IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

vs.

MIGUEL ANGEL JIMENEZ,

Defendant and Respondent.

COURT NO. S249397

Court of Appeal
No. B283858

Ventura County
Superior Court
No. 2016041618

OPENING BRIEF ON THE MERITS

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TO CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Appellant, the People of the State of California, by and through Gregory D. Totten, District Attorney of the County of Ventura, respectfully submits this opening brief on the merits.

ISSUE PRESENTED

Does the unauthorized use of the personal identifying information of another in violation of section 530.5, subdivision (a) of the Penal Code, constitute theft subject to reclassification as a shoplifting as defined by Penal Code section 459.5, pursuant to Penal Code section 1170.18 and Proposition 47?

OVERVIEW OF PROPOSITION 47

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act" ("the Act"). Its stated goal was "to ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) Though the Act aims to reduce spending, this court has recognized that "the purpose of saving money does not mean we should interpret the statute in every way that might maximize any monetary savings." (*People v. Morales* (2016) 63 Cal.4th 399, 408.)

Proposition 47 targets specific, enumerated theft and drug crimes as offenses that should be penalized in most instances as misdemeanors. (Pen. Code,[1] §§ 1170.18, 459.5, 490.2.) The act allows a person convicted of a felony to be resentenced if the person would have been guilty of a misdemeanor had the Act been in effect at the time of their offense. (See § 1170.18, subds. (a)-(i); Voter Information Guide, *supra*, text of Prop.47 §§ 2-3.) One way an offense may be deemed a misdemeanor is pursuant to section 490.2, which provides that "obtaining any

[1] Subsequent statutory references, if undesignated, are to the Penal Code.

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."[2]

In section 459.5, Proposition 47 created the new crime of shoplifting, "defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).)[3] In most cases, shoplifting is a misdemeanor but if a defendant has an enumerated prior conviction the crime may be punished as a felony.

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[2] Section 490.2, subdivision (a) provides in full:

> Notwithstanding Section 487 or any other provision of law defining grand theft, 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 and shall be punished as a misdemeanor, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 if that person has one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290.

[3] Section 459.5, subdivision (a) provides in full:

> Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except that a person with 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 may be punished pursuant to subdivision (h) of Section 1170.

(§ 459.5, subd. (a).) The shoplifting statute has a defined preclusive effect on the charging of "burglary or theft of the same property." (§ 459.5, subd. (b).)

SUMMARY OF ARGUMENT

Respondent was charged with violations of section 530.5, subdivision (a)[4] (§ 530.5(a)), colloquially known as "identity theft." Section 530.5(a) provides in pertinent part: "Every person who willfully obtains personal identifying information ... of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense ...." and shall be punished as either a misdemeanor or felony. Section 530.5(a) was neither amended by Proposition 47 nor made expressly subject to the resentencing provisions in section 1170.18. For this reason, the charged crime in this case can only be reduced or reclassified based on the direction found in sections 459.5 and 490.2. Application of the normal rules of statutory construction means the questions raised in this case are answered by the text of sections 490.2 and 459.5.

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[4] Section 530.5(a) provides in full:

> Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.

The trial court reclassified respondent's convictions as shoplifting, and the Court of Appeal agreed. But, the public offense defined in section 530.5(a) is not an act of shoplifting. The conduct required for its violation reaches beyond the mere and incidental entry into a commercial establishment that would be punished by the shoplifting statute, and the victim of the misuse of identity is not the store but is instead the person or entity whose information was used. Moreover, section 530.5(a) is not included in the unambiguous and concise list of the crimes which cannot be jointly or alternately charged when a defendant's conduct meets the definition of shoplifting.

Respondent has relied primarily on the language found in subdivision (b) of section 459.5 requiring that an act of shoplifting be charged as shoplifting, but that direction can only be properly understood in light of the immediately following phrase proscribing only additional burglary or theft charges related to "the same property." The preclusion does not apply here. The misuse of identity in violation of section 530.5(a) as charged in this case is defined not as theft or grand theft but instead as a public offense. More importantly, the crime lacks the "hallmarks of theft" relied upon by this court when construing the Act's application to other statutes. As such, a violation of section 530.5(a) is not subject to the preclusive impact of subdivision (b) of section 459.5. Furthermore, the personal identifying information at issue in a charged violation of section 530.5(a) is not the same property that would be at issue in a shoplifting charge.

Extrinsic considerations also support the conclusion that identity theft was excluded from Proposition 47's ameliorative reach. No part of the initiative or the voter materials informed the voters that the unauthorized use of their personal identifying information would be subject to reduced penalties if the initiative passed. To the contrary, the voters' materials signaled that identity theft is a different type of offense by informing voters that check forgery committed in combination with identity theft could still be prosecuted as a felony. (§ 473, subd. (b).)

STATEMENT OF THE CASE

Respondent, Miguel Angel Jimenez, was charged by Information with two felony counts of the acquisition and unauthorized use of the personal identifying information of another, in violation of section 530.5 (a). It was further alleged that he had suffered a prior strike conviction for assault with a deadly weapon and a prison prior. (§§ 245, subd. (a)(1); 667, subds. (c)(1), (e)(1); 1170.12, subds. (a)(1), (c)(1); 1170, subd. (h)(3); 667.5, subd. (b).)

On two separate occasions in June of 2016, respondent went to Loan Plus, a check cashing company in Oxnard. On each occasion, respondent presented a check allegedly issued from the corporation known as OuterWall, Inc. At the time respondent cashed them, the checks were made payable to respondent, for $632.47 and $596.60, respectively, and OuterWall's account information appeared on both checks. In fact, neither check had been issued by OuterWall in respondent's name

and respondent did not have permission to possess, issue, or use the checks or the personal identifying information contained on the checks.[5]

Respondent was charged with neither burglary nor theft from Loan Plus. (§§ 459, 484.) He was charged only with two counts of the willful acquisition of the personal identifying information (bank account number) of OuterWall, Inc. and its unconsented to use for an unlawful purpose. (§530.5 (a).)

In February 2017, a jury convicted respondent of both felony counts and he admitted the special allegations. Before he was sentenced, respondent filed a motion to reduce his conviction offenses to misdemeanor shoplifting pursuant to § 459.5, § 1170.18, Proposition 47, and *People v. Gonzales* (2017) 2 Cal.5th 858 (*Gonzales I*). Thereafter, at respondent's May 26, 2017 sentencing hearing, over the People's objection, the court granted respondent's motion and reclassified the felony convictions to misdemeanor shoplifting convictions under section 459.5.

The People filed a timely notice of appeal, and the case was heard in the Second Appellate District, Division Six. The Court of Appeal issued its published decision on May 8, 2018, affirming the trial court's order. (*People v. Jimenez* (2018) 22 Cal.App.5th 1282.) The People's petition for review was granted by this court on July 26, 2018.

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[5] Cashing checks stolen from a company is sufficient to establish a violation of section 530.5(a). (*People v. Barba* (2012) 25 Cal.App.4th 214, 228.) Penal Code section 530.55, subdivision (a) provides: "For purposes of this chapter, 'person' means a ... firm, association, organization, partnership, business trust, company, corporation, limited liability company ...."

ARGUMENT

I.

STANDARD OF REVIEW

Whether a defendant is entitled to have a conviction reclassified as a misdemeanor under Proposition 47 is a question of statutory interpretation that is reviewed de novo. (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Gonzales* (2018) __ Cal.5th __ [237 Cal.Rptr.3d 193, 198] (*Gonzales II*).)

Voter initiatives are construed by the same principles applied to legislative enactments. (*People v. Johnson* (2015) 61 Cal.4th 674, 682.) The inquiry begins with the "language of the statute, to which we give its ordinary meaning and construe in the context of the statutory scheme." (*Ibid.*) The process begins with the statutory language because "the statutory language is generally the most reliable indicator of legislative intent." (*People v. Leiva* (2013) 56 Cal.4th 498, 506, citing *People v. King* (2006) 38 Cal.4th 617, 622 [punctuation omitted].) For this reason, when the statutory language is unambiguous, "the plain meaning controls" (*People v. Leiva, supra*, 56 Cal.4th at p. 506, citing *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519), and "there is no need for construction ...." (*People v. Zambia* (2011) 51 Cal.4th 965, 972.)

The statutory language is not considered in isolation. Instead the court must look to "'the entire substance of the statute ... in order to determine the scope and purpose of the provision .... [Citation.]' [Citation.]" (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) Every "word, phrase, sentence, and part of an act" is significant.

(*People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277.) "'If the Legislature has provided an express definition of a term, that definition ordinarily is binding on the courts.'" (*Ibid.*, citing *Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063.) Omissions are also significant: "failure to make changes in a given statute in a particular respect when the subject is before the Legislature, and changes are made in other respects, is indicative of an intention to leave the law unchanged in that respect." (*Kusior v. Silver* (1960) 54 Cal.2d 603, 618.)

II.

SECTION 530.5(A) DEFINES A PUBLIC OFFENSE WHICH IS NOT THEFT

Misuse of identity in violation of section 530.5(a) is commonly referred to as "identity theft." However convenient this term of art has become, it does not define the crime itself. (See *People v. Barba* (2012) 211 Cal.App.4th 214, 226-227 [use of shorthand term "identity theft" does not alter statute to require proof of personation].) Instead, section 530.5(a) provides that "[e]very person who willfully obtains personal identifying information ... and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services ... or medical information without the consent of that person, is guilty of a public offense ...."

"Notably absent from [the elements of identity theft] is any requirement—central to the crime of theft—that the information be stolen at all. (*People v. Thuy Le Truong* (2017) 10 Cal.App.5th 551, 561-562.) "Theft ... requires a taking with intent to steal the property—that is, the intent to permanently deprive the owner of its

possession." (*People v. Page* (2017) 3 Cal.5th 1175, 1182 [*Page*].) For a violation of section 530.5(a), however, the information does not have to be taken away from its owner. By possessing a victim's identifying information, "the defendant does not deprive the rightful owner of it; any number of people can be in simultaneous possession of the same information." (*People v. Thuy Le Truong, supra,* 10 Cal.App.5th at pp. 561-562.) Nor does acquisition of the personal identifying information have to be without the owner's consent or otherwise fraudulent, as required by the definition of theft in section 484.[6] (See *In re Rolando S.* (2011) 197 Cal.App.4th 936, 941 [act of memorizing password shared in unsolicited text message was sufficient to establish minor willfully obtained the information].) Moreover, any unlawful use will satisfy the second element. A defendant might use the victim's identity to obtain cash or goods but also might try to obtain medical information or infiltrate a victim's social media accounts. (See *ibid.* [unlawful purpose includes causes of action under civil tort law].)

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[6] Section 484, subdivision (a), which defines theft, provides in pertinent part:

> Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft.

Whatever the unlawful use, "no injurious intent or result is required." (*People v. Hagedorn* (2005) 127 Cal.App.4th 734, 744 [defendant used victim's identity to cash check which was payment for work performed by defendant in victim's name].) "It is evident from the legislative history of section 530.5 and *Hagedorn* that the purpose of section 530.5, subdivision (a) is to criminalize the willful use of another's personal identifying information, regardless of whether the user intends to defraud and regardless of whether any actual harm or loss is caused." (*People v. Johnson* (2012) 209 Cal.App.4th 800, 816-818 [violation of section 530.5(a) does not require proof that victim was harmed].)

The Legislature did not characterize section 530.5(a) as a theft offense. In *Romanowski*, this court analyzed whether theft of access cards in violation of section 484e[7] was subject to reduction pursuant to section 490.2." (*People v. Romanowski*

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[7] Section 484e provides:

> (a) Every person who, with intent to defraud, sells, transfers, or conveys, an access card, without the cardholder's or issuer's consent, is guilty of grand theft.
> (b) Every person, other than the issuer, who within any consecutive 12-month period, acquires access cards issued in the names of four or more persons which he or she has reason to know were taken or retained under circumstances which constitute a violation of subdivision (a), (c), or (d) is guilty of grand theft.
> (c) Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of petty theft.
> (d) Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft.

(2017) 2 Cal.5th 903, 908 [*Romanowski*].) Added by Proposition 47, "section 490.2, subdivision (a), mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950." (*Page*, *supra*, 3 Cal.5th at p. 1183.) The answer in *Romanowski* therefore hinged on whether section 484e was a theft crime. Noting first that section 484e was defined as "grand theft" (§ 484e, subd. (d)), this court next observed "[s]ection 484e also resides in chapter 5 of the Penal Code, which is titled 'Larceny.'" (*Romanowski*, *supra*, 2 Cal.5th at p. 908.) Based on the statutory definition and chapter placement, this court concluded: "In just about every way available, the Legislature made clear that theft of access card information is a theft crime." (*Ibid.*)

The same conclusion cannot be made about the misuse of identity at issue in this case. Unlike section 484e, section 530.5(a) is defined as a public offense and contains no references to theft or its hallmarks. Moreover, section 530.5 "is placed in the chapter of the Penal Code defining 'False Personation and Cheats,' which includes crimes such as marriage by false pretenses (§ 528), and falsifying birth certifications and licenses (§§ 529a, 529.5)." (*People v. Liu* (2018) 21 Cal.App.5th 143, 151, review granted on a different issue, April 10, 2018, S248130; see also *People v. Sanders* (2018) 22 Cal.App.5th 397, 403-404, review granted and held behind this case, July 25, 2018, S248775.) Here, with regard to misuse of identity, the Legislature has used "just about every way available," to make clear that a violation of section 530.5(a) is *not* a theft offense.

Aware of its statutory definition, the Legislature has specifically listed section 530.5 when it has meant to include it in a statute. For example, subdivision (d) of section 368 specifies:

> Any person who is not a caretaker who violates any provision of law proscribing theft, embezzlement, forgery, or fraud, *or who violates Section 530.5 proscribing identity theft*, with respect to the property or personal identifying information of an elder or a dependent adult, and who knows or reasonably should know that the victim is an elder or a dependent adult, is punishable as follows.

(Emphasis added.) Identity theft is expressly listed alongside theft, embezzlement, forgery, and fraud, because the misuse of identifying information it proscribes is not, by definition, in the same classification of crimes.

That section 530.5 has developed as a non-theft offense is significant. In *Gonzales I*, this court held that the electorate is presumed to have understood, based on the historical development of the burglary and theft statutes, that the use of the term "larceny" in section 459.5 included each of the three different types of theft as enumerated in section 484. (*Gonzales I, supra*, 2 Cal.5th 858, 869-871.) The defendant in *Gonzales I* was charged with check forgery. (*Ibid.*) Check forgery, under section 476, applies when a person makes or uses a forged check "with intent to defraud." Fraudulently depriving another person of money or goods is, by definition theft. (See § 484.) But because shoplifting applies to "larceny," it was necessary for this court to determine whether "theft" and "larceny" could be used interchangeably. To do so, this court turned to section 490a, which was enacted by the Legislature to consolidate "all three ways in which property could be unlawfully stolen" into the

definition of theft. (*Gonzales I, supra*, 2 Cal.5th at p. 865.) Section 490a provides that "[w]herever 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." [Emphasis added.] With these statutes in mind, this court easily concluded the use of the term larceny in the definition of shoplifting included theft crimes like check forgery such that an *entry* to commit check forgery was an act of shoplifting and not burglary. (*Gonzales I, supra*, 2 Cal.5th at pp. 865, 870.)

The same conclusion cannot be reached in this case. A violation of section 530.5(a) requires neither a taking nor any intent to defraud. (*People v. Hagedorn, supra,* 127 Cal.App.4th at p. 744; People *v. Johnson, supra*, 209 Cal.App.4th at pp. 816-818.) Moreover, the terms theft, larceny, embezzlement, and stealing, "the three ways in which property can be unlawfully stolen" (*Gonzales I, supra*, 2 Cal.5th at p. 865) are entirely absent from section 530.5(a). As this court reiterated in *Gonzales I*, "'a judgment of conviction of theft, based on a general verdict of guilty, can be sustained only if the evidence discloses the elements of one of the consolidated offenses.'" (*Id.*, at pp. 865-866, citing *People v. Ashley* (1954) 42 Cal.2d 246, 258.) For this reason, misuse of identity in violation of section 530.5(a), by any name, is not theft.

This court's decision in *Page* does not alter the conclusion that section 530.5(a) is not a theft offense. In *Page*, this court determined the application of Proposition 47 to violations of section 10851 of the Vehicle Code, which is not only

defined as a public offense, but is found outside of the Penal Code. (*Page*, *supra*, 3 Cal.5th 1175.) In this sense, *Page* establishes that such designation and chaptering will not always be determinative of the issue. Even so, *Page* did not expand the definition of theft or stretch the application of section 490.2 beyond its plain language. Instead, this court relied on its own established precedent distinguishing "between the theft and non-theft forms of" Vehicle Code section 10851. (*Page*, *supra,* 3 Cal.5th at p. 1183, citing *People v. Garza* (2005) 35 Cal.4th 866, 871.) Adhering to precedent, *Page* repeated: "Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft .... For this reason, a defendant convicted under [Vehicle Code] section 10851(a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction ...." (*Ibid.*)

Page's conclusion, that "obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2" (*Page*, *supra,* 3 Cal.5th at p. 1187), does not, however, advance respondent's cause here. "It is important to remember that *Page* involved vehicle theft, which has at all times been defined as grand theft. (§ 487, subd. (d)(1) ['Grand theft is committed ... [w]hen the property taken is ... an automobile'].)" (*People v. Soto* (2018) 23 Cal.App.5th 813, 824-825, review denied, Aug. 29, 2018, S249622.) Misuse of identity in violation of section 530.5(a), on the other hand, has not been similarly defined as theft. Instead, the misuse of identity at issue in this case more closely resembles the non-theft driving offense also defined in Vehicle Code section 10851. Unlawfully driving a vehicle, like the misuse of identity

at issue here, requires neither a felonious taking nor an intent to permanently deprive the owner of possession. (*Page*, *supra,* 3 Cal.5th at p. 1183.) Instead, the offense of unlawfully driving a vehicle penalizes the unconsented use of another's car in the same way section 530.5(a) penalizes the unconsented use of another's identification. Neither offense is theft as defined in section 484, as consolidated in section 490a, or as contemplated in sections 459.5(b) or 490.2.

This court's decisions in *Romanowski* and *Page* have been cited as support for the argument that the misuse of identity charged in this case must be reclassified as shoplifting. But as the Court of Appeal has recently explained, both of those cases "involve crimes that were previously *classified* as grand theft," and "[n]othing in *Romanowski* or *Page* suggests that section 490.2 extends to any course of conduct that happens to include obtaining property by theft worth less than $950." (*People v. Soto*, *supra*, 23 Cal.App.5th at p. 822 [emphasis original].) In *Soto*, the Court of Appeal drew a useful distinction between the theft crimes considered in *Romanowski* and *Page* and offenses which are "not identified as grand theft and require[] *additional necessary elements* beyond [theft]." (*Ibid.* [emphasis original].) The *Soto* court labeled the second category of offenses "theft plus" offenses. (*Ibid.*) The "theft-plus" offense at issue in *Soto* was theft from an elder, in violation of section 368, subdivision (d), that occurred when the defendant used his grandmother's birthdate and social security number to obtain a line of credit in her name. (*Id.*, at p. 816.)