IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S231171
Plaintiff and Respondent,	(Fourth Dist., Div. 1, No. D067554)
v.	(Imperial County Superior Court No. JCF32479)
GIOVANNI GONZALES,	
Defendant and Appellant.	

Appeal from the Superior Court of Imperial County
Hon. L. Brooks Anderholt, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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I.

The trial court erred because new Penal Code section 459.5 directly applies to Gonzales's case

A. New authorities support Gonzales's position.

Gonzales's position is supported by three Court of Appeal opinions issued after the opening brief was filed. All three cases hold that theft by false pretenses constitutes "shoplifting" within the meaning of new Penal Code section 459.5. The cases reject the principal arguments the People now raise in Gonzales's case.

In People v. Fusting (July 11, 2016, D069050) __ Cal.App.4th __ [2016 WL 3677103, *1], defendant "entered a building with the intent to sell a stolen surf board." He pleaded guilty to second-degree burglary (Pen. Code, § 459). (Ibid.) The trial court denied his petition to reduce the crime to shoplifting (Pen. Code, § 459.5; see Pen. Code, § 1170.18) on the ground that "entry into a building with the intent to commit theft by false pretenses does not qualify as shoplifting." (Ibid.) The Court of Appeal reversed, and directed the trial court to grant the petition. (2016 WL at p. *4.) The court rejected the identical argument that the People now proffer, namely, that "the voters intended to restrict [section 459.5] to stealing goods or merchandise openly displayed in retail stores." (Id. at p. *3; see RB 8 (arguing that "shoplifting" is restricted to "the larcenous stealing of openly displayed merchandise from a commercial retailer").) Fusting also held that this Court's robbery opinion, People v. Williams

(2013) 57 Cal.4th 776, did not apply, for that case interpreted the common-law definition of "felonious taking," not the statutory definition of larceny. (Fusting at p. *3.) Here, too, the People rely on the argument that Fusting rejected. (See RB 16-17 (attempting to apply Williams to construe the statutory definition of larceny).) Finally, Fusting rejected the contention that the voters intended to exclude theft by false pretenses, another theory on which the People rely in Gonzales's case. (Fusting at p. *4 ("Our interpretation is consistent with the voters' overall intent"); see RB 19 (arguing that "the voters clearly did not intend" to apply section 459.5 to "property other than tangible merchandise").)

Just as in Fusting, Gonzales entered a commercial establishment to commit theft by false pretenses, namely, to pass forged checks valued below the value threshold (CT 28, 30-31) and therefore qualifies for relief.

In People v. Smith (July 8, 2016, E062858) __ Cal.App.4th __ [2016 WL 3676069, *1, *4], defendant presented counterfeit bills at a check-cashing business. He pleaded guilty to second-degree burglary and counterfeiting (Pen. Code, § 476 (forgery)). (Id. at p. *1.) The trial court denied his petition to reduce the burglary to a violation of section 459.5 on the ground that the check-cashing business was not a "commercial establishment," and on appeal the People also argued that passing a counterfeit bill was theft by false pretenses and therefore not "shoplifting" under section 459.5. (Id. at pp. *2, *4.) The Court of Appeal rejected both arguments. A check-cashing business was a

commercial establishment even though it offered "services, not goods or merchandise." (Id. at p. *4.) And "the voters intended section 459.5 to include theft by false pretenses" in light of Penal Code section 490a, so that "entering a check cashing establishment and passing counterfeit bills or notes qualifies as shoplifting under section 459.5." (Id. at pp. *4-5.)

Smith is apposite to Gonzales's case. Gonzales entered a financial-services business and passed forged documents (checks) under section 476. In fact, count 2, which was dismissed pursuant to his plea agreement, was for forgery under section 476, just as in Smith. (CT 2; RT 1-3.)

In People v. Garrett (2016) 248 Cal.App.4th 82, 84, petition for review filed July 20, 2016, S236012, defendant "entered a convenience store with a stolen credit card and attempted to buy gift cards valued at $50." He was charged with burglary, identity theft (Pen. Code, § 530.5), receiving stolen property (Pen. Code, § 496), and unrelated counts. (Id. at pp. 85-86.) He pleaded no contest to second-degree burglary in return for dismissal of the remaining counts, and he later petitioned for resentencing under Proposition 47. (Id. at pp. 85-86.) The trial court denied the petition on the ground that defendant's intent was to "commit felony identity theft" (Pen. Code, § 530.5), which was one of the dismissed counts. (Ibid.) The Court of Appeal reversed. (Id. at p. 90.) First, the intended theft was encompassed by "larceny" as used in section 459.5, in light of the statutory interpretation of the term (Pen. Code, § 490a). (Id. at pp. 88-89.) Second, even if defendant entered the store with intent to commit identity theft

in addition to larceny under section 459.5, that new code section *required* that the burglary be reduced to shoplifting. (Id. at pp. 87-88.) Garrett thus rejected two of the People's principal arguments. (See RB 16-17, 28-35.)[1]

[1] Several cases discussed in the opening brief have been superseded by a grant of review under former rule 8.1100(e) of the Rules of Court. (See People v. Valencia (2016) 245 Cal.App.4th 730, review granted May 25, 2016, S233402 (grant and hold behind this case, People v. Gonzales, S231171); People v. Root (2016) 245 Cal.App.4th 353, review granted May 11, 2016, S233546 (grant and hold behind Gonzales); People v. Bias (2016) 245 Cal.App.4th 302, review granted May 5, 2011, S233634 (grant and hold behind Gonzales); People v. Triplett (2016) 244 Cal.App.4th 824, review granted April 27, 2016, S233172 (grant and hold behind Gonzales and People v. Valenzuela, S232900); People v. Brown (2016) 244 Cal.App.4th 1170, review granted April 27, 2016, S233274 (grant and hold behind Harris v. Superior Court, S231489); People v. Vargas (2016) 243 Cal.App.4th 1416, review granted March 30, 2016, S232673 (grant and hold behind Gonzales).)

B. Shoplifting under section 459.5 encompasses Gonzales's intended crime, theft by false pretenses.

1. "Shoplifting" in the new statute is not defined according to a purported "common" meaning, which on its face does not apply to the new crime, but rather according to the statutory definition.[2]

The People argue that "the drafters used the term 'shoplifting' . . . because they meant 'shoplifting.'" (RB 5.) According to the People, " '[s]hoplifting' means what it says," namely, "the larcenous stealing of openly displayed merchandise from a commercial retailer." (RB 8.) On the face of the new statute, this cannot be so. As the People themselves recognize, shoplifting under Penal Code section 459.5 is not committed by a *taking* (caption) but rather by an *entry* with a certain intent. (See, e.g., RB 21 (recognizing that the new crime of "shoplifting" is committed by an entry); Pen. Code, § 459.5, subd. (a) ("shoplifting is defined as *entering* a commercial establishment ...."), emphasis added.) One can commit an illegal entry with the intent to steal an item without ever actually stealing it or even coming close. (E.g., People v. Mitchell (1966) 239 Cal.App.2d 318, 328 ("The crime of burglary is complete when the entry with necessary intent is made, whether the intended theft was committed or not"); People v. Azevedo (1963) 218 Cal.App.2d 483, 489.)

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[2] See section I(C) of respondent's brief.

The People thus seek to define a type of illegal entry as a type of consummated theft. But just as burglary with intent to commit a theft is not the same as theft, so the type of burglary called "shoplifting" is not the same as an act of "larcenous stealing" (RB 8), however broadly or narrowly the larceny is defined. Thus, on its face, "shoplifting" in section 459.5 must mean something different from the "common understanding of shoplifting" (RB 8), just as "burglary" means something different from larceny or another type of theft.

The People state that "[o]ne would be hard-pressed to find any California voter who would define fraudulently cashing forged and stolen checks as shoplifting." (RB 26.) The same could be said of a voter who would define shoplifting as a type of illegal entry, rather than as an actual theft of goods. Even the dictionary definitions quoted by the People define shoplifting in terms of a *taking*, not an *entry* with a specific intent. (See RB 9-10.) Thus, the People would also be "hard pressed" (RB 26) to find a voter who would define "shoplifting" as the People now try to define it.

Separately, the very fact that the new statute defines "shoplifting" for purposes of the scope of the statute itself is at odds with the People's contention that "the drafters used the term 'shoplifting' – which has an accepted meaning in both common sense and the law – because they meant 'shoplifting'" (RB 5). As the drafters made clear, they did not use the term "shoplifting" because "they meant 'shoplifting'" (RB 5). Rather, they used

"shoplifting" because they meant: "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours," the definition they inserted into the very statute at issue. (Pen. Code, § 459.5, subd. (a).) It is that explicit definition that provides the plain meaning of shoplifting under the statute. (See People v. Fusting, supra, 2016 WL at p. *4 ("The statute does not contain any definition of shoplifting other than setting forth the elements of the offense in the specific language of section 459.5").)

The People state that "[t]he text of section 459.5 repeatedly defines the offense as 'shoplifting.'" (RB 10.) This seems not to be fully considered. The offense is not defined *as* shoplifting; rather, it is shoplifting itself that is defined: "shoplifting is defined as entering a commercial establishment . . . ." (Pen. Code, § 459.5, subd. (a).)

Apart from the fact that the drafters specifically defined "shoplifting," rather than relying on a purported "accepted meaning in both common sense and the law" (RB 5), the People err in assuming that there is any such "accepted meaning" at all. Section 459.5 could not have incorporated any prior California legal understanding of the term, for there was no such prior understanding. As the People themselves recognize, "[p]rior to the passage of section 459.5, there was no specific crime of 'shoplifting' in the California Penal Code." (RB 10.) The two California cases on which the People rely (RB 10) do not purport to restrict or define shoplifting, and in fact deal with entirely different issues. (See People v. Dent (1995) 38 Cal.App.4th 1726,

1728 (scope of trial court's discretion under three-strikes law); People v. Gonzales (1965) 235 Cal.App.2d Supp. 887, 889 (authority of prosecutor to dismiss charge without notice).) And as noted in the opening brief (AOB 33-35), the statutes and case law of several other states define shoplifting far more broadly than the People's "accepted meaning." In these states, "shoplifting" encompasses charging merchandise to another person without that person's permission, credit-card fraud, documentary fraud, and other types of fraud, not just the taking of tangible goods. (AOB 33-35.)

The People observe that "[t]he drafters could have labeled this new offense with many names." (RB 11.) Yet, the drafters had to choose some name or other. To ensure precision, they attached a definition to the name they selected. It is not easy to see what more they could reasonably do.

The People's theory that the purported "common sense" (RB 5) definition of shoplifting takes precedence over the technical definition within the statute is contrary to the express requirement of the Penal Code:

> Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and appropriate meaning.

(Pen. Code, § 7(16); see, e.g., People v. Elmore (2014) 59 Cal.4th

121, 140, fn. 11 ("We note that legal 'insanity' is a term of art, defined by statute in conformity with the *M'Naghten* rule. It may differ from medical or popular usage"); People v. Leal (2004) 33 Cal.4th 999, 1007.)[3]

The People rely on Wharton's Criminal Law and on various legal and popular dictionaries. (RB 9.) The Court of Appeal has rejected the identical argument, finding it "unlikely" that voters had recourse to legal treatises and dictionaries. (People v. Fusting, supra, 2016 WL at p. *4.) After all, the voters had no need to refer to such general, non-California authorities, for the definition of shoplifting was before their eyes in the text of the new statute that was printed in the ballot pamphlet. (See Ballot Pamphlet, General Election (Nov. 4, 2014) text of Prop. 47, § 5, p. 71.) As the Court of Appeal recently held in interpreting another sentencing initiative (Proposition 36, amending the three-strikes law), the voters are presumed to have read the text of the measure, not just the secondary material. (People v. Cordova (June 24, 2016, H041050) __ Cal.App.4th __ [2016 WL 3513920, *6]; see also Wright v. Jordan (1923) 192 Cal. 704, 713.)

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[3] The recent amendments to section 7 (Stats. 2016, ch. 50, § 65) do not affect the definitions cited in this brief.

(. . . continued)

2. **The ballot material and jury instructions are consistent with Gonzales's interpretation.**[4]

The People rely on the fiscal analysis by the Legislative Analyst, which refers to shoplifting as "a type of petty theft" that may also be charged as burglary. (Ballot Pamphlet, supra, at p. 35.) (See RB 25-26.) Nowhere does this analysis state that shoplifting under the new statute is limited to the intent to commit larceny. Thus, it is entirely consistent with Gonzales's position. (See Delaney v. Superior Court (1990) 50 Cal.3d 785, 802 ("The ballot materials emphasized the need for confidentiality but did not state that *only* confidential matters would be protected"), italics in original.) In fact, in using the term, "theft," not "larceny" (Ballot Pamphlet at p. 35), the analysis impliedly supports Gonzales's interpretation.

The People assert that by using the term, "shoplifting," the Legislative Analyst's summary of the fiscal effect of the measure "indicates that the new crime would not be defined in any way other than by its common and ordinary meaning." (RB 26.) Voters could not have drawn this inference, for they had the statutory language in front of them, which provided a specific definition of shoplifting. (Ballot Pamphlet at p. 71.) As noted above, when the voters have the text of the measure in front of them, they are presumed to have read that text, not just the secondary material contained in the same ballot pamphlet. (People v. Cordova, supra, 2016 WL at p. *6; Wright v. Jordan.

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[4] See section I(G) of respondent's brief.

supra, 192 Cal. at p. 713.)

The voters would not even have expected the Legislative Analyst to provide an exhaustive analysis of every type of conduct encompassed by the new statute. As the ballot pamphlet made clear, the Legislative Analyst's discussion was intended as a fiscal report, not a compendium of every type of conduct that might be subject to the new law. (See Ballot Pamphlet at p. 34 (setting forth in large type the "Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact," followed by his analysis in smaller type).)

This Court has indeed rejected the contention that the Legislative Analyst's comments in the ballot pamphlet should be deemed an exhaustive analysis of every aspect of the initiative:

> The Legislative Analyst did not suggest that all the effects and ramifications of the Act were being set forth in his brief summation. . . . In light of the explicit language and purpose of the statute, and the generality and brevity of the Legislative Analyst's commentary, the latter cannot plausibly be viewed as implicitly limiting the scope of the statute in the manner advocated by defendants.

(People ex rel. Lungren v. Superior Court (1996) 14 Cal.4th 294, 308 (construing Proposition 65, a public-health initiative).) So, too, in this case, the Legislative Analyst's comments "did not suggest that all the effects and ramifications of the Act were being set forth in his brief summation," which was a single paragraph of about 60 words. (See also Carman v. Alvord (1982)

31 Cal.3d 318, 331 ("We should not assume that [the legislative analyst's] brief comments accurately reflected the full intent of the drafters or the understanding of the electorate").)

Even if it had been possible to find an overt inconsistency between the analysis and the text of the measure, it is the text – here, the explicit statutory definition of shoplifting – that controls. (See Delany v. Superior Court, supra, 50 Cal.3d at p. 803 ("Moreover, a possible inference based on the ballot argument is an insufficient basis on which to ignore the unrestricted and unambiguous language of the measure itself"); People v. Eribarne (2004) 124 Cal.App.4th 1463, 1468, fn. 5 (noting that the Legislative Analyst's summary "does not accurately paraphrase the statute"); Moore v. Superior Court (2004) 117 Cal.App.4th 401, 407, fn. 6 ("We also believe the Legislative Analysis misread the express words of the proposed statute").)

In relying exclusively on the Legislative Analyst's fiscal analysis, the People overlook the fact that the official title and summary prepared by the Attorney General herself does not use the term "shoplifting" at all. (See Ballot Pamphlet at p. 34.) Similarly, in the entirety of the ballot arguments pro and con, "shoplifting" is not mentioned a single time. (See Ballot Pamphlet at pp. 38-39.) The proponents and opponent refer to "theft" and "nonviolent petty crimes" (e.g., id. at p. 38), but never to "shoplifting." In fact, even the president of the statewide retailers trade association, who is quoted by the opponents, refers broadly to "theft" and "forgery," and never to "shoplifting":

> California Retailers Association President Bill Dombrowski says "reducing penalties for theft, receiving stolen property and forgery could cost retailers and consumers millions of dollars."

(Ibid.) This suggests that the two sides understood that what was at issue was broadly "theft" or the intent to commit theft, not what the People contend is the "common" meaning of "shoplifting."

The People cite the cross-reference in the Bench Notes to CALCRIM No. 1703: "To instruct on the necessary intent to commit theft, see CALCRIM No. 1800, Theft by Larceny." (RB 27-28.) The People overlook the fact that the Bench Notes for CALCRIM No. 1800, in turn, specifically guide the court to other theories of theft when raised by the facts of the particular case: "If a different theory of theft is presented, see CALCRIM No. 1804, *Theft by False Pretenses*, CALCRIM No. 1805, *Theft by Trick*, CALCRIM No. 1806, *Theft by Embezzlement*." (CALCRIM No. 1800, Bench Notes, Related Instructions, italics in original.) Thus, the CALCRIM instructions are fully consistent with Gonzales's position.

The People fear that relying on the statutory definition amounts to a "bait and switch" on the voters. (RB 27.) Yet, the voters knew from the text of the measure exactly how shoplifting was defined. Accordingly, they could not have intended a narrower definition. (See Amwest Surety Ins. Co. v. Wilson (1995) 11 Cal.4th 1243, 1260-1261 (rejecting the argument "that

the voters intended a constitutional amendment passed by initiative to have a narrower scope than would follow from its broad language").) There is no "bait" and no "switch," but only a carefully defined provision that was before the voters' eyes.

3. Shoplifting under section 459.5 is not limited to an intent to commit larceny but encompasses an intent to commit any theft.[5]

The People rely on People v. Williams, supra, 57 Cal.4th 776. (RB 11, 15-17.) The three recent opinions of the Court of Appeal discussed in subsection (A) squarely concur in Gonzales's analysis that Williams is inapposite because it applied the common-law definition of "felonious taking," which was not addressed by the expanded definition of larceny contained in Penal Code section 490a, whereas that section does explicitly define larceny, the word at issue in Gonzales's case. (See People v. Fusting, supra, 2016 WL 3677103 at p. *3 ("The analysis in Williams [citation] is distinguishable from our current issue of whether section 459.5 can be satisfied by theft from false pretenses"); People v. Smith, supra, 2016 WL 3676069 at p. *5, fn. 5 ("We conclude that neither Williams nor [Penal Code] section 211, which does not contain the term 'larceny,' governs the meaning of that term in the new shoplifting statute"); People v. Garrett, supra, 248 Cal.App.4th 82, 89 ("The language in Williams that distinguishes 'larceny' from 'theft by false

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[5] See section I(D) of respondent's brief.

pretenses' does not alter our analysis"); see AOB 14, 28-30.) The People fail to address the analysis of Fusting, Smith, and Garrett.

Further, as explained in the opening brief (AOB 14), Williams itself in fact indirectly supports Gonzales's position, for it recognized that if a statute specified "larceny" (rather than "felonious taking"), the definition would be governed by section 490a. (People v. Williams, supra, 57 Cal.4th at p. 789.)

The People find it significant that the new statute is limited to burglary during normal business hours. (RB 12; see Pen. Code, § 459.5, subd. (a).) This limitation, however, reveals nothing about the scope of "shoplifting" as defined in the statute. It may merely reflect the fact that an entry with intent to commit *any* minor theft during normal business hours is generally less serious than an entry committed after hours, for the latter generally involves the aggravated conduct of breaking into the building. For example, the Legislature has determined that it is a more-serious crime to enter a car when the doors are locked than when they are unlocked. (See Pen. Code, § 459; In re Lamont R. (1988) 200 Cal.App.3d 244, 247

According to the People, it would be "absurd" for an employee who entered his store with intent to commit embezzlement to be guilty of burglary if he entered "one minute before the store is officially open" but only of shoplifting if he entered "one minute later during business hours." (RB 12.) This facile argument applies to any statutory cutoff or boundary.

Surely it is no less "absurd" for a defendant to be guilty of burglary if he intends to obtain $950.01 during business hours, but only of shoplifting if he intends to obtain $950 during business hours. This Court, in construing the "entry" element burglary, recognized that line drawing does not create an absurdity: "That the requirement of 'entry' inevitably calls for line drawing does not make the line drawing absurd." (Magness v. Superior Court (2012) 54 Cal.4th 270, 279.)

The People argue that "[t]he drafters' use of the phrase 'intent to commit larceny' shows the offense of shoplifting is limited to larcenous stealing; an alternative reading would render these phrases meaningless." (RB 12.) Yet, the burglary statute itself uses almost the identical phrase: "intent to commit grand or petit larceny." (Pen. Code, § 459.) Section 459.5 simply tracks the burglary statute, for its purpose is to carve out a mitigated, lesser included crime, as demonstrated by the very first clause of the new statute ("Notwithstanding Section 459") and by the second sentence ("Any other entry into a commercial establishment with intent to commit larceny is burglary"). In fact, by virtue of the explicit cross-reference, "larceny" is presumed to mean the same as in the burglary statute. (See People v. Dillon (1983) 34 Cal.3d 441, 468.)

The People invoke the maxim, *noscitur a sociis* and argue that "a word takes meaning from the company it keeps. (RB 13, quoting Cable Connection v. DIRECTV (2008) 44 Cal.4th 1334, 1370-1371.) According to the People, "the phrases 'shoplifting,'

'commercial establishment,' and 'open during business hours,' viewed together with the term 'larceny,' show the drafters contemplated the common understanding of shoplifting and thus the common law definition of larceny, which is consistent with the common understanding of shoplifting." (RB 13.) But if "a word takes meaning from the company it keeps," that "company" must encompass the statute that section 459.5 explicitly incorporates, which as noted above uses the identical word, "larceny." (Pen. Code, § 459.) Nowhere do the People argue that the courts have been misinterpreting the scope of larceny in section 459 all these years. (See, e.g., People v. Parson (2008) 44 Cal.4th 332, 354 ("An intent to commit theft by a false pretense or a false promise without the intent to perform will support a burglary conviction"); People v. Williams, supra, 57 Cal.4th at p. 789, fn. 4 ("if a defendant enters a store with the intent to commit theft by false pretenses (as defendant did here), and if that defendant, while fleeing, kills a store employee, that defendant can be convicted of felony-murder *burglary*") (emphasis added).)

The neighboring word "property" ("where the value of the property that is taken . . .") is also significant. The People repeatedly argue that shoplifting is limited to tangible, openly displayed merchandise. (E.g., RB 1, 5 ("openly displayed merchandise" and "burglaries involving merchandise and not to those involving money"); 8, 11 ("the larcenous stealing of openly displayed merchandise from a commercial store"); 19.) Section 459.5, however, never uses the term "merchandise" at all, but only "property." "Property," in turn, is statutorily defined to

encompass "money, goods, chattels, things in action, and evidences of debt." (Pen. Code, § 7(10), (12).) Similarly, the statute never refers to open displays. In using the broad term "property," rather than the narrow term "merchandise" (or even "goods"), and in omitting any restriction to displayed items, the drafters made clear that section 459.5 covered more than "the larcenous stealing of openly displayed merchandise." (RB 11.) If a word is to be interpreted according to the company it keeps, as the People contend, the drafters' use of "property" is in itself irreconcilable with the People's interpretation.

Similarly, section 459.5 uses the broad term "commercial establishment," not the narrow term "retail establishment" or "retail store." The broad term encompasses the narrow term and much more. (See City of Monterey v. Carrnshimba (2013) 215 Cal.App.4th 1068, 1088 (noting that a city code defined "commercial establishments" to include not just "retail stores" but also restaurants, service stations, and financial-services businesses); People v. Smith, supra, 2016 WL 3676069 at p. *4 ("commercial establishment" encompasses a business that deals in services, such as a check-cashing business, and is not limited to one that deals in goods).) If the drafters had intended to adopt the People's narrow interpretation, they would not have used the broad term when the narrow term was just as readily at hand.

Finally, the People's maxim cannot override the statutory text. (See People v. Prunty (2015) 62 Cal.4th 59, 71 ("criminal street gang" is "a term in colloquial usage that is nonetheless given a specific meaning" in the statute).) Penal Code section

490a expressly expands the scope of larceny in *every* law: "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 therefor." The drafters are presumed to have been aware of this statute. (E.g., Foley v. Interactive Data Corp. (1988) 47 Cal.3d 654, 675.) Thus, if they had intended to limit section 459.5 to theft by larceny, the first clause of section 459.5 would have been: "Notwithstanding Section 459 *and Section 490a.*"

The People note that other provisions of Proposition 47 use the term "theft." (RB 14; see, e.g., Pen. Code, § 490.2.) Those provisions, however, use "theft" for the same reason that section 459.5 uses "larceny": because the statute that is incorporated by reference uses that term. (See Pen. Code, § 490.2, subd. (a) ("Notwithstanding Section 487 or any other provision of law defining grand theft . . ."); Pen. Code, § 487 ("Grand theft is theft committed in any of the following cases . . ."); see also Pen. Code, § 666 (petty theft with a prior), cross referencing Pen. Code, § 490).)

The People rely on subdivision (b) of the new statute: "Any 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." (Pen. Code, §459.5, subd. (b).) According to the People, this demonstrates that "the drafters conscientiously used larceny

instead of theft when defining shoplifting earlier in that section." (RB 14.) This overlooks the fact that there is no statutory crime of "larceny" with which a defendant could be charged: the crime is theft, whether petty or grand. (See, e.g., Pen. Code, § 486; Pen. Code, § 487; Pen. Code, § 488.) It is only the burglary statute that uses the word "larceny." The drafters thus demonstrated that they knew exactly what terms were used in the statutes that were cross-referenced by the new statutory provisions, which provides further support for the view that they must have intended for those terms to have the same meaning in the cross-referencing statutes.

The People argue that Penal Code section 490a does not apply because it "did not eliminate different types of theft." (RB 15.) Appellant has never argued otherwise. Section 490a does not eliminate crimes but rather expands the definition of larceny. The three new Court of Appeal opinions discussed in section (A) are consistent: they all hold that section 490a governs the meaning of "larceny" in section 459.5 (People v. Fusting, supra, 2016 WL 3677103 at p. *3; People v. Smith, supra, 2016 WL 3676069 at p. *4; People v. Garrett, supra, 248 Cal.App.4th at pp. 88-89.)

The People argue that the drafters and voters may not have been aware of section 490a. (RB 17-18.) The very authority on which the People rely has declined to carve out a new presumption that the drafters and voters of initiatives are presumed to be less knowledgeable than the Legislature as to

existing statutes. (People v. Davenport (1985) 41 Cal.3d 247, 263, fn. 6, cited at RB 17; see also People v. Rizo (2000) 22 Cal.4th 681, 685 ("In interpreting a voter initiative like Proposition 187, we apply the same principles that govern statutory construction").)

The People observe that there may have been other ways to draft the statute. (RB 18-19.) The same could be said of any document. The fact that there are several ways to say the same thing does not in itself create any ambiguity. (See A.O. Smith Corp. v. Transpac Container System (C.D.Cal. 2009, No. CV 09-00304) 2009 WL 3001503, *3 ("There are certainly numerous ways to draft a valid and enforceable forum selection clause and Plaintiffs have failed to show how the mere fact that Blue Anchor could have drafted its forum selection clause in a different way renders the clause ambiguous").)

4. Shoplifting under section 459.5 is not limited to tangible merchandise.[6]

The People argue that because the drafters used the term "property," they intended to restrict "shoplifting" to the intended taking of tangible merchandise. (RB 19.) As explained in the preceding subsection, the inference is to the contrary. For example, the People repeatedly highlight the word "merchandise" (e.g., RB 1, 5, 8, 11, 19), but the word "merchandise" never appears in section 459.5. The statute uses the broader term, "property," which, under the definitions applicable to the entirety

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[6] See section I(E) of respondent's brief.

of the Penal Code, encompasses personal property, specifically including money and evidences of debt. (Pen. Code, § 459.5; Pen. Code, § 7(10),(12).)

The People fail to confront the fact that "property" is statutorily defined. It is true that a definition in section 7 does not apply if it is "otherwise apparent from the context" (ibid.), but "apparent" is not equivalent to a tendentious inference. (See Diamond View Limited v. Herz (1986) 180 Cal.App.3d 612, 618 (applying the identical language of Code Civ. Proc., § 17: "the preliminary definition contained in section 17 is superseded when it *obviously* conflicts with the Legislature's subsequent use of the term in a different statute"), emphasis added; People v. Man (1974) 39 Cal.App.3d Supp. 1, 5 ("There is nothing 'otherwise apparent from the context' of [Penal Code] section 647c to indicate that the words should be defined in a manner other than as provided in section 7 quoted above").)

The People state that "property" must be narrowly construed because another part of Proposition 47 refers to "money, labor, real or personal property." (RB 19-20, quoting Pen. Code, § 490.2, subd. (a).) But section 490.2 does in fact specify "property," just as section 459.5 does; the specific explanatory or illustrative enumerations do not purport to restrict its scope. (See Pen. Code, § 490.2. subd. (a) ("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"), emphasis added.) Further, the enumeration is taken directly from Penal Code section 487, which

section 490.2 explicitly incorporates by reference. (See Pen. Code, § 487, subd. (a) ("when the money, labor, or real or personal property taken is of a value . . .").) Thus, just as section 459.5 uses the term "larceny" to ensure that the new statute is parallel to section 459, which already uses that term, so new section 490.2 specifies "money, labor, real or personal property" in order to ensure that the new statute is parallel to section 487, which already uses the same phrase.

The People state that "it is hard to imagine how one could shoplift labor or real property." This assumes that shoplifting is defined according to the People's interpretation, namely, taking openly displayed merchandise from a store. Preexisting California law explicitly recognizes that real property and labor may be the objects of a theft. (Pen. Code, § 484 (defining "theft" to encompass "defraud[ing] any other person of money, labor or real or personal property"); Pen. Code, § 487, subd. (a) (defining "grand theft" as the taking of "money, labor, or real or personal property" above a certain value).) Fixtures are often classified as part of real property, and yet a defendant may physically steal them and take them away, sometimes merely by using a screwdriver. (See Pen. Code, § 502.5; People v. Acosta (2014) 226 Cal.App.4th 108, 113-115, 117-118.) Because these may be the object of a theft, they may also be the object of an entry with intent to commit theft under section 459.5, however rare such conduct might be.

5. The statutory definition is consistent with the voters' intent and does not lead to "absurd results."[7]

According to the People, interpreting shoplifting as defined in the statute "would largely defeat the purpose of burglary laws, an absurd result the voters clearly did not intend." (RB 21.) The People's theory is that the risk of violence is not commensurate with the low value of the intended theft. (RB 22-23.) The same, however, could be said for Proposition 47's theft amendments. Formerly, taking money in *any* amount from the body of a person (but without a sufficient level of force or fear to constitute robbery), such as grabbing the wallet of a pedestrian on a busy street, was grand theft from the person. (Pen. Code, § 487, subd. (c); People v. Montes (1959) 173 Cal.App.2d 256, 261.) Now, it is reduced to petty theft if the amount taken is $950 or less (Pen. Code, § 490.2, subd. (a); People v. Hall (2016) 247 Cal.App.4th 1255, 1263). Yet, there are obvious risks to life inherent in such a crime, and these risks do not necessarily vary with the value of the items taken. (See People v. McElroy (1897) 116 Cal. 583, 584 ("The stealing of property from the person has been from an early period, under the English statutes, treated as a much graver and more heinous offense than ordinary or common theft, . . . partly because of the greater liability of endangering the person or life of the victim").) The initiative's newly reduced penalty for this particular type of theft reflects the voters' policy decisions regarding the use of scarce criminal-justice resources and the

[7] See section I(F) of respondent's brief.

appropriate level of punishment. It does not "largely defeat" the purpose of the theft laws or "lead to absurd results." (RB 21.) So, too, the fact that the voters made a similar policy decision as to burglary withstands the same accusation of "defeat" and "absurd results."

The fact that it is possible to conceive of a particular instance of violating section 459.5 that is more serious than other instances (RB 22-24) does not mean that the voters meant to ignore the statutory definition of "shoplifting." In fact, in the ballot arguments, the opponents specifically cited scenarios under which Proposition 47 could lead to punishment that in their view was too lenient. For example, the opponents stated that "Proposition 47 will reduce the penalty for possession of drugs used to facilitate date-rape to a simple misdemeanor." (Ballot Pamphlet, supra. p. 39.) Similarly, they argued that "[p]eople stealing guns are protected under Proposition 47" because of the $950 threshold. (Ibid.) The voters were thus fully aware of the type of argument that the People now make: that there might possibly be instances where the new punishment did not fit the crime. Yet, the voters weighed the risks and benefits and chose to enact the initiative.

Further, the People's contention that section 459.5 "would largely defeat the purpose of burglary laws and thus lead to absurd results" (RB 21) is not supported by any of their specific hypotheticals. Of course there is a theoretical risk of violence if defendant enters a "manager's office" or "back room" or "locked pharmacy" or "locker room." (RB 22-23.) But there is a

documented, real-life risk of great violence if defendant enters a retail store during normal business hours to steal a low-value item openly displayed on the shelf, which is the very type of crime that the People consider to be low risk. For example, in Indiana v. Edwards (2008) 554 U.S. 164, 167, defendant "tried to steal a pair of shoes from an Indiana department store," but "[a]fter he was discovered, he drew a gun, fired at a store security officer, and wounded a bystander." Similarly, in People v. Vidaurri (1980) 103 Cal.App.3d 450, 455, defendant entered a department store during normal business hours and took two blouses, which he concealed under his jacket. When two security guards confronted him, he "immediately produced a knife from his pocket" and "took several swings at [one guard's] head with the knife and struck him on the ear." (Ibid.) When he reached the parking lot he approached a family, stabbed the man, and tried to flee in their car. (Id. at pp. 455-456; see also People v. Estes (1983) 147 Cal.App.3d 23, 25-26 (when store security guard confronts defendant outside the store after the shoplifting, defendant produced a knife, swung it at the guard, and threatened to kill him); People v. Galoia (1995) 31 Cal.App.4th 595, 596 (man who shoplifted some beer, cigarettes, and candy was chased by another customer, who was struck by defendant's accomplice).) These real-life instances – as contrasted with the People's imaginative hypotheticals – cast some doubt on the People's casual assurance that shoplifters will "most likely" encounter only people "who are trained to handle exactly these situations without overreacting or exposing themselves to

unreasonable risks of harm," so that "such situations are not likely to escalate based on a perceived violation of intrusion." (RB 24.) The People cite no data, no expert, no appellate opinion, and no other authority for their freewheeling speculation that an intent to steal goods from a shop during normal business hours poses substantially less of a risk to the public than other types of intended theft.

The People's reliance on locked rooms and offices also fails to take account of this Court's recent opinion, People v. Garcia (2016) 62 Cal.4th 1116, under which a locked or otherwise private room within another structure may be a separate space subject to a separate count of burglary corresponding to the seriousness of the crime. (See id. at p. 1119 (multiple burglary convictions permitted where "the room or space is secured against the rest of the space within the structure").)

Further, the People's assumption that a locked manager's office or other non-public room is even a "commercial establishment" under section 459.5 is unsupported by any authority. The Court of Appeal has recognized the possibility that a single physical institution could contain both a commercial establishment and a private establishment. (In re J.L. (2015) 242 Cal.App.4th 1108, 1115 (recognizing that a school cafeteria or bookstore might be a commercial establishment, even though the students' locker room *within the same school* was not).)

Finally, there is nothing "absurd" (RB 21) in an initiative that enacts a lesser punishment than the People consider appropriate, just as there is nothing absurd in an initiative that

enacts a punishment that many people would contend is too harsh, but which the People consider appropriate. (See, e.g. Ewing v. California (2003) 538 U.S. 11, 17-18 (California Attorney General successfully defends three-strikes initiative (Pen. Code, § 1170.12) against a challenge that the punishment was cruel and unusual where defendant stole three golf clubs worth about $1200).) These are policy decisions that the voters are often called upon to make. The voters' decision should not be thwarted where it is otherwise consistent with the federal and state constitutions. (See, e.g., People v. Prather (1990) 50 Cal.3d 428, 437 (declining to interpret an initiative in a manner that would "thwart the intent of the voters and framers").)

6. Gonzales's conviction should be reduced whether or not he harbored the additional intent to commit identity theft.[8]

The People argue that Gonzales intended "not only to commit theft, but also to make unlawful use of personal identifying information of another person," which is not within the scope of Proposition 47. (RB 28.) One of the new opinions discussed in section (A) supports Gonzales's analysis to the contrary. In People v. Garrett, supra, 248 Cal.App.4th 82, 86, the People made the identical argument: "that substantial evidence shows defendant entered the store with the intent to commit felony identity theft under Penal Code section 530.5, making him ineligible for resentencing" under Proposition 47. (The defendant "entered a convenience store with a stolen credit card and

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[8] See section II of respondent's brief.

attempted to buy gift cards valued at $50," and pleaded no contest to second-degree burglary. (Id. at pp. 85-86.)) The Court of Appeal held that even if defendant entered the store with intent to commit identity theft *in addition to* larceny under section 459.5, that new statute *required* that the burglary be reduced to 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. Furthermore, Section 459.5 mandates that *notwithstanding* Penal Code section 459, a person who enters a store "with intent to commit larceny" *shall be punished as a misdemeanant* if the value of the property to be taken is not more than %950. (Pen. Code, § 459.5, subd. (a).) Subdivision (b) further provides that any act defined as shoplifting "shall be charged as shoplifting" and may not be charged as burglary or theft of the same property. (Pen. Code, § 459.5, subd. (b).) Thus, even assuming defendant intended to commit felony identity theft, he could not have been charged with burglary under Pena 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, italics in original.) Garrett thus rejects the People's

current argument that reduction of the burglary to shoplifting is precluded because Gonzales "entered the bank, not only to commit theft, but also to make unlawful use of personal identifying information of another person." (RB 28.)

Gonzales's case is even easier. Whereas in Garrett the defendant was specifically charged with identity theft in addition to burglary (id. at pp. 85-86), Gonzales was never charged with identity theft, but only with making or uttering a forged check (Pen. Code, § 476) (see CT 1-2), which itself is an eligible crime under Proposition 47 pursuant to Penal Code section 473, subdivision (b).

Further, whereas in Garrett the court specifically found that defendant was ineligible because he harbored the intent to commit identity theft (id. at p. 86), in Gonzales's case the trial court made no such factual finding. Rather, the court specifically found that the intended crime was forgery, and the prosecutor concurred. (RT (7) 304; see AOB 24.)

The opening brief observed that because the prosecutor specifically concurred that the intended crime was forgery, the People waived or forfeited any argument that it was actually or additionally identity theft. (See AOB 24.) According to the People, it was Gonzales, not the People, who forfeited the issue, "because he did not demur to the information." (RB 34.) There was, however, nothing to demur to because the crime with which Gonzales was charged, and to which he ultimately pleaded guilty, was indeed "enter[ing] a commercial building occupied by Bank of

America, with the intent to commit larceny and any felony." (CT 1 (information); see RT 3 (plea).) The information was thus sufficient on its face and provided adequate notice of his intent to commit theft by false pretenses. (See generally People v. Holt (1997) 15 Cal.4th 619, 672 (information that "charged the intent element of burglary in language conforming to section 459" was adequate); People v. Williams (1979) 97 Cal.App.3d 382, 387-388 ("a demurrer raises an issue of law as to the sufficiency of the accusatory pleading, and it tests only those defects appearing on the face of that pleading"); Pen. Code, § 1004.)

The People argue that section 459.5, subdivision (b), "deals only with prospective *charging*, not with retroactive resentencing." (RB 31, italics in original.) The People overlook the very provision of Proposition 47 that permits retroactive resentencing, that is, the recall of the original sentence and resentencing where defendant was sentenced prior to the effective date of Proposition 47 and is now serving that sentence:

> A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections . . . 459.5 . . . of the Penal

> Code, as those sections have been amended or added by this act.

(Pen. Code, § 1170.18, subd. (a); see also People v. Garrett, supra, 248 Cal.App.4th at p. 87.) Thus, because Gonzales's act would have constituted a violation of section 459.5 if that statute had existed at the time of the crime, he was entitled to have his burglary conviction reduced to a misdemeanor. (Pen. Code, § 459.5, subd. (b); Garrett at p. 88.) The possibility that the People could have charged him with something else, or that he could have pleaded to something other than what he did plead to, is irrelevant.

The People appear to argue that because identity theft is not technically "theft," it is not encompassed by section 459.5, subdivision (b). (RB 30-31.) As Garrett explained, however, under the statutory language, the fact that defendant may harbor an additional intent that was not within the scope of the initiative is irrelevant. (People v. Garrett, supra, 248 Cal.App.4th at p. 88.) Further, the People's supposition that the drafters adopted the view of certain appellate opinions that identity theft was not really theft, notwithstanding common usage, is hard to reconcile with their insistence that the drafters intended to interpret shoplifting according to its purported common usage rather than according to the statutory definition that the drafters themselves wrote.

In any event, the drafters' treatment of identity theft in the analogous context of forgery suggests that a prerequisite to

barring relief based on identity theft is that there be a conviction for identity theft. (See Pen. Code, § 473, subd. (b) ("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"), emphasis added; see AOB 23.) This suggests that the drafters and voters did not intend to preclude relief under section 459.5 merely because it was possible that defendant could have been charged with and convicted of identity theft. As noted above, Gonzales was not convicted of identity theft and was not even charged with that crime.

The People memorably argue that "under appellant's reasoning, if a defendant enters a shop with the intent to commit murder and also to commit petty theft, he may only be charged with shoplifting." (RB 33.) The plain statutory language forecloses the People's fear that would-be murderers will get away with a mere shoplifting conviction. The restriction on charging applies only to burglary or theft "of the same property." (Pen. Code, § 459.5, subd. (b).) Thus, an entry with intent to commit murder remains burglary even if defendant also harbors the intent to commit theft valued at $950 or less. (Of course, if the intended murder is consummated, nothing in Proposition 47 would preclude full punishment for that crime in any event.)

II.

In the alternative, Proposition 47 impliedly encompasses Gonzales's crime

This Court specified a second issue for review: whether Proposition 47 "impliedly includes any second degree burglary involving property valued at $950 or less." (See AOB 1; AOB 45-52 (addressing this second issue).) The People have not addressed the second issue. They only make a single brief reference to *Gonzales's* analysis of that issue, in their discussion of the separate question of the definition of "property." (RB 21.) The People have therefore forfeited any argument against this alternative ground. (See generally People v. Norman (1999) 75 Cal.App.4th 1234, 1241, fn. 4.)[9]

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[9] This Court is currently considering whether "the Attorney General's failure to argue in the answer brief that an alleged error is harmless constitute[s] forfeiture of any harmless error argument regarding either state law errors or federal constitutional errors." (People v. Grimes, S076339 (automatic appeal), order of June 18, 2014, requesting supplemental briefing.)

CONCLUSION

For these reasons, appellant Gonzales respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: July 27, 2016.

Respectfully submitted,

_____

Richard A. Levy
Attorney for
Giovanni Gonzales

CERTIFICATION OF WORD COUNT

I certify that the word count of this computer-produced document, calculated pursuant to rule 8.520(c)(1) of the Rules of Court, does not exceed 8400 words, and that the actual count is: **8398** words.

Richard A. Levy

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