In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **GIOVANNI GONZALES,** **Defendant and Appellant.**

Case No. S231171

Fourth Appellate District, Division One, Case No. D067554
Imperial County Superior Court, Case No. JCF32479
The Honorable L. Brooks Anderholt, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Appellant Giovanni Gonzales stole two checks from his grandmother, fraudulently wrote them out in his own name, and then entered a bank and cashed them. Based on this felonious intent at the time he entered the bank, appellant pleaded guilty to second degree burglary. He now seeks to have this court reclassify this conduct as "shoplifting." "Shoplifting"—which was added to the Penal Code as a separate crime as part of Proposition 47—is "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours." (Pen. Code, § 459.5.)[1] Appellant's act of cashing stolen and forged checks is not shoplifting. Recognizing this, appellant asks this court to read shoplifting broadly as covering the entry into a commercial establishment to commit any type of theft of any type of property or money, or in the alternative, to redefine shoplifting as a new crime of misdemeanor burglary. This court should decline to do so. Plainly read, the new shoplifting provision reflects the common understanding of what shoplifting is—the larcenous theft of openly displayed merchandise from a commercial establishment during business hours. And even if this court were to broadly interpret shoplifting as applying to any type of theft, appellant here also entered the bank with the intent to make unlawful use of another person's personal identifying information under section 530.5, a felony, which is not a theft crime and falls outside even appellant's broadest interpretation of shoplifting. For these reasons, the superior court was correct in denying appellant's petition for resentencing relief, and this court should affirm the Court of Appeal's decision upholding that denial.

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[1] All unspecified statutory references are to the Penal Code.

STATEMENT OF THE CASE AND FACTS

In December 2013, appellant stole two bank checks from his grandmother. (CT 30-31.) Appellant walked into a Bank of America during regular business hours on December 2 and again on December 7, each time depositing one check, which he wrote out to himself without permission each time. Each check was cashed for $125. (CT 31.)

On February 19, 2014, appellant pleaded guilty to second degree burglary, a felony (§ 459). In exchange for his plea, the trial court dismissed the second count, forgery (§ 476). (CT 12-16.) The trial court then suspended imposition of sentence, placed appellant on formal probation for three years, and ordered appellant to serve 50 days in county jail with credit for time served. (CT 24-26; 2 RT 51-55.)

On June 4, 2014, the trial court summarily revoked appellant's probation for failure to obey all laws after appellant was arrested for possession of a controlled substance (Heath & Saf. Code, § 11377, subd. (a)), possession of drug paraphernalia (Heath & Saf. Code, § 11364), and unauthorized possession of a controlled substance in jail (§ 4573.6). (CT 42, 45; 3 RT 104.) Appellant admitted the violation, and the trial court reinstated probation and ordered appellant to serve 90 days in county jail with credit for time served. (CT 46.)

On January 16, 2015, appellant petitioned to have his felony burglary conviction reduced to a misdemeanor after the passage of Proposition 47, the "Safe Neighborhoods and Schools Act," which reduced certain non-serious felonies to misdemeanors and allowed those already convicted of those specified felony offenses to petition to have their convictions reduced to misdemeanors. Appellant claimed that his burglary offense qualified as a misdemeanor offense for shoplifting under newly added section 459.5. (CT 53-55.) The superior court determined that appellant was ineligible for

relief because he did not enter the bank with the intent to commit larceny, an element required by section 459.5. The court reasoned,

> We don't have a larceny. We don't have a carrying away of merchandise. We don't have a nonconsensual theft. We have a consensual theft. The defendant goes in and utters a check against the account of his grandmother or family member. The bank is handing the money over with consent. This is not a nonconsensual action. [...] I do not believe that 459.5, Proposition 47, applies to this particular type of case.

(7 RT 305.) The court found that appellant's offense did not constitute shoplifting. It determined that a contrary finding would contradict the electorate's intent, stating,

> I don't see how we get past the plain language of the statute and the intent behind those statutes, and certainly I don't think that was the intent of the initiative when it was passed by the people. They wouldn't have used the word shoplifting.

(7 RT 306-307.) The court therefore denied the petition. (CT 78; 7 RT 307.) That same day, the superior court summarily revoked appellant's probation for failure to obey all laws after he was arrested for possession of a controlled substance (Heath & Saf. Code, § 11350, subd. (a)). (CT 47-51.) Appellant admitted the violation, and the trial court reinstated probation and ordered appellant to serve 130 additional days in county jail with credit for time served. (CT 80.)

Appellant appealed the superior court's denial of his petition for resentencing under the Act. (CT 40, 43.) He argued that the trial court erroneously found him ineligible for resentencing under the Act because his conviction under section 459 constituted misdemeanor shoplifting under the newly added section 459.5. The People responded, arguing that the superior court properly denied appellant's petition because appellant entered the bank with the intent to commit theft by false pretenses, not

larceny, as required by section 459.5; thus he necessarily did not commit the offense of shoplifting.

The Fourth District California Court of Appeal, Division One, affirmed the superior court's denial in full. It held that the trial court properly denied appellant's petition because his conviction of second degree burglary did not constitute misdemeanor shoplifting under newly added section 459.5 since he did not have the intent to commit larceny. (D067554.)

Appellant petitioned for rehearing, and the Court of Appeal denied the petition without comment. Appellant then petitioned for review, raising one issue: whether his second degree burglary conviction constituted "shoplifting" under section 459.5 making appellant eligible for resentencing under the Act. (ABOM 1.)[2] This court granted the petition without limiting the issue.

ARGUMENT

I. APPELLANT IS INELIGIBLE FOR PROPOSITION 47 RELIEF BECAUSE HIS CASHING OF FORGED CHECKS IS NOT "SHOPLIFTING" UNDER PENAL CODE SECTION 459.5

Appellant asserts that his felony burglary offense of cashing forged checks at a bank constituted misdemeanor shoplifting under section 459.5, thus the trial court erred when it declined to reduce his conviction to a misdemeanor under Proposition 47. (ABOM 5.) This court should reject appellant's claim because appellant's crime did not constitute "shoplifting" under section 459.5. Shoplifting under section 459.5 is "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the

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[2] Appellant's opening brief on the merits is hereinafter referred to as "ABOM."

property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." The plain language of this provision shows that the crime of shoplifting is meant to track the common understanding of that term, which is the larcenous stealing of openly displayed merchandise from a commercial establishment during business hours.[3] First, the drafters used the term "shoplifting"—which has an accepted meaning in both common sense and the law—because they meant "shoplifting." Second, the word "larceny" means common law larceny, which is consistent with the meaning of shoplifting. Third, the use of the word "property"—and not broader terms such as "money, labor, real or personal property" as used in other parts of Proposition 47—reflects the drafters' intention to describe only a narrow exception to certain burglaries involving merchandise and not to those involving money. Fourth, adopting appellant's expansive definition of shoplifting would largely defeat the purpose of burglary laws and thus lead to absurd results. Finally, even if the plain language were not dispositive, the ballot pamphlet shows the drafters contemplated, and the voters accepted, the common definition of shoplifting, not the version of shoplifting appellant now advocates.

A. Overview of Proposition 47

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act," and it became effective the next day. (Cal. Const., art. II, § 10 (a) ["An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise"]; *People v. Morales* (2016) 63 Cal.4th 399; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328 (*Diaz*).) The declared purposes of Proposition 47 included the following: reducing

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[3] By separate cover, respondent respectfully requests this court take judicial notice of the official Proposition 47 ballot materials.

felonies for certain "nonserious, nonviolent crimes like petty theft and drug possession" to misdemeanors; "authoriz[ing] consideration of resentencing for anyone who is currently serving a sentence" for the listed offenses; "ensur[ing] that people convicted of murder, rape, and child molestation will not benefit;" and "requir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (2014 Cal. Legis. Serv. Prop. 47 (Proposition 47) (WEST), § 3; *Diaz*, *supra*, 238 Cal.App.4th at p. 1328.)

To achieve those purposes, Proposition 47 first reduced certain specified nonserious, nonviolent felonies to misdemeanors. (*Diaz*, *supra*, 238 Cal.App.4th at p. 1325.) These specified offenses included, for example, simple drug possession, receipt of stolen property valued at $950 or less, and petty theft. (§ 1170.18, subd. (a).) As relevant here, "shoplifting" under section 459.5 is explicitly listed in Penal Code section 1170.18 as one of "those sections [that] have been amended or added" by Proposition 47. (*Ibid.*) Newly added section 459.5 states:

> 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.

Proposition 47 next provided a process by which those already convicted of these specified offenses can petition to have those convictions reduced to misdemeanors. Specifically, "[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 . . . 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 . . . ." (§ 1170.18,

subd. (a).) This procedure requires that the trial court determine whether the prior conviction would necessarily be a misdemeanor. If so, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) The term "unreasonable risk of danger to public safety" means "an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (§ 1170.18, subd. (c).) Thus, the court must find the petitioner poses an unreasonable risk of committing a limited list of offenses such as murder, molestation of a child, a sexually violent offense, or an offense punishable by life in prison or death. (§ 667, subd. (e)(2)(C)(iv).)

B. Interpretation of a Ballot Initiative

The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) First, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 (*Robert L.*).) Second, the statutory language is construed in the context of the statute as a whole and within the framework of the overall statutory scheme to effectuate the voters' intent. (*Ibid.*) Statutory interpretation canons are employed to determine the meaning of the statute's plain language. Third, where the language is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L.*, *supra*, 30 Cal.4th at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187–188 [ballot pamphlet information is a valuable aid in construing the intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the

defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent [electorate] intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation omitted.) Ultimately, the court's duty is to interpret and apply the language of the initiative "so as to effectuate the electorate's intent." (*Robert L., supra*, 30 Cal.4th at p. 900; Code Civ. Proc., § 1859.) "The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context[.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) And if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed. (*Ibid.*)

C. The Drafters Used the Word "Shoplifting" in Section 459.5 Because They Intended for the Offense to Apply to the Common Understanding of Shoplifting

The text of section 459.5 demonstrates that "shoplifting" applies only to the common understanding of shoplifting—theft by larceny of openly displayed merchandise from a commercial establishment during business hours. Thus, appellant is incorrect that the statutory definition of shoplifting under section 459.5 is contrary to the common understanding of shoplifting. (ABOM 30-35.)

"Shoplifting" means what it says—it is the lifting of items offered for sale at a shop. "Shoplifting" has long and commonly been understood to encompass only the larcenous stealing of openly displayed merchandise from a commercial retailer. Indeed, over three hundred years ago, England's "Shoplifting Act" of 1699 recognized that "the Crime of stealing Goods privately out of Shops and Warehouses [is] commonly called Shoplifting. . ." (Shoplifting Act (1699) Will. 3, 7 Statutes of the Realm 511-512.) This common understanding of shoplifting has not changed since then; rather, it is consistently reflected in American jurisprudence. (E.g. 50

Am. Jur. 2d Larceny § 64 ["Shoplifting, meaning the willful concealment of unpurchased goods or merchandise of a store, either on or outside the premises, with the intent of converting those goods to personal use without paying the purchase price, is a form of larceny that may be prosecuted as such."]; 52B C.J.S. Larceny § 17 ["Generally, the elements of the offense of shoplifting are the willful taking of the possession of goods offered for sale by a mercantile establishment without the knowledge or consent of the seller with the intention of converting such goods to one's own use without having paid the purchase price thereof."].)

It is well understood that the essential elements of shoplifting are "a knowing taking of possession, carrying away, transferring, or causing to be carried away or transferred any merchandise; that the merchandise has been displayed, held, stored, or offered for sale in a retail establishment; and that there is the intention of depriving the merchant permanently of the possession, use, or benefit of such merchandise without paying its full retail value." (52B C.J.S. Larceny § 1; also 3 Wharton's Criminal Law (15th ed. 2014) § 343 ["A defendant is guilty of 'shoplifting' when he commits larceny in a store, i.e., when he steals merchandise displayed or offered for sale in a retail establishment"]; Black's Law Dict. (10th ed. 2014) p. 1590, col. 1 [shoplifting is the "larceny of goods from a store or other commercial establishment by willfully taking and concealing the merchandise with the intention of converting the goods to one's personal use without paying the purchase price"]; Webster's Collegiate Dict. (10 ed. 2002) p. 1084, col. 1) ["shoplift[ing]" is "steal[ing] displayed goods from a store"].) A "shoplifter" is "a person who steals goods from the shelves or displays of a retail store while posing as a customer." (Random House Webster's Unabridged Dict. (1997) p. 1769.) "The essential element of intent to steal [in shoplifting], however, usually must be inferred from proof that the accused made an elaborate attempt to conceal the item on his person or that

he carried it out of the store without offering payment." (Comment, Shoplifting And The Law Of Arrest: The Merchant's Dilemma (1953) 62 Yale L.J. 788, 789.)

Prior to the passage of section 459.5, there was no specific crime of "shoplifting" in the California Penal Code. Instead, the larcenous theft of property from merchants fell under the broad provisions of section 459, burglary.[4] (See *Taylor v. United States* (1990) 495 U.S. 575, 591 ["California defines 'burglary' so broadly as to include shoplifting"].) But the common understanding of shoplifting—the larcenous stealing of openly displayed merchandise from a commercial retailer—has long been long recognized in California. (See, e.g., *People v. Dent* (1995) 38 Cal.App.4th 1726, 1728 [defendant was caught shoplifting three bottles of liquor from a market]; *People v. Gonzales* (1965) 235 Cal.App.2d Supp. 887, 892 ["we note that it was a charge of shoplifting . . . whereby customers enter a turnstile, have free access to all the shelves displaying wares and merchandise, and the proper payment for merchandise taken away from the store depends upon the customer properly declaring it at the check-out or cashier's stand."].)

Indeed, the text of section 459.5 shows shoplifting is limited to its common understanding. First, the fact that the drafters defined section 459.5 as "shoplifting" demonstrates that the electorate contemplated the commonly understood meaning of shoplifting. The text of section 459.5 repeatedly defines the offense as "shoplifting." (459.5, subds. (a) ["*shoplifting* is defined as . . ."] & (b) ["Any act of *shoplifting*. . . shall be charged as *shoplifting*. No person who is charged with *shoplifting* may also

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[4] Section 459 provides in relevant part: "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building . . . with the intent to commit grand or petit larceny or any felony is guilty of burglary."

be charged with burglary or theft of the same property."] [emphasis added].) The drafters could have labeled this new offense with many names, but they deliberately chose "shoplifting." This specific label shows the drafters did not intend for section 459.5 to encompass conduct far broader than that which falls under the common understanding of shoplifting.

D. The Term "Larceny" in Section 459.5 Means Common Law Larceny, Which is Consistent with the Common Understanding of Shoplifting

Section 459.5 requires a defendant intend to commit "larceny." (§ 459.5 ["shoplifting is defined as entering a commercial establishment with intent to commit *larceny*," italics added].) Theft by larceny is committed when a person takes possession of personal property owned or possessed by another, by means of trespass and with intent to steal the property, and carries the property away. (*People v. Davis* (1998) 19 Cal.4th 301, 305.) Such a taking is always a trespass unless the owner consents to the taking freely and unconditionally or the taker has a legal right to take the property. (*Ibid.*) Other forms of theft include theft by embezzlement and theft by false pretenses. Theft by embezzlement is the fraudulent appropriation of property by a person to whom it has been entrusted. (§ 503.) Theft by false pretenses occurs when a person makes a false pretense or representation to the owner of property with the intent to defraud the owner of that property, and the owner transfers the property to the defendant in reliance on the representation. (§ 532; see also *People v. Williams* (2013) 57 Cal.4th 776, 787.) Unlike larceny, neither embezzlement nor theft by false pretenses must be committed by trespass and neither requires the asportation of the stolen property. (*Id.* at p. 788 [theft by false pretenses]; *In re Basinger* (1988) 45 Cal.3d 1348, 1363 [embezzlement].) Here, it is undisputed that appellant did not commit theft

by larceny because there was no trespassory taking—the bank consensually gave appellant money based on his fraudulent representation that his checks were valid.

The text of section 459.5 shows that "larceny" means common law larceny; it does not mean all theft. The 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. Courts do not presume that the Legislature performs idle acts, nor do they construe statutory provisions so as to render them superfluous. (*Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390.) In addition, the requirement that shoplifting occur in a store that is "open during business hours" further shows the drafters contemplated larceny. Indeed, the business hours limitation is only meaningful if it targets criminal conduct of persons who have access to steal property *because* the business is open to the public during regular business hours. This limitation prohibits application of the statute to persons who break into the building or are lawfully on the premises when the store is closed to the public. Thus, the clause "open during business hours" is inconsistent with theft by embezzlement because it would arbitrarily draw a distinction between employees who steal property from the commercial establishment *during* business hours and those who steal seconds *after* business hours end. An alternative reading would lead to absurd results. For example, an employee who enters the commercial establishment where she works with the intent to steal from her employer one minute before the store is officially open would commit *burglary*, while the same employee would commit *shoplifting* if she committed the offense one minute later during business hours. To hold that "shoplifting" applies to theft by embezzlement would therefore lead to absurd results. Accordingly, since the business hours

limitation shows that "larceny" cannot include embezzlement, "larceny" does not mean all forms of theft.

Other language in section 459.5 also shows that larceny does not mean general theft in this context. The statutory rule of construction *noscitur a sociis* ("it is known by its associates") is the principle that the meaning of word may be determined by reference to the whole clause in which it is used. (E.g. *People v. Prunty* (2015) 62 Cal.4th 59, 73.) In other words, "a word takes meaning from the company it keeps." (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, internal citation omitted.) Section 459.5 states that to qualify as shoplifting, the defendant must enter a "*commercial* establishment [. . .] while that establishment is *open during regular business hours* . . . ." (§ 459.5, subd. (a), emphasis added.) In context, 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. The meaning of "commercial establishment" is a place of commerce, i.e., where one goes to engage in "social intercourse" and the "buying and selling of commodities." (Webster's 3d New Internat. Dict. (2002) p. 456, col. 3 ["commerce" and "commercial"].) Indeed, inherent in the idea of "shoplifting is that there is an intended theft by larceny (or "lifting") from a "shop" of some sort. This again accords with the term "commerce," which traces its origin in part to the Latin "merx," i.e., "merchandise" or "market." (Webster's 3d New Internat. Dict. (2002) p. 456, col. 3 ["commerce"].) A person may commit second degree burglary in many ways that do not involve entering a commercial establishment; he or she may enter a variety of structures including uninhabited dwellings, vehicles, barns, or vessels. (§§ 459 & 460.) But section 459.5 limits shoplifting to commercial establishments

open during business hours, which indicates that in enacting section 459.5, the drafters contemplated the traditional definition of shoplifting—a person who enters an open business and takes and conceals merchandise without the store's permission. Additionally, the business hours element is a commonsense requirement of traditional shoplifting, because if the business is closed, one cannot have "free access to all the shelves displaying wares and merchandise," nor can one accomplish the theft by merely failing to "declar[e the items] at the check-out or cashier's stand." (See *People v. Gonzales*, *supra*, 235 Cal.App.2d Supp. at p. 892.) Put simply, one cannot accomplish what is traditionally understood to be shoplifting unless, as required by section 459.5, the establishment is open for commercial business. Accordingly, the contextual language of section 459.5 shows that the voters did not intend for shoplifting to encompass all forms of theft.

Furthermore, that the drafters used the term "larceny" and not "theft" is telling because elsewhere in Proposition 47 where they wanted to invoke theft generally, they used the term "theft." Where the drafters change language between statutes that might otherwise be similar, an interpreter should consider that difference to be significant. (See *Keene Corp. v. United States* (1993) 508 U.S. 200, 208 [applying this rule of construction to Congress].) The Act only uses the term "larceny" in section 459.5. However, the term "theft" is used repeatedly throughout the Act. (E.g. § 490.2 [defining petty theft].) Indeed, not only did the drafters use the term "theft" elsewhere, they used the term "theft" in the shoplifting section itself (see § 459.5, subd. (b) ["No person who is charged with shoplifting may also be charged with burglary or *theft* of the same property], emphasis added), which further shows that the drafters conscientiously used larceny instead of theft when defining shoplifting earlier in that section. Accordingly, in the context of shoplifting, "larceny" means the trespassory

taking and carrying away of another person's property with the intent to steal.

Appellant contends that, based on section 490a, intent to commit "larceny" under section 459.5 means intent to commit any type of theft. (ABOM 8-18.) However, section 490a did not substantively change the different types of theft, and, as explained above, section 459.5 clearly requires that larceny retain its common law definition in the context of shoplifting.

In 1927, the Legislature made several procedural amendments to the Penal Code with the goal of providing this state with "the most efficient system for the swift and certain administration of criminal justice." (*People v. Hickman* (1928) 204 Cal. 470, 477.) As part of this procedural reform, the Legislature "amalgamate[d] the crimes of larceny, embezzlement, false pretenses and kindred offenses under the cognomen of theft." (*People v. Myers* (1929) 206 Cal. 480, 483 (*Myers*).) This was accomplished by amending section 484 to list all the theft offenses together in one subdivision and by adding section 490a, which 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." (§§ 484, 490a; see also Stats. 1927, ch. 619, p 1046, § 1 & p. 1047, § 7.) Accordingly, courts have held that a burglary, which may be committed with the intent to commit a "larceny," may be satisfied by evidence showing an intent to commit any kind of theft, under section 490a. (See *People v. Parson* (2008) 44 Cal.4th 332, 354 ["intent to commit theft by false pretense or a false promise without the intent to perform will support a burglary conviction"], citing *People v. Nguyen* (1995) 40 Cal.App.4th 28, 30-31.)

But section 490a did not eliminate different types of theft. The purpose of section 490a was to eliminate pleading and proof

"technicalities." (*People v. Williams*, *supra*, 57 Cal.4th at p. 786.) The purpose of the 1927 amendments was merely to remove some of the *procedural* distinctions between these offenses—i.e., "the technicalities that existed in the pleading and proof of these crimes at common law" (*People v. Ashley* (1954) 42 Cal.2d 246, 258)—while maintaining all the *substantive* differences between them. (*Davis*, *supra*, 19 Cal.4th at p. 304.) Indeed, this court has repeatedly held that the Legislature's assembly of the various theft offenses under one umbrella did not change the distinct elements of those offenses. (See *Williams*, at p. 786 ["consolidation of larceny, false pretenses, and embezzlement . . . did not change the elements of those offenses"]; *Davis*, at p. 304 [when larceny, embezzlement, and false pretenses were consolidated "most of the procedural distinctions between those offenses were abolished[; b]ut their substantive distinctions were not"]; *Ashley*, at p. 258 [describing larceny by trick and obtaining property by false pretenses as "crimes" that are "much alike" but "aimed at different criminal acquisitive techniques"]; *Myers*, at p. 483 ["[n]o elements of the former crimes have been changed by addition or subtraction" following the 1927 amendments].) Because the changes did not alter the elements of any of the theft offenses, "the essence of section 490a is simply to effect a change in nomenclature without disturbing the substance of the law." (*Id.* at p. 485; see also *Williams*, *supra*, 57 Cal.4th at p. 789, quoting and citing *Myers* for that proposition.)

This court's recent decision in *Williams*, *supra*, 57 Cal.4th 776, further shows how firm the historical distinctions between the various theft offenses have remained even after the 1927 amendments. At issue in that case was the element of robbery that requires the "felonious taking of personal property of another[.]" (*Williams*, *supra*, 57 Cal.4th at p. 779; see also § 211.) Called to determine what types of theft could constitute a "felonious taking," this court held that only theft by larceny could meet that

element. (*Williams*, at pp. 779, 786–787.) In reaching this holding, the majority rejected a broad application of section 490a. Under section 490a, "[w]herever any law or statute *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." (Italics added.) In the dissent's view, because "felonious taking" was synonymous with larceny at common law, as the majority agreed (*Williams*, at pp. 786–787), the robbery statute's use of that phrase necessarily constituted a "refer[ence] to" or "mention[]" of larceny for purposes of section 490a. (See *Williams*, at pp. 796–797 (dis. opn. of Baxter, J.).) Accordingly, the robbery statute—read through the lens of section 490a—should permit any form of theft to meet its "felonious taking" requirement. (*Williams*, at pp. 796–797 (dis. opn. of Baxter, J.).) The majority disagreed with this application of section 490a, emphasizing the court's more-than-80-year history of reaffirming that the 1927 amendments did not change the elements of the theft offenses or the "substance of any law." (*Williams*, at p. 789; citing *Myers*, *supra*, 206 Cal. at p. 485.) By limiting the theft element of robbery to larceny, and by excluding false pretenses and embezzlement, *Williams* shows that each theft crime is a separate and distinct offense.

Here, evidence of voter intent shows that the voters contemplated that shoplifting apply only to theft by larceny—not other forms of theft. This court has recognized that the rule of strict construction of penal statutes "is not an inexorable command to override common sense and evident statutory purpose." (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312, internal citations omitted.) Further, while section 490a may apply to statutes enacted or amended by the Legislature because the Legislature is presumed to know that "larceny" means "theft" under section 490a, that presumption may not be as applicable when a statute is enacted by voters. (*People v. Davenport* (1985) 41 Cal.3d 247, 263, fn. 6;

Brosnahan v. Brown (1982) 32 Cal.3d 236, 257 [it would be unrealistic to require proponents of Proposition 8, 1982 Victims' Rights Act, to anticipate and specify in advance every change in existing statutory provisions which could be expected to result from the adoption of that measure]; *People v. Pieters* (1991) 52 Cal.3d 894, 907, conc. and dis. opn. of Broussard, J. ["We hold initiatives to a different standard than enactments by the Legislature because of the nature of the initiative process. Initiatives are the direct expression of the people, typically drafted without extended discussion or debate."]; *McLaughlin v. State Bd. of Education* (1999) 75 Cal.App.4th 196, 214[qualitative and quantitative differences exist between knowledge of informed voters and that of legislators].) In any event, in this case, any presumption that the voters were aware of section 490a is rebutted by clear evidence; it cannot be conclusively presumed that the voters intended "misdemeanor shoplifting" to encompass "theft" as broadly defined in sections 484 and 490a as opposed to the narrow type of theft called "larceny." Indeed, the information provided to the voters about Proposition 47 decisively points to exactly the opposite conclusion. Voters enacted the crime of *shoplifting* under section 459.5 when they passed Proposition 47. It is in the context of its common meaning that the voters enacting Proposition 47 understood the reference to "shoplifting" in the ballot pamphlet materials, including in the title and text of section 459.5. Appellant suggests that reading "larceny" under section 459.5 to mean the common law definition of larceny would change the meaning of larceny in section 459, the burglary statute. (ABOM 17.) But indicia of voter intent shows larceny is defined by its common law definition solely in the context of shoplifting—there is no evidence of intent to amend section 459 or any other statute in the Penal Code by implication.

Moreover, had the drafters simply intended to grant misdemeanor treatment to all thefts of property valued at $950 or less from a business,

they would have said so, rather than going to the trouble of creating a new crime called "shoplifting," specifying that only "larceny" would satisfy it. It is a settled principle of statutory interpretation that the language of a statute should not be given a particular meaning if doing so would result in absurd consequences. (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) Therefore, the meaning that was universally understood by the voters—which does not include thefts accomplished by any means that is not larceny, such as embezzlement or theft by false pretenses—should apply.

E. The Use of the Word "Property"—And Not Broader Terms Such as "Money, Labor, Real or Personal Property" as Used in Other Parts of Proposition 47—Reflects the Drafters' Intent to Describe Only A Narrow Exception to Certain Burglaries Involving Merchandise

The text of section 459.5 shows that "shoplifting" applies only to the theft by larceny of merchandise. Here, appellant took money from the bank—not merchandise. Appellant contends that "shoplifting" applies to the theft of any type of property (ABOM 35-37) and, in fact, to any burglary involving property valued at $950 or less (ABOM 45). However, interpreting shoplifting to apply to property other than tangible merchandise would result in application of the statute in absurd ways in which the voters clearly did not intend. (See *People v. Cruz*, *supra*, 13 Cal.4th at p. 782.) And there is no reason to believe that the voters intended shoplifting to be a general misdemeanor burglary provision beyond what the text provides.

When "construed in the context of [Proposition 47] as a whole" (see *Robert L.*, *supra*, 30 Cal.4th at p. 901), the language used in section 459.5 suggests that "shoplifting" was intended to include only the theft of items of personal property offered for sale. In passing Proposition 47, the voters added section 490.2, which transforms most thefts where the value of the

"money, labor, real or personal property taken" does not exceed $950 into misdemeanor petty theft. By contrast, section 459.5 requires that the value of "the property that is taken" does not exceed $950. "When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful. [Citations.]" (*In re Ethan C.* (2012) 54 Cal.4th 610, 638.) Because "money," "labor" and "real [] property" were included in the portion of Proposition 47 addressing petty theft but omitted from section 459.5, this court "must reasonably infer that the [voters] did not intend to include" cash, intangible property, or real property as items that could be "shoplifted." (See *ibid.*) This conclusion that "property" is limited to personal property is reasonable because it is hard to imagine how one could shoplift labor or real property.

Likewise, the language used in section 459.5 suggests that "shoplifting" was meant to apply only to certain types of entries currently constituting commercial burglary. Section 459 broadly permits burglary charges for entries into a variety of businesses, including any "shop, warehouse, store, mill, barn, [or] stable . . . ." By contrast, section 459.5 applies to entries into "commercial establishment[s]." (§ 459.5, subd. (a).) Although "commercial establishment" is not expressly defined anywhere in Proposition 47 or in the Penal Code, that section 459.5 uses terminology different than that in the statute it was expressly intended to limit suggests that one cannot "shoplift" inside certain types of businesses. Indeed, this interpretation is compatible with the traditional understanding that shoplifting only applies to merchandise stolen from a retail establishment, and demonstrates that the voters would have understood that burglarious entries into warehouses, industrial buildings, and financial institutions involve greater culpability and pose a greater risk of harm than does traditional shoplifting.

Section 459.5 is merely one piece of Proposition 47's overall scheme reducing some offenses to misdemeanors, and it provides a narrow exception to the general rule defining burglary. As expressly stated, aside from shoplifting, "any other entry into a commercial establishment with the intent to commit larceny is burglary." (§ 459.5.) Thus, the Act specifically contemplates that many entries into shops, stores, and other commercial buildings with the intent to commit larceny do not qualify as shoplifting, but more appropriately remain wobblers as second degree burglary. Accordingly, appellant's alternative argument—which essentially asks this court to redefine shoplifting as misdemeanor burglary (ABOM 45)—fails. Contrary to appellant's assertion, it is only shoplifting that the voters intended to make a misdemeanor, not "any burglary involving an intended theft from a commercial establishment during business hours where the property is valued at $950 or less." (ABOM 45.)

F. Adopting Appellant's Expansive Definition of Shoplifting Would Largely Defeat the Purpose of Burglary Laws And Thus Lead to Absurd Results

Interpreting shoplifting to apply to all types of theft and to property other than tangible merchandise would largely defeat the purpose of burglary laws, an absurd result the voters clearly did not intend. (See *People v. Cruz*, *supra*, 13 Cal.4th at p. 782.) The culpability of a person who commits burglary may be determined in three ways: 1) the value of the property stolen, 2) the possibility of personal harm and violence that occurs from unauthorized entries into spaces that make the victim feel vulnerable, and 3) the unquantifiable harm that occurs, for example, from the invasion into private spaces or damage to the commercial reliability of financial instruments. The culpability of a person who commits shoplifting is related to the low value of the merchandise taken from a shop—it would be absurd

to interpret shoplifting to apply to more culpable burglars whose conduct was specifically contemplated and targeted by burglary laws.

This court has recognized that burglary laws are "based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence." (*People v. Gauze* (1975) 15 Cal.3d 709, 715, internal citation omitted.) Burglary laws "are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall the germination of a situation dangerous to personal safety. Section 459, in short, is aimed at the danger caused by the unauthorized entry itself." (*Ibid.*, internal citation omitted.)

By requiring stolen property be valued at $950 or less and requiring the business be "open" during regular business hours, "shoplifting" seemingly targets the *financial* harm that occurs when a shoplifter is *invited* into a mercantile establishment and steals property—it does not deter the risk of personal harm that occurs from an unauthorized entry. Yet, if this court were to adopt appellant's expansive definition of "shoplifting" and determine that shoplifting is not limited to the theft by larceny of openly displayed merchandise for sale to the public, numerous scenarios clearly posing a danger to personal safety due to unauthorized entries—a harm that does not hinge on the value of the property taken— could no longer be charged as burglary. For example, a person who enters a restaurant, then sneaks into the manager's office and attempts to steal $950 in cash from the safe could be charged only with misdemeanor shoplifting. And yet, the danger is apparent that such a perpetrator could "harm the occupants in attempting to . . . escape" or that a manager who accidentally interrupts the theft could "in anger or panic react violently to the invasion." (See *People*

v. Gauze, *supra*, 15 Cal.3d at p. 715, internal citations omitted.) The same is true where a person enters a supermarket that is open 24 hours a day, then enters a closed and locked pharmacy within the supermarket with the intent to steal narcotics or other dangerous drugs. Or, where a person enters a business that operates as a private club, proceeds to the locker room where members store and subsequently access their private property, then steals wallets, keys, and other items of personal property. These examples, along with countless other scenarios where a perpetrator enters a business with the intent to commit larceny, present precisely the "situation dangerous to personal safety" that burglary laws are designed to address. (See *ibid.*) When a shop is open to the public, the shopkeeper is on guard because she expects that the public will enter—she may, therefore, employ security guards and use surveillance cameras for safety. But in an area within the store that is not open to the public, like a back office or a private locker room within a sports club, the shopkeeper lets down her guard and may react suddenly and violently to an unauthorized intrusion.

Furthermore, persons who take property not displayed for sale, or engage in unauthorized entries into certain parts of a commercial establishment not opened to the public, or engage in more sophisticated types of theft, are more culpable than those who simply take displayed merchandise. The harm committed when a person commits theft by larceny of merchandise is the loss of value of the property, thus it makes sense that such an offense is considered a misdemeanor based on the value of the property taken. But the harm committed when a person, like appellant, unlawfully uses another person's personal identifying information, is far greater. (E.g. *People v. Valenzuela* (2012) 205 Cal.App.4th 800, 808, citing Stats. 2006, ch. 522 (A.B. 2886), § 2 [the unauthorized use of another person's personal identifying information creates harm to victims "well beyond the actual property obtained through the misuse of the person's

identity"].) For example, the victim's "credit may be very difficult to repair." (*Ibid.*) Similarly, the harm committed when a person enters a commercial establishment and cashes a stolen and forged check or uses a stolen credit card is the harmful effect on the commercial reliability of those instruments. This ancillary harm cannot be quantified by the value of the property taken, thus it does not make sense that shoplifting encompasses such conduct. Also, shoplifting is typically a crime of opportunity and thus generally targets less culpable conduct than conduct involving sophisticated planning and fraudulent behavior including purchasing items with stolen credit cards, cashing stolen and forged checks, or returning stolen items to a store to collect a refund. Thus, reading "shoplifting" to apply to appellant's more culpable criminal conduct leads to absurd results because his conduct is more sophisticated and creates a type of harm that cannot be quantified simply by the value of the property taken from the bank.

Reading "shoplifting" in Proposition 47 with its common meaning produces no such absurd results. Where the general public has "free access" to a retail area "displaying wares and merchandise" (see *People v. Gonzales*, *supra*, 235 Cal.App.2d Supp. at p. 892), there is no "unauthorized entry" (*People v. Gauze*, *supra*, 15 Cal.3d at p. 715). The persons most likely to encounter and attempt to stop a perpetrator from shoplifting are loss-prevention officers, who are trained to handle exactly these situations without overreacting or exposing themselves to unreasonable risks of harm. More importantly, such situations are not likely to escalate based on a perceived violation of intrusion. Thus, while it is entirely consistent with both the voters' intent and the traditional purpose of burglary laws to make traditional shoplifting a misdemeanor, it is contrary to these principles to categorically make all entries into a business with the intent to commit larceny of *any* property into misdemeanors.

By contrast, in other commercial burglaries with the intent to commit larceny, an entry is *more* likely to present a danger to personal safety if it is done while the establishment is open for business. Where a person sneaks into the manager's office of a restaurant seeking cash, or where a person enters the locker room of a fitness club intending to steal personal property from other members, or even where a person enters the store room of a supermarket intending to steal items that have yet to be stocked on the shelves, the burglary is *more dangerous* when it is committed during regular hours of operation, because it dramatically increases the likelihood that an employee will encounter the burglar and see the burglar's presence as a personal affront based on the intrusion itself, resulting in violence. This result would defeat not only the purpose of burglary laws, but also the express purpose of Proposition 47 to reduce sentences only for "nonviolent crimes." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) Analysis of Prop. 47 by Legislative Analyst, p. 35.)

G. The Ballot Pamphlet Shows the Drafters Contemplated, and the Voters Accepted, the Common Definition of Shoplifting

Even if the statutory language were not sufficient by itself to resolve the issue, the information presented to the voters in the ballot pamphlet removes any doubt. Where there is ambiguity, courts should look to the ballot pamphlet in order to ascertain voters' intent. (*People v. Morales*, *supra*, 63 Cal.4th at p. 403 ["[I]f we can assume voters had in mind existing law, and further assume the seemingly mandatory statutory language is ambiguous, we can also make the more realistic assumption that the voters, or at least some of them, read and were guided by the ballot materials concerning the proposition."]; *People v. Floyd* (2003) 31 Cal.4th 179, 187-188.) The ballot pamphlet here simply told the voters that the law would prevent "shoplifting property worth $950 or less" from being charged as

felony burglary. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) Analysis of Prop. 47 by Legislative Analyst, p. 35.) This analysis's unadorned use of the popular term "shoplifting" indicates that the new crime would not be defined in any way other than by its common and ordinary meaning. In particular, the analysis does not indicate that this new crime would include entries of commercial establishments to commit larceny by trick or device, theft by false pretenses, or embezzlement—all of the various other illegal takings that have been placed under the umbrella label "theft" by sections 484 and 490a. In fact, the summary is precisely to the contrary. The summary identifies "shoplifting" as "*a type of petty theft.*" (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) Analysis of Prop. 47 by Legislative Analyst, p. 35 [emphasis added].) Thus, a reasonable voter reading the summary would have concluded that "shoplifting" was simply a specific type or subset of theft, not a crime embracing all the different types of theft tucked away in various sections of the Penal Code that were not mentioned in the ballot materials.

As used in the ballot analysis, "shoplifting" connoted the popular image of a stealthy pseudo-customer entering a "shop," "lifting" an item, concealing the item, and exiting the shop without paying. It did not expand that picture to the qualitatively different circumstances of thieves, like appellant, who engaged in a more sophisticated scheme involving stealing his grandmother's checkbook, writing multiple checks out in his name, forging his grandmother's signature on those checks, and cashing those forged checks at a bank while fraudulently representing that they were valid checks. The word "shoplifting" also did not encompass the harm that occurs when the reliability of negotiable instruments is cast into doubt. One would be hard-pressed to find any California voter who would define fraudulently cashing forged and stolen checks as shoplifting.

In the common mind's eye, "shoplifting" is a simple "in and out" crime. It does not include persons who enter stores to commit more sophisticated and, therefore, more serious forms of property crime. Certainly, its breadth does not take in other non-substantive technical statutes, such as sections 484 and 490a, that merely combined all types of theft into an administratively convenient cluster. (See *McBoyle v. United States* (1931) 282 U.S. 25, 26-27 [a statute that applies to motor vehicles including "any other self-propelled vehicle not designed to for running on rails" calls up the "popular picture" of a vehicle that runs on land, not an airplane], cited with approval in *People v. Weidert* (1985) 39 Cal.3d 836, 848-849.)

The irresistible conclusion is that section 459.5 applies to "shoplifting" in the colloquial sense. A reasonable voter would most likely have concluded that "misdemeanor shoplifting" was only a single type of theft—a larceny that accorded with the common and ordinary meaning of "shoplifting." Indeed, the text of section 459.5 itself, by using the phrases "commercial establishment" and "open during regular business hours," would have supported the voters' reasonable belief that the crime of "shoplifting" refers only to the common understanding of that crime and does not include entry with the intent to commit theft by other means. To expand the reach of "misdemeanor shoplifting" beyond what the voters desired to more serious burglaries "would amount to an electoral 'bait and switch.'" (*Hill v. NCAA* (1994) 7 Cal.4th 1, 20.)

This conclusion is further reflected in the jury instruction for section 459.5—CALCRIM number 1703. For the element of intent to commit theft, the bench notes for CALCRIM number 1703 instruct trial courts to provide CALCRIM number 1800, the instruction for theft by larceny. Thus, the Judicial Council also adopted the view that shoplifting is limited to entering a commercial establishment with the intent to commit theft by

larceny, i.e. taking property without the owner's consent. By limiting the new crime of shoplifting to the intent to commit larceny during regular business hours, there is no reason to conclude that the voters had anything in mind other than the traditional and more limited sense of larceny. In that case, entry into a commercial establishment during regular business hours with the intent to commit theft by some other means, such as the intent to commit theft by false pretenses, does not qualify for relief under Proposition 47.

Thus, the ballot pamphlet shows the drafters contemplated, and the voters accepted, the common definition of shoplifting. Accordingly, the rule of lenity does not help appellant. (ABOM 41-42.) The rule of lenity applies "only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule." (*People v. Avery* (2002) 27 Cal.4th 49, 58, internal citation omitted.) There is no such egregious ambiguity here to justify invoking the rule—the text of section 459.5 and other indicia of the electorate's intent shows "shoplifting" is consistent with its common definition, and that definition does not apply to appellant's conduct.

II. IN THE ALTERNATIVE, APPELLANT'S BURGLARY CONVICTION SHOULD NOT BE REDUCED TO "SHOPLIFTING" BECAUSE THE RECORD SHOWS APPELLANT ALSO ENTERED THE BANK WITH THE INTENT TO MAKE UNLAWFUL USE OF ANOTHER PERSON'S PERSONAL IDENTIFYING INFORMATION

Even if "shoplifting" extends to any theft of any type of property, appellant still does not qualify for resentencing relief. Appellant entered the bank, not only to commit theft, but also to make unlawful use of personal identifying information of another person, a felony. Because no reading of the shoplifting provision covers entry into a commercial establishment to commit this non-theft felony fraud crime, appellant is not

entitled to relief. Additionally, appellant is wrong that section 459.5, subdivision (b), requires that a defendant be convicted *only* of shoplifting if he harbors multiple criminal intents, as long as one intent is to commit petty theft. Rather, subdivision (b) simply articulates the *Williamson* rule that the People must charge conduct that constitutes shoplifting under section 459.5, a more specific statute, rather than charge such conduct as burglary under the broader section 459. Subdivision (b) does not prohibit multiple convictions of shoplifting and burglary for the same act where the defendant harbors two separate criminal intents, much less require the prosecution to forgo charging a more serious burglary crime solely because the defendant also committed shoplifting at the same time.

The unlawful use of personal identifying information of another person is defined under section 530.5. Section 530.5, subdivision (a), provides, "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...." Personal identifying information includes "any name, address, telephone number, ... checking account number [and] unique electronic data including information identification number assigned to the person, address or routing code ...." (§ 530.55, subd. (b).) A person violates section 530.5 when he or she cashes a forged check by using another person's personal identifying information, information that includes that person's "name, address, telephone number, checking account and unique electronic data for addresses or routing codes." (E.g. *People v. Barba* (2012) 211 Cal.App.4th 214, 220.)

Here, appellant pleaded guilty to count 1 of the information, burglary, which stated that he had the intent to commit "any felony." (CT 1.)

Appellant also admitted that he entered Bank of America with the intent to use his grandmother's personal identifying information without her consent to obtain financial credit. (RT [Feb. 19, 2014] at 2; 12/13/13 Police Report.[5]) This factual basis established that appellant entered the bank with the intent to commit section 530.5, a felony. It did not matter that the People did not separately charge appellant with section 530.5 because burglary is complete upon entry with the requisite criminal intent; a completed felony is not necessary. Accordingly, appellant did not meet his burden of showing his crime of second degree burglary should be reduced to a violation of section 459.5, because he would not have necessarily been convicted of misdemeanor shoplifting if Proposition 47 had been in effect at the time he committed the offense.

Furthermore, though section 530.5 is often colloquially referred to as "identity theft," it is not a theft offense at all. (*People v. Barba*, *supra*, 211 Cal.App.4th at p. 226.) All that is required under section 530.5 is that a person willfully obtained another person's personal identifying information—he need not *steal* that information. (*In re Rolando S.* (2011) 197 Cal.App.4th 936, 940 (*Rolando S.*).) For example, in *Rolando S.*, the defendant satisfied the first element of section 530.5 when he passively received another person's email password through an unsolicited text message. (*Id.* at p. 941.) Additionally, to satisfy the second element of section 530.5, using the personal identifying information for an unlawful purpose, a defendant need not take money or property. In *Rolando S.*, the defendant satisfied this second element when he used another person's personal identifying information—her email password—to ultimately

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[5] By separate cover, respondent respectfully requests this court take judicial notice of the police report in appellant's case, as appellant established the basis of his guilty plea by stipulating to the facts alleged in the police report. (RT [Feb. 19, 2014] at 2.)

access her Facebook account and impersonate the victim for the purpose of humiliating and defaming the victim. (*Id.* at p. 942.) Indeed, even the Model Penal Code, which, unlike California, seek to remove all distinction between the various types of theft, places all theft offenses into one section (Article 223), and continues to recognize forgery and fraudulent practices as wholly separate crimes (Article 224).

Appellant does not claim that section 530.5 is a form of theft, nor could he. Appellant claims instead that even if he committed a violation of section 530.5, he also entered the bank with the intent to commit theft by false pretenses, thus he must be convicted of *only* shoplifting under section 459.5. (ABOM 22-23.) In support of this claim, appellant relies on section 459.5's mandate that "[a]ny 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." (§ 459.5, subd. (b).) But section (b) does not dictate the result he seeks.

First, section (b) on its face deals only with prospective *charging*, not with retroactive resentencing. Hence it does not state that a defendant's prior conviction for an offense that was not amended by Proposition 47 must be stricken if he also committed shoplifting at the same time. Here, appellant committed second degree burglary when he entered the bank with the intent to commit section 530.5, which was not amended by Proposition 47, and subdivision (b) of section 459.5 does not affect appellant's conviction for that offense. Thus, the language of section 459.5, subdivision (b), which regards only prospective charging, does not help appellant.

Second, even if section 459.5, subdivision (b), applies to appellant's conduct retroactively, subdivision (b)'s mandate does not require appellant be convicted of solely shoplifting because it does not constrain prosecutorial charging discretion in the broad way that appellant suggests.

For over one hundred years, section 954 has provided that a defendant may be charged with and convicted of (1) "two or more different offenses connected together in their commission[]"; (2) "different statements of the same offense"; or (3) "two or more different offenses of the same class of crimes or offenses[.]" (Stats. 1915, ch. 452, § 1.) Applying section 954, this court has repeatedly affirmed the rule "that the same act can support multiple charges and multiple convictions." (*People v. Gonzalez* (2014) 60 Cal.4th 533, 537; see also, e.g., *People v. Wyatt* (2012) 55 Cal.4th 694, 704.) This court should not interpret section 459.5 to reduce the People's long-established ability to exercise its charging discretion absent a clear legislative direction to the contrary. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518.) Prosecutors should be able to charge a defendant with an offense that targets more culpable conduct than shoplifting or targets a completely different harm than shoplifting.

Reading the language of section 459.5, subdivision (b), as a whole, the language does not provide clear legislative intent to limit the People's charging discretion in any circumstance where a defendant commits a criminal act that satisfies the elements of shoplifting. Section 459.5's requirement that "any act of shoplifting [. . .] must be charged as shoplifting" is simply an expression of the *Williamson* rule, which states that absent some indication of legislative intent to the contrary, the People must exclusively prosecute certain conduct under a special statute rather than a more general statute if the general statute includes the same conduct as a special statute. (*People v. Murphy* (2011) 52 Cal.4th 81, 86, citing *In re Williamson* (1954) 43 Cal.2d 651, 654.) For example, even after the addition of section 459.5, a person who walks into a department store and steals a pair of socks would still technically commit second degree burglary under section 459. The addition of subdivision (b) of section 459.5 simply ensures the *Williamson* principle apply—that the People can only charge

such conduct as shoplifting under section 459.5, the special statute, rather than second degree burglary under section 459, the broader statute. It does not prohibit multiple convictions for the same act where a defendant commits both shoplifting and a non-shoplifting burglary, and it certainly does not preclude the prosecution—as appellant suggests—from charging just the more serious non-shoplifting burglary crime solely because the defendant also committed shoplifting at the same time

Indeed, the ballot pamphlet demonstrates that subdivision (b) simply articulates the *Williamson* rule, because it told the voters that the law would prevent "shoplifting property worth $950 or less" from being charged as felony burglary. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) Analysis of Prop. 47 by Legislative Analyst, p. 35.) Accordingly, subdivision (b)'s requirement that "[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property" simply demonstrates that a person must not be charged with second degree burglary *only* where the underlying intent is to commit theft of the same property underlying the shoplifting charge—it does not prevent the People from charging a defendant with burglary where he harbored an intent to commit a felony *in addition* to petty theft. Proposition 47 did not amend section 530.5, and entering a commercial establishment with the intent to commit section 530.5 is not shoplifting, thus the People were not foreclosed from charging appellant with burglary for entering the bank with the intent to commit section 530.5, a felony.

Moreover, it would be absurd to require the People to charge a defendant with *only* shoplifting when he enters a commercial establishment harboring multiple intents including the intent to commit petty. For example, 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. Here, appellant entered the bank with the intent

to commit a more culpable crime than petty theft, thus he did not necessarily commit only shoplifting. Appellant's underlying intent was the intent to commit section 530.5, which is not a theft crime, thus subdivision (b) of section 459.5 does not require appellant be convicted of solely shoplifting rather than second degree burglary.

Appellant also claims that the People forfeited any argument that appellant entered the bank with the intent to commit section 530.5, because during the plea hearing, the trial court asked whether the underlying offense was "a forged check," and the People responded, "that's the conduct, your Honor." (ABOM 24, citing 7 RT 304.) But in fact, appellant forfeited the argument that section 530.5 was not the underlying felony of his burglary offense, because he did not demur to the information and challenge whether the information adequately charged the underlying felony. Generally, in defining the elements of a crime, it is enough for the court to instruct in the language of the statute when the defendant fails to request an amplification thereof. (*People v. Failla* (1966) 64 Cal.2d 560, 565.) Appellant pleaded guilty to burglary, and the facts in the underlying police report were sufficient to satisfy the requirement that appellant entered the bank with the intent to commit "a felony." (*People v. Holmes* (2004) 32 Cal.4th 432, 440 [stipulating to a police report establishes the factual basis for a guilty plea].) Additionally, during the colloquy with the court, the People were referring to appellant's fraudulent behavior of cashing the forged check and using his grandmother's personal identifying information for an unlawful purpose. The record shows that appellant entered the bank with the intent to use his grandmother's personal identifying information to unlawfully withdrawal money from her account.

Because the record of appellant's conviction shows that he entered the bank with the intent to commit section 530.5, and because the act of entering a bank with the intent to commit that provision is not the act

identified in section 459.5, subdivision (a), i.e., entry with intent to commit petty theft by larceny, appellant did not meet his burden of showing his crime of second degree burglary should be reduced to a violation of section 459.5. In other words, appellant cannot show that he would have necessarily been convicted of misdemeanor shoplifting if Proposition 47 had been in effect at the time he committed the offense, because he also necessarily committed a felony that remains unaffected by section 459.5.

CONCLUSION

Based on the arguments above, respondent respectfully requests this court affirm the Court of Appeal's judgment.

Dated: July 13, 2016

Respectfully submitted,

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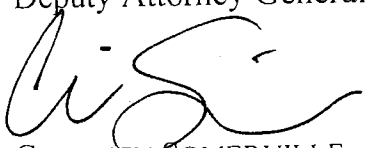

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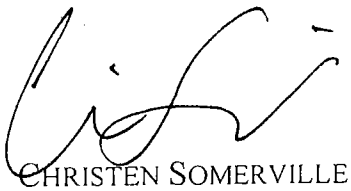
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13-point Times New Roman font and contains **10,805** words.

Dated: July 13, 2016

KAMALA D. HARRIS
Attorney General of California



CHRISTEN SOMERVILLE
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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Gonzales** No.: **S231171**

I declare: I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On July 13, 2016, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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Fourth Appellate District, Division One
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The Honorable L. Brooks Anderholt
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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **July 13, 2016** to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Richard P. Levy, Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at rlevy@richardalevy.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 13, 2016, at San Diego, California.

D. Wallace
Declarant

D. Wallace
Signature

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