft for his conduct, respondent was subject to felony punishment. (OBM: 21-23.) Appellant defends this position by claiming that the identity theft in this case shares no common elements with shoplifting. (OBM: 19.) That is simply untrue. As provided to the jury, the "unlawful purpose element in this case was attempting to obtain money in the form of cash in exchange for a presented check without the consent of the other person." (CT: 75.) Further, the shoplifting element is what the

prosecution uses to elevate respondent's conduct from misdemeanor to felony identity theft. For example, if respondent had simply possessed the checks from Outer Wall without attempting to cash them, he could not have been charged with section 530.5, subdivision (a), but rather section 530.5, subdivision (c)(1), a misdemeanor.[7]

Additionally, the argument by appellant runs counter to one of the main purposes of Proposition 47, which is to take away the prosecutor's discretion to charge a felony for nonserious and nonviolent conduct. This Court's decision in *People v. Martinez* (2018) 4 Cal.5th 647 does not advance appellant's argument. In *Martinez,* the defendant petitioned for a resentencing pursuant to Proposition 47 of his conviction for transportation of methamphetamine in violation of Health and Safety Code section 11379. Martinez argued that his "transportation offense should come within the ambit of Proposition 47 because the amendment to section 11379 narrowing the definition of 'transport' to 'transport for sale took effect" before the voters passed Proposition 47." (*Id.* at p. 677.) Absent proof that he committed transportation for sale, the defendant should get the benefit of Proposition 47 because his conduct constituted a violation of Health and Safety Code section 11377, a statute amended under the Act. This Court disagreed and held that Martinez was ineligible because had Proposition 47 been in effect at the time of his offense, his criminal conduct still would have amounted to felony drug transportation

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[7] Section 530.5, subdivision (c)(1) provides in pertinent part: "Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information . . . of another person is guilty of a public offense, and . . . shall be punished by a fine, by imprisonment in a count jail not to exceed one year, or by both a fine and imprisonment.

because none of the statutes amended or enacted by Proposition 47 altered the offense set forth in section 11379. (*Id.* at. pp. 677-678.)

In contrast to the facts in *Martinez*, respondent Jimenez's conduct occurred after the passage of Proposition 47 and constitutes shoplifting under section 459.5.

IV.

Mr. Jimenez's identity theft also qualifies as petty theft under section 490.2.

Mr. Jimenez contends that section 490.2 encompasses identity thefts under $950, when the identity theft is for the purpose of stealing money. The Court of Appeal relied upon section 459.5 to reduce his conviction to a misdemeanor, however, respondent's conduct also constitutes a petty theft misdemeanor under section 490.2.

Section 490.2, subdivision (a), provides in pertinent part: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor. . . ."

This Court has interpreted section 490.2 on two occasions. In *People v. Romanowski, supra,* 2 Cal.5th 903, the Court addressed whether theft of access card information in violation of section 484e, subdivision (d), is one of the crimes eligible for reduced punishment under the newly enacted section 490.2. The Attorney General argued that theft of access card information is different than grand theft and implicates greater consumer privacy concerns than simple theft.

Therefore, such conduct should be excluded from the reduced punishment afforded by Proposition 47. (*Id.* at pp. 912-913.)

This Court rejected that argument, stating, "[w]e see no reason to infer (against § 490.2's plain meaning) that voters implicitly intended to exempt theft of access card information simply because this criminal prohibition serves to protect consumers. Where the electorate excluded whole categories of crimes based on the underlying purpose of the crimes, these limits were explicit. (See, e.g., Voter Information Guide [Gen. Elec. (Nov. 4, 2014)] Prop. 47, § 3, p.70 ["people convicted of murder, rape, and child molestation will not benefit from this act"].) The electorate weighed the costs and benefits of Proposition 47. On the question of whether consumer protection offenses are exempt from the initiative's provision, the language approved by the public conveys an unambiguous, negative answer." (*Id.* at pp. 913-914.) This Court concluded that section 490.2's broad language of "obtaining any property by theft" included in its ambit theft of access card information even though such theft was not specifically listed in section 490.2. (*Id.* at p. 908.)

Page, supra, 3 Cal.5th 1175 reaffirmed *Romanowski's* expansive interpretation of section 490.2. *Page* held that the act of obtaining "any property by theft where the value does not exceed nine hundred fifty dollars ($950) constitutes petty theft" and is a misdemeanor. (*Id.* at p. 1183.) "Nothing in the operate language of the subdivision suggests an intent to restrict the universe of covered theft offenses to those offenses that were expressly designated as 'grand theft' offenses before the passage of Proposition 47." (*Id.* at p. 1186.)

In the same manner that *Romanowski* rejected the exclusion of consumer protection theft – theft of access card information – and *Page* rejected the exclusion of Vehicle Code section 10851 from the ambit of section 490.2, this Court should hold that respondent Jimenez's identity theft constituted petty theft under section 490.2.

A recent appellate decision that involved similar facts to the present case supports respondent's position. (See *People v. Warmington* (2017) 16 Cal.App.5th 333.) Defendant Warmington, while working as a clerk at Walmart, stole a television and recliner chair from Walmart and then returned the items to obtain a gift card. The value of the items stolen was $851. (*Id.* at p. 335.) Warmington pleaded no contest to embezzlement – section 503[8] – and after Proposition 47 passed, filed an application for a misdemeanor reduction. The trial court denied the application on the basis that an embezzlement offense was not eligible for Proposition 47 relief. (*Ibid.*)

The appellate court reversed. The court held that section 490.2, subdivision (a), applies to embezzlement. "Any doubt that embezzlement is a form of theft is resolved by section 490a, as interpreted in *Gonzales*. While section 503 does not define a form of grand theft, it nonetheless defines a form of theft. Since section 490.2 applies to 'obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred and fifty dollars.'" (*Id.* at pp. 337-338.)

Mr. Jimenez contends that just like embezzlement by a store clerk constitutes theft under section 490.2, identity theft against

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[8] Section 503 defines embezzlement as "the fraudulent appropriation of property by a person to whom it has been entrusted."

Outer Wall, Inc. to steal from Loans Plus for an amount less than $950 is also a petty theft under section 490.2.

People v. Soto (2018) 23 Cal.App.5th 813 (*Soto*) does not aid appellant. Defendant Soto pleaded guilty to a violation of section 368, subdivision (d) – theft of an elder.[9] He used his grandmother's birth date and Social Security number to obtain a credit card in her name. He then made unauthorized purchases in the amount of $1,822.05. (*Id.* at 816.) The trial court denied his Proposition 47 petition and the Court of Appeal affirmed the denial. The Court acknowledged that section 368, subdivision (d), requires an underlying theft offense such as identity theft. However, the Court denied relief based solely on the status of the elderly victim:

> "Even if we assume that Soto's conviction was based on an underlying theft offense, this does not resolve the question of eligibility for relief under Proposition 47 because a violation of section 368, subdivision (d) requires additional necessary elements. The victim must be an 'elder or dependent adult,' and there must be a finding that the defendant knew or reasonably should have known that fact." (*Id.* at pp. 823-824.)

Here, the theft was not from an elder or dependent adult that had been plead and proved. This was a garden variety type of

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[9] At the time of Soto's plea, section 368, subdivision (d) read: "Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, or who violates section 530.5 proscribing identity theft . . . of an elder or a dependent adult . . .when the moneys, labor, goods, services, or real or personal property taken or obtained is of a value exceeding four hundred dollars . . . . "Since 2012, it is a wobbler if the value taken exceeds $950 and a misdemeanor if it does not. (Stats. 2011, ch. 366, § 1.5.)

theft that would have typically been charged as commercial burglary prior to the passage of Proposition 47. Further, the elder abuse statute supports respondent's position that his conduct required misdemeanor treatment. The Legislature stated that "crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children." (Pen. Code, § 368, subd. (a).) Even with this special protection for elders, the Legislature still made identity theft (or theft, embezzlement, forgery and fraud) against an elder a misdemeanor if the value taken does not exceed $950. (Pen. Code sec. 368, subd. (d).) Even against elders, the Legislature declined to require felony treatment for identity thefts of less than $950. Instead, the degree of culpability is tethered to the value of the property taken regardless of the technique employed. Proposition 47 is the logical expansion of this sound principle.

Last, respondent Jimenez urges this Court to reverse *People v. Sanders* (2018) 22 Cal.App.5th 397, S248775, review granted July 25, 2018, and held behind this case. Defendant Sanders found a credit card and used it to make unauthorized purchases at a 7-Eleven store and at Burger King. She was charged with and pleaded guilty to two counts of commercial burglary and two counts of identity theft. The total amount of fraudulent charges was $176.61. (*Id.* at p. 400.) The trial court granted her petition to reduce the commercial burglaries to shoplifting but denied her request to dismiss the identity theft charges. (*Id.* at p. 399.) The Court of Appeal affirmed on the basis that identity theft is not a theft-based offense under section 490.2. (*Id.* at p. 403.)

Respondent contends that the court's reasoning is flawed and hence unpersuasive. The *Sanders* opinion failed to address this Court's holding in *Gonzales* that a defendant must be charged only with shoplifting when the statute applies and prohibits alternate charging for the underlying described conduct." (*Gonzales, supra,* 2 Cal.5th at p. 876.) That Sanders committed shoplifting is beyond dispute. She used another person's credit card to purchase goods by false pretenses. She therefore should have only been convicted of shoplifting under *Gonzales* and section 459.5, subdivision (b). The opinion's failure to address or distinguish *Gonzales* compels reversal on that ground alone. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 456 [superior court decisions are binding on inferior courts.].)

The opinion also errs by making the same argument as appellant that identity theft is not a theft offense. (*Sanders, supra,* 22 Cal.App.5th at p. 400.) That may be true for some identity thefts but not for the conduct at issue in *Sanders,* nor the conduct at issue in this case. In both instances, the personal identification was used for the unlawful purpose of committing a theft – and is therefore a theft offense under Proposition 47.

V.

Respondent's conduct is the type of nonserious, nonviolent theft that Proposition 47 requires to be treated as a misdemeanor.

Appellant's final argument is that respondent's identity theft conduct is too serious to be afforded misdemeanor treatment.

(RB: 27-29.) The gist of the contention is that identity theft is a unique type of theft that should be exempted from the charging and sentencing limitations imposed by Proposition 47.

First, respondent's conduct was not more harmful than the theft of another's credit or debit card in *Romanowski,* nor does it implicate greater personal identification than the use of a stolen check in *Gonzales.* Second, to require misdemeanor treatment for respondent's conduct is entirely consistent with the Act's stated purpose of prohibiting felony sentences for nonserious and nonviolent offenses. (Voter Information Guide, *supra,* text of Prop. 47, sec. 3, sub. (3), p. 70.) Further, The Legislative Analyst specifically told the voters that "[u]nder this measure, shoplifting a property worth $950 or less would always be a misdemeanor and could not be charged as burglary." (*Id.,* analysis by Legis. Analyst, p. 35.)

Appellant contends that since identity theft is only mentioned under the provisions relating to check forgery, it is evidence against including identity theft within the ameliorative sweep of shoplifting. (OBM: 31-32.) Respondent argues that the opposite is true. That is, if voters intended to exempt identity theft from the ambit of shoplifting, they could have done so. Instead, the drafters chose to define shoplifting as entering a commercial establishment with the intent to commit theft in all of its permutations, including identity theft. In *Gonzales,* this Court stated it thusly:

> "Finally, the Attorney General suggests defendant's interpretation leads to absurd results because taking property displayed for sale is less blameworthy than taking other kinds of property, entering into areas not open to the public, or engaging in more sophisticated types of theft. She suggests that the

> harm from using personal identifying information, like that found on a check, 'is far greater.' One might question the premise of this argument. The degree of culpability can reasonably be linked to the value of property stolen, regardless of the technique employed. In each case, the thief has a specific intent to steal. In any event, the culpability levels of the various theft offenses are policy decisions for the electorate to make. Its decision to treat various theft offenses similarly may be debated but it is not absurd." (*Gonzales, supra,* 2 Cal.5th at 874.)

This Court rejected a similar argument in *Romanowski* where the Attorney General argued that theft of an access card required different treatment than other theft offenses because of the consumer protection concerns.

> "The People's argument about 'the statute's broad consumer protection' also overlooks the fact that Proposition 47 expressly reduced the punishment for another set of crimes that serve to protect consumers. Proposition 47 reduces punishment for 'forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the check, bond, bank bill, cashier's check, traveler's check, or money order does not exceed nine hundred fifty dollars ($950).' (§ 473, subd. (b).) Section 473 also protects consumers from fraud and identity theft. In fact, a check can contain some of the same information that is found on an access card, along with the owner's address and other details that would facilitate identity theft. Given that Proposition 47 specifically created a $950 threshold for check forgery, we see no reason to infer (against section 490.2's plain meaning) that voters implicitly

> intended to exempt theft of access information simply because this criminal prohibition serves to protect consumers. Where the electorate excluded whole categories of crimes based on the underlying purpose of the crimes, these limits were explicit. (See, e.g., Voter Information Guide, Prop. 47, § 3, p. 69 ['people convicted of murder, rape, and child molestation will not benefit from this act'].) Nothing in Proposition 47 suggests that voters implicitly intended for the initiative's scope to hinge on inferences about the objectives of the crimes at issue. The electorate weighed the costs and benefits of Proposition 47. On the question of whether consumer protection offenses are exempt from the initiative's provisions, the language approved by the public conveys an unambiguous, negative answer." (*Romanowski, supra,* 2 Cal.5th at 913–914.)

In *Page,* this Court declined to exclude vehicle theft from Proposition 47 because it is not specifically identified as a theft offense. "It does no violence to the initiative's text, and serves to accomplish its purpose, to read 'any other provision of law defining grand theft,' in section 490.2, subdivision (a) as encompassing the theft offense made punishable by Vehicle Code section in 10851." (*Page, supra,* 3 Cal.5th at 1177.)

The same policy considerations that the Court found in *Gonzales, Romanowski* and *Page* apply to the present case. On two occasions Mr. Jimenez cashed a stolen check for an amount less than $950. This is the type of theft – no matter how the prosecution tries to charge it – that, consistent with the stated purposes of the Act, requires misdemeanor treatment.

Conclusion

The trial court and Court of Appeal correctly reduced respondent's felony convictions to misdemeanors pursuant to Proposition 47. Respondent respectfully urges this Court to affirm.

Date: October 22, 2018

Respectfully Submitted,
Todd W. Howeth, Public Defender

By: _____
William Quest
Senior Deputy Public Defender
Attorneys for Miguel Angel Jimenez

Certificate of Word Count

I do hereby certify that by utilizing the Word Count feature of MSWord software, in Century Schoolbook size 13 font there are 7916 words in this document, excluding Declaration of Service.

Date: October 22, 2018

Jeane Renick
Legal Mgmt. Asst. III

DECLARATION OF SERVICE

Case Name: ***The People, Plaintiff/Respondent v. MIGUEL ANGEL JIMENEZ, Defendant/Appellant.***

Case No. **S249397 from B283858 [Ventura Superior Court No. 2016041618**

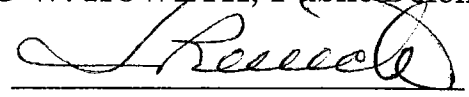
On October 22, 2018, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender at 800 South Victoria Avenue, Ventura, California 93009. I am familiar with the business practice of my office for collecting and processing electronic and physical correspondence. On this date I *electronically served, as indicated,* a true and correct copy of the attached Respondent's **Answer Brief on the Merits** upon:

1) Gregory Totten, District Attorney via *appellateDA@ventura.org*
2) Sr. Dep. District Attorney Lyytikainen at *lisa.lyytikainen@ventura.org*
3) Xavier Becerra, Attorney General, via *docketingLAAWT@doj.ca.gov.*
4) Hon. Manuel Covarrubias, Judge via *admin-vcs@ventura.courts.ca.gov*
5) Michael D. Planet, Exec. Officer via *admin-vcs@ventura.courts.ca.gov*

and via U. S. Mail:
6) Miguel Angel Jimenez, address of record.

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 the above date at San Buenaventura, California.

TODD W. HOWETH, Public Defender

By: 

Jeane Renick
Legal Mgmt. Asst. III