IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CRAIG DANNY GONZALES,

Defendant and Appellant.

S240044

Court of Appeal, Third Appellate District, No C078960
Sacramento County Superior Court No. 03F07705

Hon. Marjorie Koller, Judge

APPELLANT'S ANSWER BRIEF ON THE MERITS

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960

PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108
campbell166960@gmail.com
Attorney for Appellant

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APPELLANT'S ANSWER BRIEF ON THE MERITS

INTRODUCTION

This court has limited briefing to the following issue:

> "What relationship, if any, must exist between convictions for forgery and identity theft in order to exclude a forgery conviction from sentencing as a misdemeanor under Penal Code section 473, subdivision (b)?"

The Court of Appeal answered this question by finding that, while the statutory language was ambiguous, the analysis by the Legislative Analyst in the voter information packet demonstrated that the two offenses must be "transactionally related" in order for the identity theft conviction to be excluded from relief under Penal Code section 1170.18. (*People v. Gonzales* (2016) 6 Cal.App.5th 1067, 1072-1073, rev. gr. 2/15/17.) The Attorney General urges this court to reverse that holding, arguing that the plain language

of the statute bars appellant from relief in the instant case. (Respondent's Opening Brief on the Merits, p. 14.)

In fact, whether this court finds the language ambiguous, as the Court of Appeal did, or relies on the plain language of the statute, it is clear that the intent of the electorate as revealed in both the language of the statute and the voter information materials was to maintain felony status for forgery charges committed in conjunction with identity theft, and not in the unusual circumstances of the instant case.

Appellant respectfully requests that this court affirm the holding of the Court of Appeal and remand the matter to the trial court.

STATEMENT OF THE CASE

On April 12, 2006, a consolidated information was filed in Sacramento County case numbers 03F07705 and 05F09704, charging appellant with a total of thirteen offenses. (C058340 CT 556 et seq.) Counts one, three, four, and five charged appellant with willfully making, forging, or passing a counterfeit check with intent to defraud. (Pen. Code, § 470, subd. (d).) (C058340 CT 556-557.) Count two charged him with obtaining money by false pretenses. (Pen. Code, § 532, subd. (a).) (C058340 CT 556.) Counts six charged him with possession of blank checks with the intention of completing them. (Pen. Code, § 475, subd. (b).) (C058340 CT 557-558, C058340 CT 633.) Count seven charged him with making, passing, or uttering a check with intent to defraud. (Pen. Code, § 476.) (C058340 CT 557.) Count eight charged him with possession of a falsified identification card. (Pen. Code, § 470b.) (C058340 CT 557-558, C058340 CT 633-634.) Counts nine and twelve charged him with possession of methamphetamine for sale. (Health & Saf. Code, § 11378.) (C058340 CT 558-559.) Counts ten and eleven charged him with transportation or sale of methamphetamine. (Health & Saf. Code, § 11379, subd. (a).) (C058340 CT 558-559.) Finally, count thirteen charged him with failing to appear. (Pen. Code, § 1320.5.) (C058340 CT 560.)[1]

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[1]Counts one, two, and five through ten were alleged to have been committed on September 9, 2003. Counts three and four were alleged to have been committed on July 26 and July 27, 2003, respectively. Counts eleven, twelve, and thirteen were alleged to have been committed on November 1, 2005; these

On July 13, 2007, while the matter in cases 03F07705 and 05F09704 was still pending, information number 06F11190 charged appellant with five new offenses. (C058340 CT 1191-1194.) Count one charged him with conspiracy to cheat and defraud ATT. (Pen. Code, § 182, subd. (a)(4).) (C058340 CT 1191.) Count two charged him with telephone fraud. (Pen. Code, § 502.7, subd. (a)(5).) (C058340 CT 1193.) Counts three, four, and five charged him obtaining identification without consent and using it to defraud. (Pen. Code, § 530.5, subd. (a).) (C058340 CT 1193-1194.)[2]

On February 22, 2007, appellant entered a change of plea in all cases. (C058340 CT 33.) He admitted all charges alleged in cases 03F07705 and 05F09704, and pleaded no contest to count six in case number 06F11190. (C058340 CT 33-34, 1172-1173.) On February 29, 2008, the court denied probation and imposed a total term of 18 years and four months for case numbers 03F07705 and 05F09704, with a total of 19 years and eight months for all three cases. (C058340 CT 38.)

On January 21, 2015, appellant filed a petition under Penal Code section 1170.18, requesting resentencing in case number 03F07705. (CT 2.) The court denied the request on March 13,

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counts were originally charged under case number 05F09704.

[2]Count one was alleged to have occurred between the dates of December 1, 2005, and August 31, 2006. Counts two through five were alleged to have occurred between the dates of January 1, 2006, and August 31, 2006. (C058340 CT 1191-1194.)

2015, noting that the denial was based on the current conviction. (CT 1, 7.)

Appellant filed timely notice of appeal on April 9, 2015. (CT 8.) On December 19, 2016, the Court of Appeal reversed the order denying relief as to count one and counts three through seven. (*People v. Gonzales* (2016) 6 Cal.App.5th 1067, 1073.) On February 15, 2017, this court granted review on its own motion.

STATEMENT OF FACTS

03F07705

During a search of a van connected to Craig Gonzales on September 9, 2003, law enforcement officers located a wallet containing counterfeit driver's licenses bearing Gonzales's photograph and the names Jim C., John O., and Mark L. (C058340 CT 731.) The wallet also contained counterfeit currency and counterfeit checks drawn on Wells Fargo bank accounts in the names of those three individuals. (C058340 CT 732.) Also found in the wallet were customer copies of receipts for a water heater and three garbage disposals; a new water heater and three new garbage disposals were found in the back of the van. (C058340 CT 732.) Two of these receipts were eventually tied to purchases made at the Lowe's in Elk Grove on September 9, 2003[3], and July 26, 2003. (C058340 CT 732.) The first purchase was for $564.32 and was made with a check bearing the name of Collins Construction and signed "Jim P." (C058340 CT 732.) The driver's license number written on the check corresponded to the number on the counterfeit license in the name of Jim C. that was seized from the wallet in the van. (C058340 CT 732.) The second receipt was for $315.35 and was made with a check bearing the name of Barrett Security; the identification presented was for a George B. (C058340 CT 732-733.)

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[3]The probation report lists this date as September 9, 2007, but in context that date is obviously incorrect.

The third receipt was for a $262.22 purchase made at Lowe's in Citrus Heights, also with a check in the name of Barrett Security, and signed by George B. (C058340 CT 733.) The fourth receipt was for a $312.46 purchase from Orchard Supply Hardware on September 9, 2003, and was also made with a check bearing the name of Collins Construction and the identification information for Jim C. (C058340 CT 733.)

In addition to the wallet, officers located a pouch in the front passenger area of the van containing four baggies of methamphetamine. (C058340 CT 733.) The pouch also contained a gram scale, clear plastic baggies, and two pipes for smoking methamphetamine, as well as a business card in the name of Mark L. (C058340 CT 733.) A search of Gonzales's person turned up a counterfeit driver's license in the name of Jim C., which bore Gonzales's photograph. (CT 733-734.) The number on this driver's license was the same as the number recorded on the checks used at Lowe's and OSH for purchases on September 9, 2003. (C058340 CT 734.) Detectives seized $504 in cash as well as two hotel keys. (C058340 CT 734.)

A search of a hotel room linked to Gonzales turned up a computer containing driver's license templates and photos, as well as a photo of Gonzales smoking methamphetamine with a pipe similar to the one found in the pouch in the van. (C058340 CT 734.)

06F11189

Between the dates of December 22, 2005, and June 12, 2006, fraudulent AT&T accounts were opened in Sacramento County using personal identifying information for persons named Ellen M., Eugene V., Edward J., Jane F., Lorraine F., and Michelle R. (C058340 CT 736.) The personal identification information had been obtained by an employee, later identified as Lakenya Brumfield, at the billing department of a local hospital. (C058340 CT 736.) Brumfield gave the information to another woman, Melissa Brown. Brumfield's husband, Marquette Hudson, was housed in the same pod as Craig Gonzales at the Sacramento County Main Jail in December of 2005. (C058340 CT 736.) When interviewed by law enforcement officers, Brown and Brumfield stated that Hudson had introduced Gonzales to Brown so that Gonzales could open a fraudulent telephone account. (C058340 CT 736.)

Ultimately officers uncovered a scheme designed to permit Hudson and Gonzales to make free telephone calls from the jail. (C058340 CT 737.) Brown opened a fraudelent account in the name of Ellen M., with phone calls on that account from the jail totaling $1,022.01 An account under the name of Eugene V. was used to make calls totalling $516.09. (C058340 CT 736.) Calls to an account under Edward J.'s name totaled $524.69; the account under Lorraine F.' s name totaled $461.22. (C058340 CT 736.) A final account had calls totaling $1,398.29. (C058340 CT 737.)

ARGUMENT

THE COURT OF APPEAL CORRECTLY REVERSED THE ORDER DENYING THE PENAL CODE SECTION 1170.18 PETITION BECAUSE APPELLANT'S IDENTITY THEFT CONVICTION WAS NOT TRANSACTIONALLY RELATED TO HIS FORGERY CONVICTIONS

This court has granted review to determine what relationship is required between a forgery conviction and an identity theft conviction in order for the latter to bar application of the sentence reduction enacted by Proposition 47. The People argue here, as they did in the lower courts, that appellant was ineligible for resentencing for forgery due to the exclusion stated in Penal Code section 473, subdivision (b), which states that the sentence reduction enacted by Proposition 47 "shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5." (Pen. Code, § 473, subd. (b); see Respondent's Opening Brief on the Merits, pp. 11 et seq.)

Appellant was not convicted of any violation of Penal Code section 530.5 in case number 03F07705, which involved offenses that occurred in 2003. (C058340 CT 731.) He was, however, convicted of a single violation of that code section in case number 06F11190, based on conduct that occurred in 2005 and 2006. (C058340 CT 736-737.)

The Court of Appeal correctly found that this transactionally unrelated conviction does not bar appellant from relief under Penal Code section 1170.18. The appellate court relied on the ambiguity of the word "both" in Penal Code section 473, subdivision (b), and clear indications in the ballot materials stating that in order for

this exclusion to apply, the identity theft be transactionally related to the forgery charge. (*People v. Gonzales* (2016) 6 Cal.App.5th 1067, 1072-1073, rev. gr. 2/15/17.) Appellant urges this court to adopt the Court of Appeal's sound reasoning.

Even if this court does not find the language ambiguous, however, the plain language of the statute as read within the context of other relevant law shows that the electorate could not have intended for the exclusion to apply under the specific circumstances of this case. In short, well-established rules of statutory construction demonstrate that appellant was eligible for resentencing, because the exclusionary language in section 473, subdivision (b), only applies to convictions under Penal Code section 530.5 that occur in connection with – that is, are transactionally related to – the forgery conviction in question. Here the record of conviction plainly shows that appellant was not ineligible for relief on this basis.

Appellant requests that this court affirm the holding of the Court of Appeal and remand to the trial court for further proceedings.

A. The Court of Appeal Correctly Found the Statutory Language to be Ambiguous

As noted, the appellate court found that the statute was ambiguous regarding what relationship must exist between the forgery charge and the identity theft charge in order to disqualify a petitioner from relief under Penal Code section 473, subdivision (b). (*People v. Gonzales* (2016) 6 Cal.App.5th 1067, 1072-1073, rev. gr. 2/15/17.) This interpretation was correct.

As this court is aware, on November 4, 2014, voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47). Proposition 47 created a new resentencing provision, section 1170.18, by which a person currently serving a felony sentence for an offense that is now a misdemeanor may petition for a recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47. (Pen. Code, § 1170.18, subd. (a).) A person who satisfies the criteria in subdivision (a) of section 1170.18 shall have their sentence recalled and be resentenced to a misdemeanor unless the court determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. (Id., subd. (b).)

Proposition 47 added subdivision (b) to section 473, which provides that most forgery convictions involving amounts under $950 are now to be treated as misdemeanors. (Pen. Code, § 473, subd. (b).) Subdivision (b) further states, however, that "[t]his subdivision shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5." (Pen. Code, § 473, subd. (b).) As the Court of Appeal noted, the statute does not define the word "both," nor does it explicitly state whether the forgery conviction and the identity theft conviction must be transactionally related, or whether (for instance) a prior conviction for identity theft is disqualifying.

When a court construes a statute, its role is to ascertain the intent of the enacting legislative body in order to adopt the

construction that best effectuates the purpose of the law. (*People v. Albillar* (2010) 51 Cal.4th 47, 54-55.) The court should first examine the words of the statute, "giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent." (*People v. Albillar, supra*, 51 Cal.4th at p. 55, internal quotations and citations omitted.) If the language of the statute is not ambiguous, then the plain meaning of the language controls, and the court need not resort to extrinsic sources to determine the intent of the lawmakers. (*Ibid.*, see also *People v. Traylor* (2009) 46 Cal.4th 1205, 1212.) The text of the statute is the starting point, and generally provides the most reliable indicator of the law's intended purpose. (*People v. Prunty* (2015) 62 Cal.4th 59, 72.)

However, where the lawmaking authority has not set forth in so many words what it intended, a court may need to consult sources outside of the statutory text for clues as to the legislative intent. Thus, when the language of a statute is ambiguous and subject to more than one reasonable interpretation, a court looks "to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Flores* (2003) 30 Cal.4th 1059, 1063, citations omitted.)

In interpreting an initiative measure as opposed to a statute enacted by the Legislature, courts apply the same principles of

statutory construction. "We first consider the initiative's language, giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole." (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571.) If the language is not ambiguous, the court will presume that the voters intended the meaning apparent from that language. (*Ibid.*) However, if the language is ambiguous, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. (*Ibid.*)

The Court of Appeal here held that "[t]he use of 'both' in section 473(b) does not clearly prescribe the manner in which the convictions for forgery and identity theft must be related." (*People v. Gonzales, supra,* 6 Cal.App.5th at p. 1073.) As the court correctly concluded, the plain language of section 473, subdivision (b), does not explicitly state one way or another whether the two convictions must be transactionally related. Instead, the language simply states: "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." (Pen. Code, § 473, subd. (b).) While the word "both" certainly indicates that the electorate contemplated a defendant who committed a forgery that was somehow related to a simultaneous crime of identity theft, it does not explain what relationship is required.

Clearly "both" does not simply mean that the defendant has at some time been convicted of forgery and identity theft. At a basic grammatical level, the word "both" could encompass a

situation where the conviction for identity theft happened in the *past*, i.e., where it is a prior conviction. But this interpretation seems unlikely. The drafters of the initiative certainly knew how to draft an exclusion based on prior convictions, as they did so in this very same paragraph, where they excluded from eligibility any person who "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." (Pen. Code, § 473, subd. (b).)

The term "both" could also mean that the forgery charge and the identity charge are transactionally related, i.e., involve the same victim or are committed according to a common scheme or plan. (See, e.g., Pen. Code, § 12022.6, subd. (b).) The term could also simply mean that the two offenses are charged in the same charging document. Through more tortured interpretations, the word "both" could encompass a defendant who is awaiting trial on check forgery charges and commits, three years after that offense, an unrelated identity theft offense. (See Respondent's Opening Brief on the Merits, pp. 11 et seq.)

In sum, the Court of Appeal was correct in concluding that the term "both," as used in subdivision (b) of section 473, is susceptible of more than one meaning. Thus, it is appropriate for this court to consider extrinsic materials in determining the electorate's intent. (See *People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.)

B. The Voter Information Pamphlet Shows an Intent by the Electorate to Require a Transactional Relationship Between a Forgery Charge and a Disqualifying Identity Theft Charge.

The Court of Appeal correctly concluded that not only was the statutory language ambiguous, the available extrinsic clues demonstrate an electoral intent to require a transactional relationship between a forgery conviction and a disqualifying identity theft conviction. (*People v. Gonzales, supra*, 6 Cal.App.5th at p. 1073.) This court should affirm this ruling.

While section 473 does not specify whether the convictions must arise from a single proceeding, the ballot materials accompanying Proposition 47 indicate clearly that the exclusionary provision of Penal Code section 473, subdivision (b), was intended to apply only where check forgery was transactionally related to identity theft. The materials prepared by the Legislative Analyst makes this clear:

> Check Forgery. Under current law, it is a wobbler crime to forge a check of any amount. Under this measure, forging a check worth $950 or less would always be a misdemeanor, except that it would remain a wobbler crime *if the offender commits identity theft in connection with forging a check.*

(Voter Information Guide, Gen Elec. (Nov. 4, 2014), p. 35, emphasis added.) In other words, the identity theft must occur *in connnection with* the check forgery.

The Court of Appeal analyzed the language from the voter pamphlet and concluded:

> In light of this indicium of the intent with which voters enacted the proposition, it is clear that "convicted both of" (§ 473(b)) must apply only to identity theft that is committed in a transactionally related manner with the forgery of an instrument, and not where, as here, the identity theft occurred in an independent transaction that simply happened to be part of the same sentencing proceeding.

(*People v. Gonzales, supra*, 6 Cal.App.5th at p. 1073.)

This interpretation is consistent with the overall intent of the electorate as expressed in the language of Proposition 47 and in the voter materials. The overall purpose of Proposition 47, as expressed in those materials, was to "ensure that prison spending is focused on violent and serious offenses" and to "maximize the alternatives for nonserious, nonviolent crimes," and to reinvest savings from prison spending into prevention and support programs. (Ballot Pamp., Text of Prop. 47, § 2, p. 70.) Under the statement of "purpose and intent," the ballot pamphlet included the following:

> Require misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes.

(Ballot Pamp., Text of Prop. 47, § 3, p. 70.)

The overall effect of Proposition 47 is to reduce the number of property and other minor crimes that may be sentenced as felonies, but to balance that reduction with provisions retaining felony sentencing for those with certain specified prior convictions. Further, because identity theft under Penal Code section 530.5 was

not included in the list of crimes reduced to misdemeanors by Proposition 47, it may be inferred that the electorate did not consider either identity theft nor forgery involving a sum under $950 committed *in conjunction with* identity theft to be the type of minor offense for which felony sentencing was inappropriate.

As noted, when confronted with ambiguous language in a statute enacted by initiative measure, courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure. *(People v. Superior Court, supra*, 48 Cal.4th at p. 571.) In construing an initiative measure, this court's task is to ascertain the intent of the voters. (*People v. Yearwood* (2013) 213 Cal. App. 4th 161, 172.) Ballot arguments are a reliable indicia of voter intent. (See *People v. Yearwood, supra*, 213 Cal.App.4th at p. 175; cf. *People v. Martinez* (2016) 5 Cal.App.5th 234, 242-243.) Ambiguities are to be interpreted in the defendant's favor unless the interpretation would provide a result that is absurd or contrary to legislative intent. (*People v. Cruz* (1996) 13 Cal.4th 764, 783, citing *People v. Davis* (1985) 166 Cal.App.3d 760, 766.)

The voter materials make only a single reference to the identity theft exception for forgery convictions, the above-cited reference to "in conjunction with." The Attorney General argues that this reference to checks forged in conjunction with identity theft is only one example of a situation in which a forgery conviction would remain a wobbler, because there might be other scenarios in which the exception would apply. (Respondent's

Opening Brief on the Merits, p. 18.) The Attorney General argues that, for instance, the statement does not mention forged bonds, bank bills, notes, cashier's checks, traveler's checks, or money orders. (Respondent's Opening Brief on the Merits, p. 18.) From this, the People conclude that because the reference to check forgery was only one example of the types of offenses reduced to misdemeanors under Penal Code section 473, subdivision (b), that the "in conjunction" language was also merely an example of situations that would be excluded from that reduction. (Respondent's Opening Brief on the Merits, p. 18.)

The People's second point does not necessarily flow from their initial observation. The Legislative Analyst's decision to use "check" as a shorthand for an exhaustive list of documents that may be forged does not mean that the words "in conjunction with" were meaningless or simply an example of a long list of possible relationships. Moreover, the People's next argument – that forgeries of some documents are unlikely to involve identity theft – does not in any way prove respondent's point, but rather provides one explanation for why the Legislative Analyst might have chosen the shorthand "checks." (See Respondent's Opening Brief on the Merits, pp. 18-19.)

Finally, the People's third point – that there are many kinds of identity theft, some of which involve the use of a person's identifying information and some of which are complete when the information is obtained – does not in any way settle the point, but rather simply demonstrates a further ambiguity. Perhaps the

electorate intended that the exclusion apply only where the identity theft is used to further the forgery. Perhaps the electorate intended a course of conduct analysis, or intended the exclusion to apply whenever the offenses were committed according to a common scheme or plan.

What is known is that the electorate intended for the exclusion to apply only where the check forgery occurs "in conjunction with" an identity theft, and not when the two offenses are entirely unrelated. To the extent that the language remains ambiguous, the rule of lenity states that this court should construe the language in the manner most favorable to the defendant. (*People v. Hernandez* (2003 30 Cal.4th 835, 869.)

In any event, regardless of the finer points of this statutory instruction, the exclusion would not have applied to appellant under any reasonable interpretation. His case did not involve a check forgery, or any other kind of forgery, committed "in conjunction" with any violation of Penal Code section 530.5. His offenses were not transactionally related; they did not occur in the same course of conduct; they were not committed on the same occasion; they did not occur according to a common scheme or plan. They were not even charged in the charging document.

Appellant's sole conviction under Penal Code section 530.5 was based on conduct that occurred two to three years after the forgery crimes for which he was convicted. Thus, the conviction in case number 06F11190 did not render him ineligible for resentencing on the forgery counts in case number 03F07705,

because he was not convicted of committing identity theft "in connection with" forging a check.

C. Even If this Court Does Not Agree That the Language Is Ambiguous, the Language of the Statute Demonstrates an Intent to Treat Cases Such as the Instant Matter as Misdemeanors

Even if the court disagrees that the word "both" is ambiguous, no reasonable interpretation of the plain language of this statute could encompass the circumstances of this case. Thus, even if the court declines to consider the extrinsic materials, it should still uphold the Court of Appeal ruling finding appellant eligible for relief.

"When statutory language is clear and unambiguous, there is no need for construction, and courts should not indulge in it." (*People v. Edwards* (1991) 54 Cal.3d 787, 810.) Courts decline to follow the plain meaning of a statute "only when it would inevitably have frustrated the manifest purpose of the legislation as a whole or led to absurd results." (*People v. Bellici* (1979) 24 Cal.3d 879, 884.) The words of a statute must be given their ordinary meaning. (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 198; *People v. Weidert* (1985) 39 Cal.3d 836, 843.) "[I]f no ambiguity, uncertainty, or doubt about the meaning of a statute appears, the provision is to be applied according to its terms without further construction. [Citation.]" (*In re Atiles* (1983) 33 Cal.3d 805, 811, limited on other grounds in *In re Joyner* (1989) 48 Cal.3d 487, 495.)

Respondent would have this court adopt an interpretation of the statute that permits an offense committed *three years after* the initial offense to alter the sentencing for the initial offense. Respondent endorses this position even though it is inarguable that, had appellant been promptly tried and sentence for the 2003 case, the subsequent 2006 offenses would have had no affect on his eligibility for relief as to the 2003 offenses.

Appellant is aware of no other scenarios where such a result can occur under California law. As previously discussed, the lawmaking authorities in this state are well-versed in drafting statutes that take into account the existence of prior convictions in determining punishment for subsequent offenses. Indeed, an entire body of statutory, constitutional, and decisional law governs the use of prior convictions in this fashion. Respondent suggests that, with one sentence in an otherwise unrelated proposition, the electorate has created a new class of *subsequent* convictions that can be used to increase an offender's sentence for a crime committed several years previously.

It is a fundamental rule of statutory construction that statutes should be construed to avoid anomalies. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76, citing *State of South Dakota v. Brown* (1978) 20 Cal.3d 765, 775.) "In the end, a court must adopt the construction most consistent with the apparent legislative intent and most likely to promote rather than defeat the legislative purpose and to avoid absurd consequences." (*People v. Leiva* (2013) 56 Cal.4th 498, 518, internal quotation marks omitted.) In the

instant case, there is no rational construction of the plain language of the statute that permits the exclusion to apply under the facts at issue here.

D. This Court Should Avoid an Interpretation of the Statute That Would Apply the Exclusionary Provision of Section 473 to These Facts in Order to Avoid a Serious Constitutional Question.

When a question of statutory interpretation implicates constitutional issues, a court should endeavor to interpret the statute in a way that avoids that constitutional question:

> If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable.

(*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373, citing *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 548, and *People v. Leiva, supra*, 56 Cal.4th at pp. 506-507.) "Applying this canon, we have repeatedly construed penal laws, including laws enacted by initiative, in a manner that avoids serious constitutional questions." (*People v. Gutierrez, supra,* 58 Cal.4th at pp. 1373-1374, citing *People v. Leiva, supra*, 56 Cal.4th at p. 509, *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 509-519, *People v. Smith* (1983) 34 Cal.3d 251, 259-262, and *Jones v. United States* (1999) 526 U.S. 227, 239-240 [119 S.Ct. 1215; 143 L.Ed.2d 311].) "We adopt the less constitutionally problematic

interpretation of a penal statute so long as that interpretation is 'reasonably possible.'" (*People v. Gutierrez, supra,* 58 Cal.4th at p. 1374, citing *People v. Superior Court* (*Romero*), *supra*, 13 Cal.4th at p. 513.)

The United States and California Constitutions guarantee equal protection of the law. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7.) To construe this statute as excluding appellant from relief because his cases were resolved together, when he would have been eligible for relief had the 2003 case resolved at a different time, would raise constitutional difficulties under the Equal Protection Clauses of the state and federal constitutions. It would be a denial of equal protection of the law to provide that persons who enter an early plea or are tried promptly are entitled to misdemeanor sentencing, where a person whose case does not resolve promptly is ineligible for relief, even if the criminal conduct occurred in precisely the same manner and at the same time.

When faced with an equal protection challenge, the stringency of judicial review depends upon the character of the classification and the interest at stake. (*Plyler v. Doe* (1982) 457 U.S. 202, 216-217 [102 S.Ct. 2382; 72 L.Ed.2d 786].) For most forms of state action courts apply the "rational relationship" test under which the court "seek[s] only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." (*Plyler v. Doe, supra*, 457 U.S. at p. 216.) The "rational relationship" test "invests legislation involving such differentiated treatment with a presumption of constitutionality

and 'requir[es] merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose.'" (*In re Marriage Cases* (2008) 43 Cal.4th 757, 832, citations omitted.)

But "strict scrutiny" is required where the state's classifications disadvantage a suspect class or impinge upon a fundamental right. (*Plyler v. Doe, supra*, 457 U.S. at pp. 216-217; *In re Marriage Cases, supra*, 43 Cal.4th at p. 832.) Because the instant case affects personal liberty, strict scrutiny is the standard that would be applied were the constitutional issue to arise. (*People v. Olivas* (1976) 17 Cal.3d 236, 244-251; *People v. McKee* (2010) 47 Cal.4th 1172, 1197-1198.)

"Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." (*In re Marriage Cases, supra*, 43 Cal.4th 747, 832, citations omitted, emphasis in original.) Further, to meet the requirements of strict scrutiny, the state has the burden to show that "the classification is narrowly drawn to achieve the goal by the least restrictive means possible." (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913, citations omitted.)

Here, respondent's proposed construction satisfies neither the rational basis test nor the strict scrutiny test. There is no state interest in determining whether a person is eligible to have their case reduced to a misdemeanor based on the order in which they

entered their pleas. There is no state interest in punishing a person more harshly for a 2003 offense based on conduct that occurred in 2006, and more particularly there is no rational basis to punish a person more harshly due to an identity theft conviction that occurred three years after the check forgery in question, where a *prior* conviction for identity theft would not have resulted in the same treatment.

This court should construe the statute to avoid these unconstitutional and anomalous results.

E. Conclusion

Under any rational reading of this statute, appellant was eligible for relief because the exclusion in Penal Code section 473, subdivision (b), did not apply to the circumstances of his case. The Court of Appeal reached the correct result, and this court should affirm the lower court's holding.

CONCLUSION

For the foregoing reasons, appellant requests that this court affirm the holding of the Court of Appeal, and remand the matter back to the trial court for further proceedings.

Dated: August 16, 2017

Respectfully submitted,

ELIZABETH CAMPBELL
Attorney at Law
State Bar No. 166960

PMB 334
3104 O Street
Sacramento, CA 95816
(530) 786-4108
campbell166960@gmail.com
Attorney for Appellant

CERTIFICATE OF WORD COUNT

As required by California Rules of Court, Rule 8.520(c), I certify that this brief contains 6,155 words, as determined by the word processing program used to create it.

Elizabeth Campbell
Attorney at Law

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a member of the State Bar of California and a citizen of the United States. I am over the age of 18 years and not a party to the within-entitled cause; my business address is PMB 334, 3104 O Street, Sacramento, California, 95816.

On August 16, 2017, I served the attached

APPELLANT'S ANSWER BRIEF ON THE MERITS

(by mail) - by placing a true copy thereof in an envelope addressed to the person(s) named below at the address(es) shown, and by sealing and depositing said envelope in the United States Mail at Sacramento, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

Craig Danny Gonzales 30857 Golden Gate Drive Canyon Lake, CA 92587	Sacramento County Superior Court 720 9th Street Sacramento, CA 95814 Sacramento County District Attorney 901 G Street Sacramento, CA 95814

(by electronic transmission) - I am personally and readily familiar with the preparation of and process of documents in portable document format (PDF) for e-mailing, and I caused said document(s) to be prepared in PDF and then served by electronic mail to the party listed below, by close of business on the date listed above:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 16, 2017, in Sacramento, California.

_____

DECLARANT