IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **RAUL O. GUERRERO,** Defendant and Appellant.	No. S253405

APPELLANT'S REPLY BRIEF ON THE MERITS

After the Unpublished Decision of the Court of Appeal,
Sixth Appellate District, Case No. H041900
Affirming the Judgment of Conviction
Filed December 5, 2018

Santa Clara County Superior Court
Case No. C1476320
The Hon. Linda R. Clark, Judge

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PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **RAUL O. GUERRERO,** Defendant and Appellant.	No. S253405

APPELLANT'S REPLY BRIEF ON THE MERITS

INTRODUCTION

Following a jury trial in September 2014, appellant suffered felony convictions for possession of stolen property (count 2) and forgery (count 4) and misdemeanor convictions for identity theft (count 1) and contempt of court (count 3.) As relevant here, the conviction on count 4 arose from appellant's possession of a counterfeit $50 bill, and the conviction on count 1 arose from appellant's concurrent possession of a driver's license, a benefits card, and five checks.

After the voters approved Proposition 47 on November 4, 2014, the trial court sentenced appellant on January 5, 2015. The trial court found that Proposition 47 had reduced count 2 to a misdemeanor by operation of law, but did not make the same

finding with respect to count 4 pursuant to Penal Code[1] section 473, subdivision (b) (hereafter section 473(b).) The court sentenced appellant to serve a four-year term (double the two-year midterm under the Three Strikes law) on count 4 and to concurrent two-month terms on counts 1, 2 and 3.

The Court of Appeal for the Sixth Appellate District ("Sixth District") denied appellant's claim for relief in *People v. Guerrero* (Oct. 11, 2016, H041900) [nonpub. opn.]. On February 15, 2017, in Case No. S238401, this Court granted review of appellant's case, and briefing concluded June 2, 2017.

However, on August 27, 2018, this Court decided a case presenting a similar issue, *People v. Gonzales* (2018) 6 Cal.5th 44 (*Gonzales*), where this Court found that "[s]ection 473(b) is best read to require 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.) Thereafter, on October 16, 2018, this Court ordered the instant matter transferred to the Sixth District "with directions to vacate its decision and to reconsider the cause in light of the decision in [*Gonzales*]. [Citation.]"

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[1] All subsequent statutory citations are to the Penal Code, unless otherwise noted.

On December 5, 2018, the Sixth District again denied relief, finding that "defendant contemporaneously possessed another person's personal identifying information and a fictitious $50 bill. He was not entitled to be sentenced under 473(b) even though the *Estrada* rule applied to his forgery conviction." (*People v. Guerrero* (Dec. 5, 2018, H041900) [nonpub. opn.] (*Guerrero II*) p. 13.) Appellant petitioned this Court for relief a second time, and in Case No. S253405, this Court accepted appellant's petition for review and ordered appellant to file an opening brief on the merits (OBM) no later than May 30, 2019.

Appellant filed his OBM on May 28, 2019, and respondent filed an answer brief on the merits (ABM) on July 24, 2019, to which appellant now replies. In summary, respondent distinguishes *Gonzales* and defends *Guerrero II* on the grounds that in appellant's case, unlike in *Gonzales*, "both the forgery and identity theft convictions were possessory offenses committed [concurrently] with the same requisite intent to defraud." (ABM 12.)

As appellant will argue herein, this Court found in *Gonzales* that the voters who passed Proposition 47 determined that heightened law enforcement concerns could arise if a defendant undertook an identity theft and a forgery offense in connection with each other, thereby justifying greater punishment for the forgery offense. But concurrent possession of personal identifying information and of a forged financial instrument, without more,

does not establish that an identity theft offense and a forgery offense were undertaken together. In the absence of facts to the contrary, the defendant could have acquired the contraband items by unrelated means, at different times, and in different places, as in *Gonzales*.

Respondent does not contend that any facts in this record established when, where, how, or from whom appellant acquired the contraband items at issue. Hence, briefing on the merits now completed, this Court should decide the arguments presented in favor of appellant, reverse the Sixth District's judgment in *Guerrero II*, and remand the matter to that court with directions that it be returned to the trial court with directions to impose a misdemeanor sentence on the forgery charge in count 4.

ARGUMENT

I. THE SIXTH DISTRICT DID NOT PROPERLY APPLY THE "SOME CONNECTION OR RELATIONSHIP" TEST THIS COURT DEFINED IN *PEOPLE v. GONZALES* FOR WHEN AN IDENTITY THEFT CONVICTION PERMITS FELONY SENTENCING FOR CERTAIN FORGERY OFFENSES

A. No Evidence Established that Appellant Undertook His Forgery and Identity Theft Offenses in Connection with Each Other

As respondent notes, the Sixth District reasoned that forgery and identity theft are each "crimes of possession." (ABM 12, quoting *Guerrero II* p. 13.) Respondent explains that "both the forgery and identity theft convictions were possessory offenses

committed with the same requisite intent to defraud." (ABM 12.) Thus, argues respondent, "[u]nlike 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." (ABM 13.) Similarly, respondent insists that this Court "nowhere suggested that joint occurrences of these crimes is [...] insufficient absent facilitation of the forgery by the identity theft." (ABM 17-18.)

But while appellant's concurrent possession of contraband items (on October 12, 2014) satisfied the elements of forgery (§ 473(b); count 4) and identity theft (§ 530.5, subd. (c)(1); count 1), in *Gonzales*, this Court focused on when the defendant *undertakes* a forgery offense and an identity theft offense. This Court wrote:

> [s]ection 473(b) is best read to require 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.

(*Gonzales, supra,* 6 Cal.5th at p. 56.) This Court focused on the *undertaking* of the offenses at issue because it found that "heightened law enforcement concerns" could arise if a perpetrator used personal identifying information in a manner that facilitated a forgery offense, or vice-versa. (*Id.* at p. 54.) This Court wrote:

> Instead of including two entirely unrelated offenses — such as criminal violation of an environmental law and

> felony assault, for example – the provision at issue [section 473(b)] lists two offenses that tend to *facilitate* each other and, committed together, arguably trigger heightened law enforcement concerns.

(*Id.* at p. 54, emphasis added.) This Court also wrote:

> 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.*) And, this Court wrote:

> 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 p. 55, emphasis added.)

Here, no evidence at trial established when, where, how, or from whom appellant acquired the personal identifying information or the counterfeit bill at issue. Hence, the Sixth District had no basis to find that that appellant had *undertaken* his identity theft offense and his forgery offense "in connection with" each other.[2]

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[2] Respondent also concedes that appellant's identity theft offense did not facilitate his forgery offense when he possessed the contraband items in his wallet. (ABM 19.) Nor did appellant's forgery offense facilitate his identity theft offense at that point in time.

B. The Voters Did Not Find that a Defendant's Concurrent Possession of a Forged Financial Instrument and Personal Identifying Information Permits Felony Sentencing for Section 473(b) Forgery Offenses

Respondent argues that heightened law enforcement concerns occur when "[f]or example, a defendant [is] 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." (ABM 19, emphasis added.)

Respondent's premise appears sound, but this Court presumes that the voters who passed Proposition 47 understood that section 654's prohibition on multiple punishments does not apply to counts involving separate victims. (§ 654; *People v. Latimer* (1993) 5 Cal.4th 1203, 1212 (*Latimer*); *Neal v. State of California* (1960) 55 Cal.2d 11, 20-21 (*Neal*); *People v. Gonzales* (2017) 2 Cal.5th 858, 869 [voters deemed aware of existing case law].) The voters, therefore, deemed punishment for identity theft (§ 530.5, subd. (c)(1)) *and* for forgery (§ 473(b)) sufficient to address the concerns arising from the multiple-victim scenario that respondent describes.[3]

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[3] Similarly, respondent argues that "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

Respondent also argues that "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. [Citations.]" (ABM 20.) And, argues respondent, "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. [Citation.]" (ABM 20.)

But exceptions to a general rule cannot (by definition) apply in all cases. Here, this Court did not deem it significant that the subset of section 473(b) forgery offenses eligible for felony punishment may not include forgery of some financial instruments. (*Gonzales, supra,* 6 Cal.5th at pp. 54-56.) This distinction between financial instruments subject to the identity-theft exception accords with section 473(b),

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information and a forged instrument relating to a single person." (ABM 19-20.) But a defendant who "possessed identifying information and a forged instrument relating to a single person" will suffer punishment for one misdemeanor offense (§ 654), whereas, the multiple-victim defendant that respondent describes will suffer punishment for *two* misdemeanor offenses. (§ 654; *Latimer, supra,* 5 Cal.4th at p. 1212; *Neal, supra,* 55 Cal.2d at pp. 20-21.) Hence, the multiple-victim defendant will not receive more lenient treatment.

which exempts from felony sentencing forgery of some, but not all, financial instruments with a value not exceeding $950. (§ 473(b).) And this distinction accords with Proposition 47 generally, which distinguishes certain theft crimes not exceeding $950 (§§ 473(b), 490.2, 476a, subd. (b), 496, subd. (a)) from other theft crimes.

Finally, respondent argues that "[o]nly 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))." (ABM 20.) According to respondent, "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)." (ABM 20-21.)

But here, respondent overlooks that a forgery offense and an identity theft offense may be undertaken in connection with each other in multiple ways. For example, if a defendant exchanges a forged $500 check for stolen personal identifying information, the defendant has undertaken a section 473(b) forgery offense and a section 530.5, subdivision (c)(1) identity theft offense "in connection with" with each other. But conversely, that same defendant has not

committed a section 530.5, subdivision (a) identity theft offense, because the defendant has not used the personal identifying information that he acquired to facilitate forgery of the check.

C. Under *People v. Gonzales*, Contemporaneous Possession of Unrelated Contraband Items Underlying Forgery and Identity Theft Convictions Does Not Satisfy the "Some Connection or Relationship" Test Applicable to Section 473(b)

Appellant has argued that in other sentencing contexts, courts have found that offenses premised upon concurrent possession of contraband items bear no meaningful connection or relationship. (OBM 25-26, citing *People v. Berry* (1981) 117 Cal.App.3d 184, 196-197 (*Berry*) [vehicle theft sentence not enhanced by concurrent illegal firearm possession when latter offense dismissed pursuant to a plea bargain] and *People v. Beagle* (2004) 125 Cal.App.4th 415, 422 (*Beagle*) [drug conditions of probation not justified for deadly weapon possession offense when count alleging concurrent drug possession offense dismissed pursuant to a plea bargain].) *Berry* and *Beagle* apply the rule of *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*), which according to respondent, "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.'" (ABM 21, quoting *Harvey, supra,* 25 Cal.3d at p.

758.) Respondent contends that given the *Harvey* rule's procedural context, *Berry* and *Beagle* have "no application to section 473(b)."

But *Berry* and *Beagle* both illustrate that, as respondent puts it, "a defendant's simultaneous possession of multiple items by itself does not make them transactionally related." (ABM 21, citing *Berry, supra,* 235 Cal.App.4th at pp. 1421-1422, 1426.) Appellant submits "a defendant's simultaneous possession of multiple items by itself" also fails to establish 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.5th at p. 56.)

Similarly, appellant has argued that, "[m]ore broadly, for purposes of evaluating joinder of offense orders, courts have found that offenses committed at or near the same place and time lacked a sufficiently meaningful relationship." (OBM 26, citing *People v. Saldana* (1965) 233 Cal.App.2d 24, 29-30 (*Saldana*) [no sufficient connection between rape count and possession of marijuana count despite likelihood of possession during the rape]; *People v. Renier* (1957) 148 Cal.App.2d 516, 519-520 (*Renier*) [no sufficient connection between cases that charged robbery and unlawful driving or taking of a vehicle even when both offenses committed on the same day and the gun used in the robbery found in the stolen vehicle]; *United States v. Singh* (5th Cir.2001) 261 F.3d 530, 532–533 (*Singh*) [no sufficient connection between counts alleging firearm possession

and harboring aliens even when law-enforcement officers discovered the gun while investigating the defendant for harboring aliens]; see also *Ondarza v. Superior Court* (1980) 106 Cal.App.3d 195, 203 (*Ondarza*) [charging defendant with sale of cocaine when commitment order limited to receiving stolen property improper because "commission of two separate crimes on the same day does not justify an inference that they were necessarily connected"]; *People v. Cardwell* (4th Cir.2005) 433 F.3d 378, 386 (*Cardwell*) [joinder of gun possession and murder-for-hire counts permissible but "we do not believe that a mere temporal relationship is sufficient to show that the two crimes at issue here were *logically* related"].)

According to respondent, the test for joinder requires a determination if the offenses are connected together by a "common element of substantial importance [citations]", and this test "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.' [Citations.]" (ABM 22.) Respondent thus argues that *Saldana, Renier, Singh, Ondarza* and *Cardwell* have no relevance to this Court's analysis because "[s]ection 473(b), by contrast, raises no such constitutional concerns." (ABM 22.) Appellant submits that respondent draws a distinction that makes no difference here, and that *Saldana, Renier,*

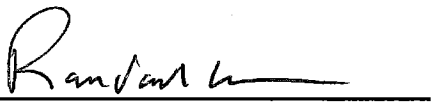
Singh, Ondarza and *Cardwell* provide helpful illustrations of when offenses have or lack meaningful relationships.

CONCLUSION

Briefing on the merits now completed, this Court should decide the arguments presented in favor of appellant, reverse the Sixth District's judgment in *Guerrero II*, and remand the matter to that court with directions that it be returned to the trial court with directions to impose a misdemeanor sentence on the forgery charge in count 4.

Dated: August 12, 2019

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

I, Randall Conner, counsel for Raul O. Guerrero, certify pursuant to the California Rules of Court that this document contains 2,560 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(d)(3). I prepared this document in Microsoft Word 2003, and this program generated the word count stated above. I certify under penalty of perjury under the laws of the State of California that the foregoing is true.

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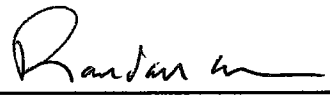
Respectfully submitted,



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Re: People v. Raul O. Guerrero Case No. S253405

ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE
(Code Civ. Proc., § 1013a(2); Cal. Rules of Court., rules 8.71(f) & 8.77)

I, Randall Conner, certify: I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is conner_law@msn.com and my business address is 315 Montgomery Street, Suite 916A, San Francisco, CA 94104. On August 12, 2019, at 1:00 p.m., I transmitted a PDF version of Appellant's Reply Brief on the Merits by electronic mail to the party(s) identified below using the e-mail service addresses(es) indicated:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 12, 2019, at San Francisco, California.

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ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL
(Code Civ. Proc., § 1013a(2))

I, Randall Conner, certify: I am an active member of the State Bar of California and am not a party to this cause. My business address is 315 Montgomery Street, Suite 916A, San Francisco, CA 94104. On August 12, 2019, I delivered to the United States Postal Service a copy of the attached Appellant's Reply Brief on the Merits in a sealed envelope with postage fully prepaid, addressed to each the following:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 12, 2019, at San Francisco, California.

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