In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. DANIEL LEE ROMANOWSKI, Defendant and Appellant.	Case No. S231405

Second Appellate District, Division Eight, Case No. B263164
Los Angeles County Superior Court, Case No. MA064403
The Honorable Christopher G. Estes, Judge

SUPREME COURT
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REPLY BRIEF ON THE MERITS

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ARGUMENT

Proposition 47 reduces to a misdemeanor any crime otherwise defined as grand theft if the crime involves "obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars." (Pen. Code, § 490.2, subd. (a).) The question in this case is whether Penal Code section 484e, subdivision (d) (hereafter "section 484e(d)," etc.)—proscribing the acquisition or possession of access card account information—is such a crime. It is not. As the People have explained, section 484e(d) does not focus on or require "theft" of account information, but is best characterized as a proscription against simple acquisition or retention of such information with fraudulent intent. Moreover, valuation of access card account information poses problems that make it an exceedingly poor candidate for the value-based division that section 490.2(a) contemplates. For both of those reasons, section 484e(d) is not reducible under the plain language of Proposition 47, nor could the electorate have intended to make the crime reducible absent some clear statement in the ballot materials which does not exist.

Romanowski's arguments to the contrary are unpersuasive.

I. It Is the Substance of the Offense, and Not Its Label, That Determines Whether It Is Reducible under Section 490.2(a)

Arguing that acquisition or retention of access card account information is a theft crime and therefore reducible under Proposition 47, Romanowski places great weight on the "unequivocal" categorization of section 484e(d) as grand theft and its placement among the theft statutes generally, and he accuses the People of attempting to "read Penal Code section 484e, subdivision (d), out of the theft statutes." (RB at 8-11, 13.) Proposition 47, however, does not simply make all crimes designated as

"grand theft" reducible. To the contrary, section 490.2(a) says that "notwithstanding Section 487 or any other provision of law defining grand theft" such a crime is reducible *if* it entails "obtaining any property by theft." Thus, despite a crime's categorization as grand theft, it is reducible only if the substance of the crime actually involves theft. Section 484e(d) is not such a crime.

While section 490.2 "indisputably applies only to theft offenses" (*People v. Solis* (2016) 245 Cal.App.4th 1099, 1109), section 484e(d) does not primarily define a "theft" offense. "Section 490.2 neither redefines nor establishes a substantive theft offense. Instead, 'theft' is defined in Penal Code section 484, subdivision (a)." (*Id.* at p. 1106.) Section 484's "reference to various 'felonious[]' takings imports the common law's specific intent [to steal] requirement" into that section's designations of these takings as thefts. (*Id.* at pp. 1106-1107, citing *People v. Avery* (2002) 27 Cal.4th 49, 55, 58.) But a violation of section 484e(d) does not require either a specific intent to steal or that any property be "obtained." It requires only (1) the acquisition or retention of the account information of an access card issued to someone else, (2) without the consent of the cardholder or issuer of the card, and (3) with the intent to use that information fraudulently. (See CALCRIM No. 1952; *People v. Molina* (2004) 120 Cal.App.4th 507, 512.)

The essence of a section 484e(d) violation is the acquisition or retention of access card information with the intent to use it fraudulently. (See *People v. Molina, supra*, 120 Cal.App.4th at p. 516 [section 484e(d) "was intended to protect innocent consumers from the injury, expense and inconvenience arising from the fraudulent use of their access card account information"].) As explained in the opening brief, while it is possible in some instances for a violation of section 484e(d) to rest solely on a theft of access card account information, to deem that small subset of cases

reducible under Proposition 47 would lead to an absurd result. (AOB 9.) Under such a construction, a person who acquired access card account information by theft would be guilty of a misdemeanor, whereas a person who merely "retained possession" of access card account information—even if the value of the information did not exceed $950—would be guilty of a felony. That is a result the electorate could not have intended. Like all statutes, initiative measures are interpreted to avoid absurd results. (*City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 52.)

That the Legislature placed section 484e within Chapter 5 of the Penal Code, which is entitled "LARCENY [THEFT]," is not determinative for purposes of applying Proposition 47 (see RB 9-10), since section 490.2(a) requires the crime itself to involve theft. Nor is it a dispositive indication of the Legislature's intent with respect to the substance of section 484e(d). The language of a statute is the most reliable indicator of intent. (*People v. Watson* (2007) 42 Cal.4th 822, 828.) And in this particular instance, the Legislature chose to prohibit the "acquisition" or "retention" of access card account information, without requiring its theft. Even if the Legislature also chose to punish the crime as "grand theft," the offense nonetheless does not actually require theft and therefore does not meet section 490.2(a)'s definition of a reducible offense.

Romanowski argues that "[t]he Legislature has expressed both a clear intent that the term 'theft' is to be broadly defined and that when it uses the word 'theft' it means for it to have the common meaning expressed in Penal Code section 490a." (RB 10.) Section 490a states, "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefore." Notably, section 490a does not say that the words "acquire" or "retain" are to be interpreted as if they meant

"theft." If that were the case, then both "acquire" and "retain" would have the same meaning in section 484e(d).

But the common meaning of "acquire" is "to get as one's own," or "to come into possession or control of often by unspecified means." (Merriam-Webster Dict. Online (2015) <http://www.merriam-webster.com/dictionary/acquire> [as of April 22, 2016]), while the common meaning of "retain" is "to keep in possession or use." (Merriam-Webster Dict. Online (2015) <http://www.merriam-webster.com/dictionary/retain> [as of April 22, 2016].) In other words, accepting Romanowski's interpretation of section 484e(d) would render either the term "acquires" or the term "retains" surplusage, a result to be avoided. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1010 ["As we have stressed in the past, interpretations that render statutory terms meaningless as surplusage are to be avoided"].)

Because section 484e(d) proscribes the acquisition or retention of access card account information with the intent to use it fraudulently, which is different from a proscription against "obtaining any property by theft," section 484e(d), by its plain terms, does not fall within Proposition 47's definition of a reducible offense.

II. THE "VALUATION PROBLEM" INHERENT IN TRYING TO SUBJECT SECTION 484E(D) TO PROPOSITION 47 ALSO SHOWS THAT IT IS NOT, AND WAS NOT INTENDED TO BE, A REDUCIBLE OFFENSE

Romanowski makes two inconsistent arguments which, taken together, belie his position that section 484e(d) is a reducible offense under Proposition 47. On the one hand, he argues that "the fact that it is difficult to quantify the value of a stolen access card" does not mean it is not subject to section 490.2(a) because if that section applied only to easily quantified property it would simply duplicate the many statutes already drawing a line

between grand and petty theft based on value. (RB 13-14.) But on the other hand, he argues that the "valuation problem" may be resolved by simply holding that the value of access card information is, as a matter of law, de minimis. (RB 15-16.) The latter proposition, however, would mean that section 490.2(a) simply duplicates statutes that designate certain crimes as petty theft as a matter of law. That cannot be what was intended by Proposition 47. Had the electorate meant for *all* violations of section 484e(d) to be considered petty theft, the law could easily have been written that way. Instead, as the People have explained in the opening brief on the merits, section 490.2(a) presupposes that an offense to which it applies will be reasonably capable of falling above or below the $950 threshold. (AOB 10-12.) That such a determination as to section 484e(d) would likely often prove exceedingly difficult is strong evidence that the offense is not, and was not intended to be, reducible through the mechanism of section 490.2(a).[1]

III. LEGISLATIVE AND ELECTORAL INTENT SUPPORT TREATING SECTION 484E(D) AS A NON-REDUCIBLE OFFENSE

Romanowski also argues that if the intent of Proposition 47 had been that section 484e(d) remain a felony, the law could have been written to make that clear. (RB 13.) But that turns the analysis on its head. Section 490.2(a) defines which offenses may be reduced, not which offenses are *not* subject to reduction. In the context of Proposition 47, it would have been

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[1] Romanowski apparently misunderstands the opening brief as having argued that access card account information cannot be considered personal property. (RB 11.) Rather, the People have argued that "such information may be considered 'property' under a broad definition of that term." But it nonetheless "does not fit neatly into the category of 'personal property' as that term is used in the theft statutes" and for the same reason is not amenable to valuation in the way that section 490.2(a) contemplates, unlike most of the traditional objects of theft. (AOB 9-10.)

far more natural for the law to specifically deem section 484e(d) a misdemeanor if that had been the intent. It did not; and instead Romanowski argues that the offense is reducible under Proposition 47's general theft reduction statute. But as explained, section 490.2(a)'s definition of a reducible theft offense does not comfortably encompass the substance of section 484e(d).

Even if there were some ambiguity about whether section 484e(d) fit the plain definition of a reducible offense under Proposition 47, legislative and electoral intent require treating the offense as non-reducible. As Romanowski acknowledges, section 484e had been "on the books" for many years at the time Proposition 47 was enacted. (RB 12.) The statute was intended to provide "broad protection to innocent consumers" (*People v. Molina*, *supra*, 120 Cal.App.4th at p. 519), and the provisions of section 484e are broadly worded in order to effectuate that goal (*People v. Butler* (1996) 43 Cal.App.4th 1224, 1245 [by "expressly authorizing prosecutions under section 484d et seq. even where conduct could also be charged under other penal statutes, the Legislature revealed a manifest purpose that because the access card statutes are broadly worded, they are to be important weapons against fraudulent consumer and business practices"]). Especially given that section 484e(d) defines an offense that is qualitatively different from most other theft crimes—an offense targeted at the acquisition or retention of *information* with fraudulent intent—there is no reason to think that the voters who enacted Proposition 47 intended to undercut the statute's broad consumer protection. Instead, the ballot materials told voters that "low-level nonviolent crimes such as simple drug possession and petty theft" would be reduced to misdemeanors. Absent some clear indication to the contrary, voters would not naturally have understood section 484e(d) to fall into that category.

Subjecting section 484e(d) to reduction under Proposition 47, as Romanowski urges, would equate that financial crime with dissimilar "low-level" offenses and undermine the broad consumer protection it was designed to advance. This would be contrary to Legislative and electoral intent.

CONCLUSION

The Court of Appeal's judgment should be reversed.

Dated: May 13, 2016

Respectfully submitted,

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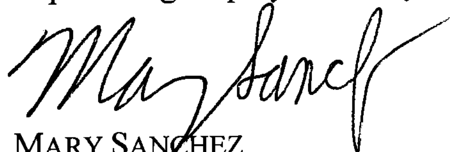

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 1,903 words.

Dated: May 13, 2016

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DECLARATION OF SERVICE

Case Name: ***People v. Daniel Lee Romanowski*** No.: **S231405**

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 May 13, 2016, I served the attached **REPLY 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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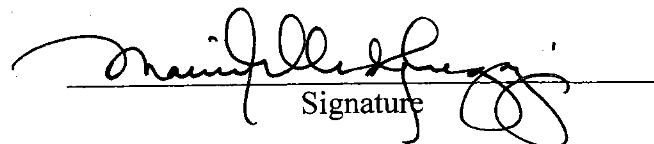
On May 13, 2016, I caused eight (8) copies of the **REPLY BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by FedEx Priority Overnight, Tracking # 8094 5192 2490.

On May 13, 2016, I caused one electronic copy of the **REPLY BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

The two copies for the California Appellate Project were placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 May 13, 2016, at Los Angeles, California.

M. O. Legaspi
Declarant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