In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA ,

Plaintiff and Respondent,

v.

RAUL OSUNA GUERRERO,

Defendant and Appellant.

Case No. S253405

Sixth Appellate District, Case No. H041900
Santa Clara County Superior Court, Case No. C1476320
The Honorable Linda R. Clark, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE

Whether, under *People v. Gonzales* (2018) 6 Cal.5th 44, convictions for the concurrent possession of a fictitious bill and of another's personal identifying information with intent to defraud come within the identity theft exception of Penal Code section 473, subdivision (b).

INTRODUCTION

Forgery is a "wobbler" offense, alternatively punishable as a felony or a misdemeanor. (Pen. Code, § 473, subd. (a).) Proposition 47 added section 473, subdivision (b) (section 473(b)), which requires misdemeanor punishment for a "forgery relating to a check, bond, bank bill, note, cashier's check, traveler's check, or money order, where the value of the [instrument] does not exceed nine hundred fifty dollars ($950)." (See *People v. Romanowski* (2017) 2 Cal.5th 903, 913.) "But forgery remains a wobbler—and therefore an offense ineligible for reclassification as a misdemeanor under Proposition 47—for 'any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.'" (*People v. Gonzales*, *supra*, 6 Cal.5th at p. 46, quoting § 473(b).) That exception is the issue in this case.

In *People v. Gonzales*, *supra*, 6 Cal.5th 44, this Court considered the relationship that must exist between convictions for forgery and identity theft in order to exclude a forgery conviction from sentencing as a misdemeanor under section 473(b). (*Id.* at p. 49.) The Court determined that section 473(b) requires "that the offenses resulting in defendant's forgery and identity theft convictions must have been undertaken 'in connection with' each other to preclude him from resentencing eligibility." (*Id.* at p. 56.) Applying this standard, *Gonzales* held that, where the crimes of forgery and identity theft were "committed years apart and [bore] no relationship to each other" other than being tried together, the identity theft

exception did not apply and the forgery offense was properly subject to resentencing as a misdemeanor. (*Ibid.*)

This case also features convictions for forgery and identity theft. Here, however, there was no years-long separation or obvious disconnection between the two crimes. Instead, the crimes were committed simultaneously. Appellant possessed together in his wallet a fictitious $50 bill and personal identifying information of others. Appellant asserts that the evidence in his case nevertheless did not satisfy *Gonzales*'s "in connection with" test, because "some transactional connection" between the forgery and the identity theft is required "such that the latter crime facilitated the former crime." (OBM 12.) Appellant reads both section 473(b) and *Gonzales* too narrowly. The Court of Appeal properly applied the test set forth in *Gonzales* to the facts and circumstances of this case in finding that appellant's forgery and identity theft were undertaken "in connection with each other" and that appellant was therefore ineligible for sentencing under section 473(b).

STATEMENT

A. Proposition 47

On November 4, 2014, the voters passed Proposition 47, the Safe Neighborhood and Schools Act (the Act). (*People v. Morales* (2016) 63 Cal.4th 399, 404.) "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)." (*Ibid.*, internal quotation marks omitted.) Offenders who had served or are serving felony sentences for crimes reduced to misdemeanors can petition under the Act for designation of their offenses as misdemeanors or for resentencing. (*Ibid.*, citing § 1170.18; see also

Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 3, 14, pp. 70, 73-74 (hereafter Voter Guide).)

As relevant here, the Act amended the punishment for the crime of forgery set forth in section 473 by adding subdivision (b). (Voter Guide, *supra*, text of Prop. 47, § 6, p. 71.) Section 473 previously provided: "Forgery is punishable by imprisonment in a county jail for not more than one year, or by imprisonment pursuant to subdivision (h) of Section 1170." (Former § 473, now § 473, subd. (a); see also Voter Guide, *supra*, text of Prop. 47, § 6, p. 71.) That provision is now codified as section 473, subdivision (a). It is followed by Section 473(b), which states:

> Notwithstanding subdivision (a), 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. This subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.

(§ 473(b).) Thus, forgery remains a wobbler if the value of the instrument exceeds $950, or if the offender was previously convicted of a so-called "super strike" offense or a crime requiring sex offender registration, or if the offender "is convicted both of forgery and of identity theft, as defined in Section 530.5." (§ 473, subds. (a), (b).)

B. Trial Court Proceedings

In February 2014, police responded to a dispatch regarding a family disturbance. (6RT 231, 237, 239; 7RT 428.) When they arrived at the

apartment, appellant's daughter told the officers she had a no contact order against appellant, whom the officers found sitting on a couch inside. (6RT 232-233.) Once the officers confirmed the no contact order, the officers placed appellant under arrest and searched him. (6RT 233; 7RT 430.) During the search, one officer found a wallet inside appellant's jacket. (7RT 430.)

When appellant was booked into the county jail later that day, a correctional officer inventoried his property. (6RT 246-247.) The officer found five checks, a driver's license, a benefits identification card, and a counterfeit $50 bill in appellant's wallet. (6RT 247-250, 252-253.) None of these items were in appellant's name, although a check belonging to the St. Thomas More Society in the amount of $400, appeared to have been made out to appellant, and was signed by him. (6RT 247-250; 7RT 501, 503, 519; 8RT 550, 555.) The treasurer of the St. Thomas More Society (Society) testified that in early February 2014, he had brought the Society's financial records and checks home with him, leaving them overnight inside a canvas bag in his car parked in front of his home. (7RT 495, 498.) When he woke up the next morning, the bag was gone. (7RT 498.) No Society member was in possession of the checks after that time. (7RT 502-503.) Appellant was not authorized to have one of the Society's checks, the check found in his possession was not authorized to be written, and appellant is not one of the Society's payees. (7RT 501-502, 519.)

Appellant was charged in a second amended information with misdemeanor acquiring or retaining personal identifying information ("namely, name(s), addresses(s), driver license number(s), and bank account number(s), of another person") with the intent to defraud (§ 530.5, subd. (c)(1)), felony concealing or withholding stolen property (§ 496, subd. (a)), misdemeanor willful disobedience of a court order (§ 166, subd. (a)(4)), and felony possession of an altered and fictitious check, bill or note

("a fictitious bill, ie. a $50 bill, purporting to be real money") with the intent to pass or to defraud (§ 476). The information also alleged a prior strike for robbery (§§ 667, subds. (b)-(i), 1170.12). (1CT 154-157.) A jury convicted appellant on all counts, and the court found the strike allegation true. (1CT 201, 206-209; 8RT 730-731, 744.)

While appellant was awaiting sentencing, voters approved Proposition 47, which became effective immediately. At sentencing, appellant requested that his forgery conviction be reduced to a misdemeanor. (2CT 345-348.) The court denied the motion as to his forgery conviction. (8RT 760.) At both parties' request, however, the court reduced the conviction of possessing stolen property to a misdemeanor "by operation of law" under Proposition 47. (8RT 766-767.) The court sentenced appellant to a four-year prison term for the forgery (double the two-year midterm under the "Three Strikes" law), and imposed concurrent two-month terms on the misdemeanors. (8RT 767-769.)

C. The Court of Appeal's Original Decision (*Guerrero I*)

The Sixth District Court of Appeal affirmed. (*People v. Guerrero* (Oct. 11, 2016, H041900) [nonpub. opn.] (hereafter *Guerrero I*).) As relevant here, the court rejected appellant's contention, raised for the first time on appeal, that the forgery was punishable only as a misdemeanor under section 473(b) for lack of a transactional relationship to the identity theft conviction. (*Id.* at pp. 8-16.)

This Court granted appellant's petition for review. On October 10, 2018, it transferred the case to the Court of Appeal, directing that court to vacate its decision and reconsider the cause in light of this Court's intervening decision in *People v. Gonzales*, *supra*, 6 Cal.5th 44.

D. *People v. Gonzales*

In *Gonzales*, the defendant was charged with forgery based on conduct committed in 2003, and charged with identity theft based on conduct committed in 2006 and 2007. (*Gonzales*, *supra*, 6 Cal.5th at p. 47.) Although the crimes were "entirely unrelated" (*ibid.*), they were charged together in a single information, to which the defendant pleaded guilty (*id.* at p. 48). Years later, after the passage of Proposition 47, the defendant sought to have his forgery conviction reduced to a misdemeanor. This Court held that that the existence of his identity theft conviction did not preclude such resentencing, because the exception in section 473(b) for those "convicted *both* of forgery and of identity theft" applies only where there is a "relationship . . . between a forgery and identity theft conviction." (*Id.* at p. 51.) The Court reasoned that the present tense language in the exception ("*is convicted*," italics added by *Gonzales*) was most consistent with an understanding of Proposition 47 that would treat differently "someone whose convictions arose from at least somewhat related conduct encompassing both forgery and identity theft." (*Id.* at p. 54.) The Legislative Analyst's analysis had told voters that under Proposition 47 forging a check "would remain a wobbler crime if the offender commits identity theft *in connection with* forging a check." (*Id.* at pp. 52-53, quoting Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35, italics added by *Gonzales*). And the Court found further confirmation in "the nature" of forgery and identity theft: "offenses that tend to facilitate each other and, committed together, arguably trigger heightened law enforcement concerns." (*Id.* at p. 55.)

In a concurring opinion, Justices Corrigan and Chin would have more narrowly construed the identity theft exception in section 473(b) to apply only if the identity theft related to the same instrument as the forgery. (*People v. Gonzales*, *supra*, 6 Cal.5th at pp. 56-58 (conc. opn. of Corrigan,

J., joined by Chin, J.).) The Court did not endorse that view, however. (*Id.* at p. 53 & fn. 6 (maj. opn.).) Likewise, the Court "decline[d] to adopt a 'transactionally related' standard" (*id.* at p. 53), which the Court of Appeal had thought required by the "convicted both of" language in the statute (*id.* at pp. 46, 49). With respect to such nexus requirements, the Court observed that "[u]sing language [in section 473(b)] such as 'in commission' would not have been sufficient to convey the same meaning as 'any person who is convicted' of 'both' crimes." (*Id.* at p. 55.)

E. The Court of Appeal's Decision after Remand (*Guerrero II*)

On remand from this Court, the Court of Appeal applied *Gonzales* and again affirmed. (*People v. Guerrero* (Dec. 5, 2018, H041900) [nonpub. opn.] (hereafter *Guerrero II*).) The court held that "a meaningful connection or relationship existed between defendant's forgery offense and his identity theft offense, both crimes of possession. [Citation.] Here, defendant contemporaneously possessed another person's personal identifying information and a fictitious $50 bill." (*Id.* at p. 13.) Accordingly, the court concluded that appellant was not entitled to be sentenced under 473(b). (*Ibid.*)

ARGUMENT

I. APPELLANT'S FORGERY AND IDENTITY THEFT OFFENSES WERE UNDERTAKEN IN CONNECTION WITH EACH OTHER

Appellant's convictions of forgery and identity theft satisfy the test set forth in *Gonzales*.

A. Appellant's Forgery and Identity Theft Convictions Satisfy *Gonzales*

Under *Gonzales*, the identity theft exception of section 473(b) applies where "the offenses resulting in defendant's forgery and identity theft

convictions" were "undertaken 'in connection with' each other." (*People v. Gonzales*, *supra*, 6 Cal.5th at p. 56.)

As courts routinely do in applying a legal test to the facts of a specific case, a court should consider the totality of the circumstances of the identity theft and forgery convictions at issue in determining whether they were "undertaken 'in connection with' each other." (See, e.g., *People v. Farwell* (2018) 5 Cal.5th 295, 298 [a plea is valid "if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances"]; *People v. Clark* (2016) 63 Cal.4th 533, 556 [considering whether an unduly suggestive identification procedure was nevertheless reliable "under the totality of the circumstances"]; *People v. Williams* (2010) 49 Cal.4th 405, 425 [determining whether waiver of right to remain silent was voluntary, knowing, and intelligent "under the totality of the circumstances"].)

For applications of the *Gonzales* test, such circumstances might include, among other factors, whether the convictions are linked in time or place, whether the crimes required an identical or similar intent, whether the same course of conduct played a significant part in both convictions, and whether the crimes facilitated one another or shared some other transactional relationship. Applying the *Gonzales* test to the facts of this case, the Sixth District correctly found that appellant's forgery and identity theft convictions were "undertaken 'in connection with' each other."

Appellant was convicted of forgery based on his possession of a counterfeit bank bill with the intent to defraud, and with identity theft based on his possession of other people's personal identifying information with the intent to defraud. (1CT 154-157; 8RT 730-731; §§ 476, 530.5, subd. (c)(1).) Unlike the defendant in *Gonzales*, appellant perpetrated the forgery and the identity theft at the same time and in the same location: He possessed the counterfeit bill and personal identifying information together in his wallet. (6RT 232-233, 247-251, 261; 7RT 430, 437.) Moreover,

both the forgery and identity theft convictions were possessory offenses committed with the same requisite intent to defraud. (Compare § 476 [proscribing the "possession" of any fictitious bill with "intent to defraud any other person"] with § 530.5, subd. (c)(1) [proscribing the "possession" of personal identifying information "with the intent to defraud"].)

The connection between the two offenses is further demonstrated by the overlap in the evidence required to prove each crime. The counterfeit bill and the personal identifying information (on which appellant's forgery and identity theft convictions were respectively based) were found in appellant's wallet during the same search of his belongings. Thus, the evidence used to establish possession (i.e., that it was appellant's wallet and that he was in possession of it) was the same as to both offenses. (See 6RT 231-274; 7RT 427-445, 459-474). There was also considerable overlap in the evidence used to establish the requisite proof of intent to defraud for each offense. The prosecution called three witnesses pursuant to Evidence Code section 1101, subdivision (b). (6RT 150-151, 285-308; 7RT 475-483.) The jury learned that, in June 2013, police had found two social security cards of third persons in appellant's wallet. (6 RT 285-286, 289.) One of those people told police that he had lost his card and that appellant did not have permission to possess it. (7 RT 453, 457-458.) And, the social security number on the other card had been used by 40 to 42 other people. (7 RT 448-449.) The jury also learned about a search in November 2013, in which police found seven counterfeit bills in appellant's wallet. (6 RT 292-293.)

Considering the totality of these facts and circumstances, the Sixth District on remand properly concluded that the *Gonzales* test was met as "a meaningful connection or relationship existed" between appellant's forgery offense and his identity theft offense, "both crimes of possession" wherein appellant "contemporaneously possessed another person's personal

identifying information and a fictitious $50 bill." (*Guerrero II*, *supra*, at p. 13.)

B. Section 473(b) Does Not Require That the Identity Theft Facilitated the Forgery

Appellant contends that section 473(b)'s exception applies only where the identity theft "facilitated" the forgery. (OBM 12.) But section 473(b) does not contain any such language, and *Gonzales* did not include such a requirement in its "in connection with" test. Nor is such a requirement necessary in order to fulfill the statutory purpose of section 473(b) that *Gonzales* identified.

1. Nothing in section 473(b) suggests a facilitating relationship requirement

Reading a facilitating relationship requirement into section 473(b) is not reasonable given the statutory language.

The interpretation of a ballot initiative is governed by the same principles that apply in construing a statute enacted by the Legislature. (*Gonzales*, *supra*, 6 Cal.5th at p. 49.) "We first look to 'the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context.' [Citation.] The words of a statute must be construed in context, keeping in mind the statutory purpose. [Citation.] Our principal objective is giving effect to the intended purpose of the initiative's provisions. [Citation.] If the provisions remain ambiguous after we consider its text and the statute's overall structure, we may consider extrinsic sources, such as an initiative's election materials, to glean the electorate's intended purpose. [Citation.] Finally, we presume that the 'adopting body' is aware of existing laws when enacting a ballot initiative. [Citation.]" (*Id.* at pp. 49-50.)

Here, nothing from the statutory language or context of section 473(b) suggests that a defendant's forgery and identity theft convictions in addition

to occurring "in connection with" each other, must also have a facilitating relationship with one another such that the forgery is facilitated by the identity theft. If the statute's language is "clear and unambiguous there is no need for construction, and courts should not indulge in it." (*People v. Belleci* (1979) 24 Cal.3d 879, 884, internal quotation marks omitted.) This Court has "declined to follow the plain meaning of a statute only when it would inevitably have frustrated the manifest purposes of the legislation as a whole or led to absurd results." (*Ibid.*)

A statutory provision is only ambiguous when susceptible to more than one *reasonable* interpretation. (*People v. Dieck* (2009) 46 Cal.4th 934, 940.) "Absent ambiguity, [it is] presume[d] that the voters intend the meaning apparent on the face of an initiative measure and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language." (*Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037, internal quotation marks omitted.) Moreover, courts "may not, under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.)

Here, the statutory language of section 473(b) contains no ambiguity regarding whether a facilitative relationship is required. Indeed, nothing in section 473(b)'s phrase "is convicted both of" even remotely speaks to such a demand. Hence, requiring such a relationship would necessitate adding language to the statute. But "the cardinal rule of statutory construction" is "that courts must not add provisions to statutes." (*People v. Guzman* (2005) 35 Cal.4th 577, 587, internal quotation marks omitted.)

2. *Gonzales* did not suggest a "facilitation" requirement

In *Gonzales*, this Court looked to the use of the word "both" in section 473(b) to conclude that some connection between the forgery and identity theft convictions is required. (*Gonzales*, 6 Cal.5th at p. 51 ["As used in this provision, the term 'both' establishes that a relationship is necessary between a forgery and identity theft conviction to disqualify an offender from the benefit of having his or her sentence recalled"].) Nothing about the term "both," however, implies that a facilitative relationship must exist between the convictions.

Gonzales noted that unlike "two entirely unrelated offenses—such as criminal violation of an environmental law and felony assault, for example,"—identity theft and forgery "tend to facilitate each other and, committed together, arguably trigger heightened law enforcement concerns." (*Gonzales*, *supra*, 6 Cal.5th at p. 54.) "A person who commits forgery by imitating the victim's signature on a check, for example, will often present identification to falsely represent his or her identity." (*Ibid.*) The Court further explained: "The nature of these two offense categories helps explain why it makes sense for these to be included together in section 473(b), and for this provision to be read as relevant to situations where the offenses bear some relationship to each other. We can reasonably distinguish—and infer a distinction in a statute mentioning related offenses in present tense—between foreclosing relief to those convicted of felony forgery that was also facilitated by the felony offense of identity theft, and barring relief for anyone who happens to have been convicted, at some point in his or her life, of unrelated forgery and identity theft offenses." (*Id.* at pp. 54-55.)

Based, in part, on its illustrative analysis of the joint occurrence of identity theft with forgery, the Court concluded that the convictions must

occur "in connection with" each other for the defendant to be ineligible for resentencing under Proposition 47 and that the connection is lacking where convictions involve unrelated conduct that was years apart. (*Gonzales*, *supra*, 6 Cal.5th at pp. 55-56.) The Court nowhere suggested that joint occurrences of these crimes is likewise insufficient absent facilitation of the forgery by the identity theft. That cannot be squared with the Court's considered rejection in *Gonzales* of both the transactionally related standard that the Court of Appeal had adopted, as well as the same-forged-instrument test that was suggested by the concurrence. (*Id.* at pp. 46, 49, 53 & fn. 6.)

3. No facilitative relationship is necessary to fulfill the statutory purpose of section 473(b)

Proposition 47's overarching purpose included "'ensur[ing] that prison spending is focused on violent and serious offenses' and 'maximizing alternatives for nonserious, nonviolent crime[s].'" (*Gonzales*, *supra*, 6 Cal.5th. at p. 56.) *Gonzales* did not find that this overarching purpose required a transactional relationship between the forgery and identity theft convictions for the identity theft exception to apply. (*Id.* at p. 53 & fn. 6.) Under this same reasoning, a facilitative relationship requirement is not necessary to prevent the frustration of the statute's purpose. Significantly, while the Act seeks to focus prison spending on violent and serious offenses, those goals did not induce the voters to reduce all nonserious, nonviolent felonies to misdemeanors. Rather, voters limited the Act's reach to *certain* felony offenses. (Voter Guide, *supra*, text of Prop. 47, §§ 5-13, pp. 71-73 [amending eight offenses and adding the crime of shoplifting]; see also *id.*, § 17, subd. (a), p. 74 [stating that "[t]his act changes the penalties associated with certain nonserious, nonviolent crimes"]; *id.*, analysis of Prop. 47 by the Legislative Analyst, p. 35 ["This

measure reduces certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors].)

For example, automobile burglary, identity theft, and firearm possession offenses were unaffected by the Act, as were felonies in codes other than the Penal Code and the Heath and Safety Code. (Voter Guide, *supra*, text of Prop. 47, §§ 4-14, pp. 70-74.) Section 473(b) demonstrates that as with those other unamended, nonserious, nonviolent offenses, voters chose not to reduce the crime of forgery to a misdemeanor under all circumstances. Specifically, forgery remains punishable as a felony when the value of the instrument exceeds $950, when the offender has been convicted of a so-called "super strike" offense or a crime requiring sex offender registration, or when the offender "is convicted both of forgery and of identity theft, as defined in Section 530.5." (§ 473, subds. (a), (b).)

The identity theft exception reflects the voters' intent to maintain forgery as a wobbler for individuals who, by also committing identity theft, demonstrate a greater commitment to their criminal enterprise than those who commit only a forgery offense. *Gonzales*'s recognition that forgery and identity theft "tend to facilitate each other and, committed together, arguably trigger heightened law enforcement concerns" (*Gonzales*, *supra*, 6 Cal.5th at p. 55) illustrated this principle. This illustration, however, cannot be viewed as a comprehensive statement of the conditions in which the exception applies given that law enforcement concerns will also be triggered in circumstances in which no facilitative relationship exists. For example, a defendant may be found in possession of the personal identifying information of one person and an altered check of another person. The particular personal identifying information would not facilitate fraud as to the particular altered check—but the combination of offenses undoubtedly should "trigger heightened law enforcement concerns." Indeed, it is hard to imagine why voters would have wanted to treat such a

defendant—who is evidently engaged in broad and wide-ranging efforts to defraud multiple victims—more leniently than someone who possessed identifying information and a forged instrument relating to a single person.

Moreover, appellant's narrow construction of the identity theft exception would render the exception effectively meaningless in some cases. For example, the identity theft exception could not apply to a "forgery relating to a . . . bank bill" unless the defendant were additionally convicted of stealing the identity of the United States Treasurer or the Secretary of the Treasury. (§ 473(b); see *People v. Maynarich* (2016) 248 Cal.App.4th 77, 80 ["counterfeit United States Federal Reserve notes are 'bank bills' or 'notes'"].) Similarly, while the identity theft exception applies to bonds, a forged bearer bond is not issued in an owner's name and would not be covered under appellant's construction of the exception unless the offender was also convicted of stealing the issuer's identity. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 ["the rule of statutory interpretation that requires [courts], if possible, to give effect and significance to every word and phrase of a statute" and to "presume that the [drafters] intended every word, phrase and provision . . . in a statute . . . to have meaning and to perform a useful function" (internal quotation marks omitted)].)

Appellant's narrow construction of the identity theft exception is even more problematic when the identity theft statute is examined. Only one type of identity theft defined in section 530.5 involves an offender's obtaining *and using* someone else's personal identifying information (§ 530.5, subd. (a)); the remaining provisions criminalize the acquisition, retention, or sale of personal identifying information with the intent to defraud and mail theft (§ 530.5, subds. (c)-(e)). This too points against appellant's construction of the identity theft exception as requiring a facilitative relationship. If voters intended to limit the exception to forgeries that were facilitated by identity thefts, they would have restricted

the exception to persons convicted of identity theft as defined in Penal Code section 530.5, *subdivision (a)*.

C. Appellant's Analogies to *People v. Harvey's* Rule on Plea-Bargain Sentencing and Rules on Joinder Are Misplaced

Appellant argues for a facilitative or transactional relationship by analogy to the tests applied in two very different circumstances.

First, appellant cites cases applying *People v. Harvey* (1979) 25 Cal.3d 754, which allows a sentencing court, following a plea bargain, to consider conduct underlying a dismissed count only if that conduct was "*transactionally related* to the offense to which the defendant" entered a plea. (Id. at p. 758; see OBM 25-27.) Dismissed counts are "transactionally related" when the conduct facilitated the crime to which the defendant pleaded. (See, e.g., *People v. Gaskill* (1980) 110 Cal.App.3d 1, 3-4 [weapons transactionally related to kidnapping, when brandished to facilitate kidnapping].) On the other hand, a defendant's simultaneous possession of multiple items by itself does not make them transactionally related. (See, e.g., *People v. Berry* (2015) 235 Cal.App.4th 1417, 1421-1422, 1426 [possession of firearm not transactionally related to simultaneous possession of fraudulent check and forged driver's license].)

But *Harvey*'s rule rests on the understanding implicit in a plea bargain (in the absence of any contrary agreement) "that [the] defendant will suffer no adverse sentencing consequences by reason of the facts underlying, and solely pertaining to, [any] dismissed count." (*People v. Harvey*, *supra*, 25 Cal.3d at p. 758.) It has no application to section 473(b).

Appellant also cites cases discussing the permissible joinder of charges under section 954. (OBM 26-27.) The statute provides that "[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or

two or more different offenses of the same class of crimes or offenses, under separate counts . . . ." (§ 954.) The test for determining if the offenses are connected together is whether they share a "common element of substantial importance." (*People v. Lucky* (1988) 45 Cal.3d 259, 276.) Thus, *People v. Saldana* (1965) 233 Cal.App.2d 24 found the possession of marijuana unrelated to rape of a victim outside her home because even if the defendant possessed the marijuana at the time of the rape, this fell "far short of establishing any causal connection or 'transactional' relationship between the two crimes." (*Id.* at p. 29.)

The test for when charges may be joined rests on the principle that "an information would be contrary to [section 8, article I, of the California] Constitution if it designated a crime or crimes unrelated to or unconnected with the transaction which was the basis for the commitment order." (*People v. Saldana*, *supra*, 233 Cal.App.2d at p. 29; *Mulkey v. Superior Court* (1963) 220 Cal.App.2d 817, 819-820.) Section 473(b), by contrast, raises no such constitutional concerns.

For all these reasons, appellant's argument that the "in connection with" test of *Gonzales* should be modified to include a facilitative relationship requirement should be rejected. *Gonzales* set for the requisite test in holding that section 473(b) requires "that the offenses resulting in defendant's forgery and identity theft convictions must have been undertaken 'in connection with' each other." (*Gonzales*, *supra*, 6 Cal.4th at p. 56.) The Court of Appeal properly applied the *Gonzales* test to the totality of circumstances and determined "a meaningful connection or relationship existed" between appellant's forgery offense and his identity theft offense and that he was not entitled to be sentenced under section 473(b).

CONCLUSION

Accordingly, the judgment of the Court of Appeal should be affirmed.

Dated: July 24, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 5,103 words.

Dated: July 24, 2019

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DECLARATION OF SERVICE BY U.S. MAIL

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No.: **S253405**

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 July 24, 2019, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Randall H. Conner
Attorney at Law
Law Office of Randall Conner
via TrueFiling: Conner_law@msn.com

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113 (by messenger)

Sixth District Appellate Program
via TrueFiling: servesdap@sdap.org

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 July 24, 2019, at San Francisco, California.

B. Wong
Declarant

B. W
Signature

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