IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

DEMETRIUS LAMONT WILLIAMS,

Defendant and Appellant

Case No. S195187

APPELLANT'S OPENING BRIEF ON THE MERITS

On Review of an Opinion and Decision of the Court of Appeal,
Second Appellate District, Division Seven, No. B222845
Los Angeles Superior Court, No. MA046168
The Honorable Bernie C. LaForteza, Judge

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Defendant and Appellant	)	
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APPELLANT'S OPENING BRIEF ON THE MERITS

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

QUESTION PRESENTED FOR REVIEW

Can a conviction for robbery be based on the use of force in the attempt to escape after committing the crime of theft by false pretenses as opposed to theft by larceny?

STATEMENT OF THE CASE

On January 10, 2010, appellant was found guilty after a jury trial of

four counts of second degree robbery (Penal Code § 211[1], counts 1-4), second degree burglary (§ 459, count 5), grand theft by using an access card (§ 484g, subd. (a), count 6), grand theft (§ 487, subd. (a), count 7), and three counts of forgery (§ 484i, subd. (b), counts 8-10). (4 RT 1842-1845, CT 42-50, 140-143.) On January 5, 2010, appellant admitted that he had suffered a prior conviction for robbery, which conviction was alleged as a "strike" under sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d), and as a five-year serious felony prior conviction under section 667, subdivision (a)(1). (4 RT 1847-1848, CT 145.) Allegations of five qualifying prior prison terms were dismissed on motion of the People. (4 RT 1846, CT 145.)

At the sentencing hearing conducted March 3, 2010, the court denied appellant's motion to dismiss the prior strike for sentencing purposes pursuant to section 1385. (4 RT 2104, 2112, CT 159, 160.) The court denied probation and sentenced appellant to the upper term of five years on count 1, robbery, and doubled that term pursuant to the strike prior. (4 RT 2112-2113, CT 159.) The court imposed consecutive two year terms for

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1 All further statutory references are to the California Penal Code unless otherwise specified.

the remaining three robbery counts (one-third of the mid-term of three years, doubled due to the strike). (4 RT 2113, CT 161-163.) The court imposed a consecutive term of one year, four months, for count five, second degree burglary (one third of the midterm of two years, doubled pursuant to the strike prior.) (4 RT 2113, CT 163-164.) The court stayed the sentence on counts six (§ 484g, subd. (a)), and seven (§ 487, subd. (a)), pursuant to section 654. (4 RT 2113, CT 164-165.) The court imposed a consecutive term of one year, four months, for count eight, credit card forgery (one third of the midterm of two years, doubled pursuant to the strike prior.) (4 RT 2114, CT 165-166.) The court stayed the sentences on counts nine and ten, also credit card forgery, pursuant to section 654. (4 RT 2114, CT 166-167.) The court imposed an additional five-year term for the serious prior felony conviction pursuant to section 667, subdivision (a), for a total prison term of twenty three years, eight months. (4 RT 2115, CT 160, 168.)

In a published opinion filed July 11, 2011, the Second District Court of Appeal, Division Seven, affirmed the robbery convictions and rejected appellant's contention that those counts should be reversed because the crime of robbery requires a larcenous taking which was not present in this case. Additionally, the Court of Appeal agreed that there was not sufficient

evidence to support the guilty verdicts with regard to counts 8 through 10, credit card forgery, and reversed the convictions for those counts. The Court of Appeal also agreed that the term for second degree burglary, count 5, should have been stayed pursuant to section 654. The court ordered that appellant's sentence be reduced to 21 years, reflecting the removal of the one-year, four-month terms imposed for counts 5 and 8.

This Court granted review on the question whether a conviction for robbery may be based on the use of force in the attempt to escape after committing the crime of theft by false pretenses as opposed to theft by larceny.

STATEMENT OF FACTS

Prosecution Evidence

On July 4, 2009, appellant entered the Wal-Mart department store in Palmdale and purchased a $200 gift card from Michael Ortiz, a store cashier, with a "gold looking" credit card. (2 RT 656, 660, 663-664.) It was later determined that the card was not a valid one, but had been altered such that the magnetic strip on the back of the card corresponded to another person's credit card account information. (2 RT 644-657, 719-723; Peo. Exhs. 1, 13.)

Minutes later, appellant again approached Ortiz and attempted to purchase three additional gift cards. (2 RT 665.) Jacqueline Pena, another cashier, intervened and told appellant that pursuant to Wal-Mart policy, credit cards could not be used to purchase gift cards; only debit cards or cash were allowable forms of payment. (2 RT 682.) Appellant handed back to Ortiz the three cards he was attempting to purchase, and Ortiz voided that transaction. (2 RT 667-668.)

Scotty Southwell, a loss[2] prevention officers at Wal-Mart, was notified that some suspicious transactions were occurring. (2 RT 685-686, 691.) Southwell and another loss prevention officer, Vyron Harris, approached appellant and Southwell identified himself as a loss prevention officer. (2 RT 697.) Southwell asked appellant for the receipt and the card he had used for the purchase. (2 RT 697-698.) Appellant complied. (2 RT 698-699.) Southwell noticed that the last four digits of the credit card provided by appellant did not match the card on the receipt. (2 RT 699.) Appellant apologized and said that he had given Southwell the wrong card,

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2 The Reporter's Transcript refers to the loss prevention officers as "lost" prevention officers. This appears to be an error since the correct term is commonly known to be "loss" prevention. Appellant uses the term "loss" prevention in this brief.

then handed him two gold mastercards. (2 RT 700.) The last four digits on those cards also did not match the digits on the Wal-Mart receipt. (2 RT 701.)

Appellant began walking toward the retail exit door. (2 RT 701.) Southwell followed appellant and asked him why the cards were different. (2 RT 702.) As appellant was walking, he handed Southwell another card, the last four digits of which also did not match the receipt. (2 RT 702-703.) As appellant neared the exit to the store, Southwell asked him to come to his office for further investigation. (2 RT 706.) Southwell then told appellant to stop, but appellant failed to do so. (2 RT 706.)

Loss prevention personnel Howard Coggeshall and Derek Valiza joined Southwell and Harris. (2 RT 707.) Appellant shoved Southwell and attempted to flee. (2 RT 707.) The loss prevention officers attempted to detain him, and appellant struggled. (2 RT 713.) The officers testified that as appellant was face down on the pavement, he put his left hand under his waistband and stated he was reaching for a gun. (2 RT 715, 969-970.) Harris and Southwell secured appellant's left arm. (3 RT 970-971.) No gun was found, but Southwell, Valiza, and Coggeshall testified they did not know if appellant had a gun, and they feared for their safety. (2 RT 715-

716, 3 RT 962, 980.) Southwell testified that he reviewed video taken at the time of the incident, and the video was played for the jury. (2 RT 688-690, 708-712.)

Los Angeles County Sheriff's Deputy Jason Jones received and impounded evidence from the loss prevention officers. (3 RT 989-990.) Four credit cards—the last four digits of which were 7288, 7197, 2015, and 0778—were impounded, as well as six Wal-Mart gift cards, two McDonald's gift cards, two Jack-in-the-Box gift cards, and one Angel's gift card. (3 RT 991-994.) In addition receipts attached to five of the Wal-Mart gift cards were impounded. (3 RT 993-994.) Appellant told Jones he did not have any knowledge of the cards and that he only purchased a beverage using his "EBT" card. (3 RT 998.) Jones pointed out that appellant did not have an EBT card in his wallet, and appellant stated he was mistaken and had in fact paid cash. (3 RT 998-999.) Appellant did not provide a receipt for the drink purchase. (3 RT 999.)

Erich Doepking, a Los Angeles County Sheriff's Deputy, testified that the credit cards recovered from appellant contained account information belonging to others encoded in the magnetic stripe. (2 RT 634, 642-647.)

Defense Evidence

Appellant testified. (3 RT 1205.) He admitted one misdemeanor prior conviction and nine felony prior convictions. (3 RT 1206-1207.) He received the mastercards from a friend, Kenneth Smith, as payment for money he was owed. (3 RT 1218-1219.) He had known Smith for four years. (3 RT 1219.) Appellant testified that he believed that Smith was currently in Arizona, and appellant's family had been unsuccessful in their attempts to reach Smith. (3 RT 1220-1221.)

Appellant admitting purchasing two gift cards and attempting to buy three others. (3 RT 1219.) He denied pushing Southwell or struggling with the loss prevention officers or making any statement about a gun. (3 RT 1235, 1239, 1246.) He stated that Southwell never stated that he was "security." (3 RT 1271.)

On cross-examination, appellant admitted that at the time of the incident he was under the influence of drugs and alcohol, having taken drugs the preceding day and having consumed alcohol and marijuana that morning. (3 RT 1267-1269.)

INTRODUCTON

"At common law, robbery consists of larceny plus two aggravating circumstances. Therefore, a defendant commits a robbery when, with the intent to permanently deprive, he trespassorily takes and carries away the personal property of another from the latter's person or presence by the use of force or threatened force." (4 Wharton, Criminal Law, 15th ed., § 454 (1996.) At least twelve decades of California decisional law is in accord. (E.g., *People v. Nelson* (1880) 56 Cal.77, 80 ["robbery is larceny, committed by violence, from the person of another"]; *People v. Gomez* (2008) 43 Cal.4th 249, 254, and 254, fn. 2 ["robbery is . . . a species of aggravated larceny;" "section 211, enacted in 1872, incorporates common law robbery requirements"].)

The underlying theft in appellant's case is theft by false pretenses, not larceny. In theft by false pretenses, there is no larcenous "taking," that is, no "caption" and "asportation" of the property. Instead, there is a fraud or false representation, based on which the victim intends to deliver and does deliver both title and possession of property to the accused. When the property is delivered, the theft is completed.

This Court should preserve the law, that it and other appellate courts

of this state have repeatedly established, that without a larcenous taking, there can be no robbery. California courts embrace the doctrine that robbery is a continuing offense, such that the crime is committed if the force or fear is used after the caption or acquisition of the property but before the asportation is completed. (E.g., *People v. Gomez, supra,* 43 Cal.4th at pp. 249, 254, 255-256; *People v. Estes* (1983) 147 Cal. App. 3d 23, 28.) In order for this doctrine to make sense, the underlying theft must involve a "taking" that can be ongoing. Larceny has that element; theft by false pretenses does not.

Too, where the force or fear is not used in the caption of the property but only during its asportation—that is, during the attempt to escape with the property and before reaching a position of temporary safety—the person against whom the force or fear is used must be deemed to be in possession of the property. The reason that a loss prevention officer may be the victim of a robbery if force or fear is used to escape with shoplifted property is that, as a store employee, the officer is deemed to be in possession of the store's property. (*People v. Estes, supra,* 147 Cal.App.3d at p. 27.) This element is inconsistent with theft by false pretenses. Once possession of and title to the store's property have been delivered (even if as a result of a

false representation) it cannot be said that the loss prevention officer is in possession of the store's property.

This Court has always hewed to the common law requirements that were carried forward into section 211, rejecting, for example, decisions of the Courts of Appeal that purported to broaden the scope of robbery to include—as the Model Penal Code and many states do—the notion that any person present may be deemed the victim of a robbery even if he or she does not have any possessory interest in the property. (*People v. Nguyen* (2000) 24 Cal.4h 756, 763-764.) Here, the question for review must be answered in the negative, and the Court should reiterate that robbery is a species of aggravated larceny. (*People v. Gomez, supra,* 43 Cal.4th at p. 254 and fn. 2.) Doing so recognizes the wisdom of the doctrine of *stare decisis* in that it promotes the "predictability and stability in the law [that] are the major objectives of the legal system . . . ." (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212.) The robbery convictions in appellant's case should be reversed.

ARGUMENT

I.

THE UNDERLYING THEFT ESTABLISHED BY THE EVIDENCE WAS THEFT BY FALSE PRETENSES, NOT THEFT BY LARCENY.

The Legislature in 1927 purported to consolidate the common law offenses of larceny, embezzlement, and obtaining property by false pretenses into a single statute as "theft." (§ 484.) In pertinent part, the statute now includes all three common law crimes:

> 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.

The Legislature also provided that "[w]henever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall be read and interpreted as if the word 'theft' were substituted therefor." (§ 490a.) This Court has consistently held, however, that the consolidation did not eliminate the substantive distinction between

the forms of theft that the common law had established:

> When the formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses were consolidated in 1927 into the single crime of "theft" defined by Penal Code section 484, most of the procedural distinctions between those offenses were abolished. But their substantive distinctions were not: "The elements of the several types of theft included within section 484 have not been changed, however, ..."

(*People v. Davis* (1998) 19 Cal. 4th 301, 304-305, quoting *People v. Ashley* (1954) 42 Cal. 2d 246, 258.)

Thus, "[w]hile a general verdict of guilt may be sustained on evidence establishing any one of the consolidated theft offenses [citation], the offense shown by the evidence must be one on which the jury was instructed and thus could have reached its verdict. [Citation.]" (*People v. Curtin* (1994) 22 Cal.App.4th 528, 531.) See also *People v. Gomez, supra,* 43 Cal.4th at p. 255, fn. 4 [citing *People v. Davis, supra*]; *People v. Allen* (1999) 21 Cal.4th 846, 863 ["theft," as used in section 484, refers to larceny, embezzlement, or theft by false pretenses]; *People v. Carter* (1933) 131 Cal.App.177, 182-183 [substantive requirements of theft by false pretenses not changed by the statute].)

The first sentence of section 484 refers to theft by larceny: "Insofar as it defines theft by larceny, Penal Code section 484, subdivision (a),

provides simply that 'Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft.' The statute is declaratory of the common law." (*People v. Davis, supra,* 19 Cal. 4th at p. 304, fn. 1.) Larceny is committed when one "(1) takes possession (2) of personal property (3) owned or possessed by another, (4) by means of trespass and (5) with intent to steal the property, and (6) carries the property away." (*Id.,* at p. 305.) "'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.'" (*People v. Gomez, supra,* 43 Cal. 4th at p. 255.) The "taking" must be trespassory, that is, non-consensual. (*People v. Edwards* (1925) 72 Cal.App. 102, 113, disapproved on other grounds in *In re Estrada* (1965) 63 Cal.2d 740, 748.)

In the crime of larceny by trick or device, the use of trickery or fraud in obtaining possession (and only possession) is deemed to vitiate any purported consent by the rightful possessor to yielding possession of the property, and thus satisfies the requirement for a larcenous taking. (*People v. Edwards, supra,* 72 Cal.App. at p. 103 ["a taking, within the definition of larceny, occurs when a person, with a preconceived design to appropriate the property to his own use, obtains possession of it by means of fraud or

trickery"].)

Theft by false pretenses, however, differs from larceny in that there is no trespassory "taking" and no "carrying away" of the property. In theft by false pretenses, both *possession and title* to the property are consensually delivered by the victim to the perpetrator; the act is criminal in that the delivery is induced by fraud or false pretense committed by the perpetrator and relied upon by the victim. (*People v. Traster* (2003) 111 Cal.App.4th 1377, 1387.)

The distinction between acquisition of possession only of the subject property and the acquisition of both title and possession is a crucial distinction between larceny and theft by false pretenses:

> Although the crimes of larceny by trick and device and obtaining property by false pretenses are much alike, they are aimed at different criminal acquisitive techniques. Larceny by trick and device is the appropriation of property, the *possession* of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of *both title and possession*.

(*People v. Ashley, supra,* 42 Cal.2d at p. 658 [emphases added].)

The Court added that, though larceny by trick and theft by false pretenses—along with other larcenous crimes—"have been consolidated into the single crime of theft . . . their elements have not been changed

thereby." (*People v. Ashley, supra,* 42 Cal.2d at p. 658.) As Professor Witkin explains, "when the victim *transfers title* there is no common law larceny, and the crime of obtaining property by false pretenses was created by English and American Statutes to fill the gap." (2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Property, § 43, pp. 67-68.) Thus:

> In larceny—even "larceny by trick," in which a victim is deceived into yielding possession of his property to the perpetrator—the victim does not intend to part with title or ownership to the property. "It is essential in such cases [larceny by trick] that the owner shall intend to part with the possession only, and not to pass the title as well. If he intends to pass both the possession and the title, the transaction, though it may amount to the crime of obtaining property by false pretenses, will not constitute larceny."

(*People v. Traster, supra,* 111 Cal.App.4th at p. 1388 [brackets in original].)

The distinction between larceny and theft by false pretenses remains controlling and may not be ignored. "In this state, these two offenses, with other larcenous crimes, have been consolidated into the single crime of theft (§ 484), but their elements have not been changed thereby. [Citations.]" *People v. Traster, supra,* 111 Cal. App. 4th at p. 1387.) *People v. Curtin, supra,* 22 Cal.App.4th 528, is illustrative. There, the defendant entered a bank and presented a check made out to a Dan Hart, a customer of the bank.

He presented a photographic identification that had Hart's name on it and the defendant's picture. The check was purportedly drawn on the account of another person, but was in fact a forged check that had been stolen from that person. The bank teller cashed the check and gave the money to the defendant. (*People v. Curtin, supra*, 22 Cal.App.4th at p. 530.) The defendant was convicted of forgery and of theft, based on the theory of larceny by trick or device. Quoting *People v. Ashley, supra,* that the distinction between obtaining possession only as compared to possession and title is controlling, the Court of Appeal reversed. (*People v. Curtin, supra*, 22 Cal.App.4th at p. 531.) The Court concluded:

> Defendant's misrepresentation of himself as a depositor, Dan Hart, was certainly a trick or device. But he used it to acquire possession and title to the money, not merely possession. The bank did not give defendant the money on any understanding as to its limited use; rather, believing he was Dan Hart, the bank gave defendant the money to keep or use as he would. That the bank might ultimately be contractually responsible to Hart for the unauthorized payment of his deposits to defendant does not affect the teller's intent at the time she cashed the check. ¶ The conviction for grand theft must therefore be reversed.

(*People v. Curtin, supra,* 22 Cal.App.4th at p. 532.)

Tested against these principles, the underlying theft offense established by the evidence in appellant's case is theft by false pretenses,

not larceny or larceny by trick. Appellant purported to purchase a Wal-Mart gift card from the cashier, Ortiz, using a "gold looking" credit card. (2 RT 656, 660, 663-664.) The card was later determined to be invalid, in that it had been re-encoded to reflect a different person's credit card account information. (2 RT 644-647, 719-723; Peo. Exhs. 1, 13.) A short time later, he attempted to purchase three additional gift cards, but was prevented from doing so when another cashier told Ortiz that it was against Wal-Mart policy to accept credit cards in payment for gift cards. (2 RT 681-682.)

The original purchase of the $200 gift card was a classic theft by false pretenses: By tendering the "gold looking" credit card, appellant represented that it was genuine when it was not; Ortiz intended to and did transfer title to and possession of the Wal-Mart gift card in the belief that the credit card was valid. As was true in *People v. Curtin, supra*, Ortiz delivered the gift card to appellant "not for any limited use," but to "keep or use as he would." (2 RT 532.) Indeed, the trial court and the parties at trial correctly analyzed this offense, such that count 7, grand theft, was prosecuted on the legal theory of theft by false pretenses and the jurors were so instructed, using CALCRIM No. 1804—Theft by False Pretenses. (4 RT

1532-1534, CT 116.)

"The elements of the several types of theft included within section 484 have not been changed . . . ." (*People v. Davis, supra,* 19 Cal. 4th at p. 304.) Because both title to and possession of the gift card were transferred to appellant, albeit fraudulently, the offense was theft by false pretenses and not larceny.

II.

ROBBERY REQUIRES THE COMMISSION OF LARCENY.

A. Existing Decisional Law.

Professor Witkin succinctly describes California's law of robbery as "a combination of assault and larceny." (2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Property, § 86, p. 115; see also 4 Wharton, Criminal Law, 15th ed., § 454, quoted *ante*, p. 9.) Witkin's characterization merely restates principles repeatedly established by California decisional law, following its common law origins. (*People v. Nelson, supra,* 56 Cal. at p. 80 ["[r]obbery is larceny, committed by violence, from the person of another. The indictment for robbery charges a larceny--together with the aggravating matter which makes it, in the particular case, robbery"]; *People v. Sheasbey* (1927) 82 Cal. App. 459, 463

["larceny is an essential part of robbery"]; *People v. Green* (1980) 27 Cal.3d 1, 54 ["robbery is but larceny aggravated by the use of force or fear to accomplish the taking of property from the person or presence of the possessor"]; *People v. Butler* (1967) 65 Cal.2d 569, 572-573 (overruled on other grounds, *People v. Tufunga* (1999) 21 Cal.4th 935) [same].)

As this Court explained in *People v. Dillon* (1983) 34 Cal.3d 441, 459, disapproved on other grounds, *People v. Chun* (2009) 45 Cal.4th 1172, 1185-1186), when the Legislature adopted section 211, it intended to preserve the common law doctrine:

> The relationship [between larceny and robbery] was acknowledged in the explanatory note of the California Code Commission accompanying the enactment of the robbery statute in 1872. The note stated in part, "Three elements are necessary to constitute the offense of robbery, as it is *generally understood*: 1. A taking of property from the person or presence of its possessor; 2. A wrongful intent to appropriate it; 3. The use of violence or fear to accomplish the purpose. The first and second of these elements, the third being wanting, constitute simply larceny; . . ." (Italics in original.)

(*People v. Dillon, supra,* 34 Cal.3d at p. 459 [italics in original].)

The requirement that robbery include the elements of larceny is no mere historical anomaly, but continues to be the law in California. (See *People v. Ortega* (1998) 19 Cal.4th 686, 694 quoting Perkins & Boyce,

Criminal Law (3d ed. 1982) p. 350 [robbery is "a species of aggravated larceny"[; *People v. Brock* (2006) 143 Cal. App. 4th 1266, 1276 ["[r]obbery is larceny, committed by violence"]; *People v. Hays* (1983) 147 Cal. App. 3d 534, 541 ["robbery is but larceny aggravated by the use of force or fear to accomplish the taking of the property from the person or presence of the possessor"].) Recently, this Court affirmed that the California law of robbery "incorporates common law robbery requirements" and that "[i]n robbery, the elements of larceny are intertwined with the aggravating elements to make up the more serious offense." (*People v. Gomez, supra,* 43 Cal.4th at pp. 254, and 254, fn .2.) The Court explained:

> Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." *Robbery is, therefore, "a species of aggravated larceny."* [citations].

(*People v. Gomez, supra,* 43 Cal. 4th at p. 254 [quotation marks within quotation marks omitted; emphasis added].)

Viewed through the lens of these authorities, the issue in appellant's case appears straightforward—robbery requires larceny; there was no larceny; the robbery convictions must be reversed. How, then, did the Court of Appeal conclude otherwise?

The Court of Appeal dismissed the substantive differences between

larceny and theft by false pretenses by concluding that "there is simply no public policy justification for treating theft by false pretenses differently from theft by larceny or by trick when, as in the case at bar, the defendant uses force or fear after the property owner, who consented to deliver ownership, immediately recognizes he or she is a victim of a scam and tries to reclaim the property." (Slip Op., p. 12.) The Court of Appeal also held that "there is no basis in the broad language of the robbery statute" to limit the term "felonious taking" to the larcenous taking that has uniformly been required heretofore. (Slip Op., p. 13.) The Court explained away the mountain of decisional law holding that robbery is a species of aggravated larceny as being simply "a consequence of the fact that most robberies are accomplished by larceny, not because courts have intended to limit robbery to an aggravated from of that specific theft offense." (Slip Op., p. 13.)

The Court of Appeal was mistaken in these assertions. The use of force or fear after the acquisition of property by a theft by false pretense cannot constitute a robbery because the latter offense does not have a "taking" element that could be ongoing. Moreover, once a theft by false pretense is completed, title and possession of the property pass to the perpetrator; thus, the store employees may not be said to be in possession of

the store's property when the force or fear is used. As a matter of doctrine, therefore, robbery may not be predicated on theft by false pretenses. Too, this Court has consistently looked to the common law of robbery in its interpretation of section 211 and should continue to do so with respect to these issues.

B. The Use of Force or Fear After the Acquisition of Property by a Theft by False Pretense Cannot Constitute a Robbery because there is no "Taking" Element that Could Be Ongoing.

The taking required for larceny is trespassory, that is, the nonconsensual violation of the victim's right of possession of property that is in his possession. (*People v. Traster, supra,* 111 Cal.App.4th at p. 1387; *People v. Davis, supra,* 19 Cal.4th at p. 305; 2 Witkin & Epstein, California Criminal Law (3d ed. 2000), Crimes Against Property, § 13, p. 32.) In addition to the initial taking, larceny requires asportation or the "carrying away" of the property taken. (*People v. Sally* (1993) 12 Cal.App.4th 1621, 1627.) This Court has referred to the requirement of "taking" as including both the initial acquisition and the carrying away: "'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.'" (*People v. Gomez, supra*, 43 Cal.4th at p. 255, citing *People v. Davis, supra,* 19 Cal.4th at p.

305.)

"Decades of case law have made clear that robbery in California is a continuing offense, the 'taking' comprising asportation as well as caption." (*People v. Gomez, supra,* 43 Cal.4th at p. 262.) Thus, "the commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1170; see also *People v. Cavitt* (2004) 33 Cal.4th 187, 208 [distinguishing "escape rule" for purposes of determining duration of robbery for purposes of "certain ancillary consequences," such as application of the felony-murder rule]; *People v. Gomez, supra,* 43 Cal.4th at p. 255; *People v. Flynn* (2000) 77 Cal.App.4th 766, 772.)

Because the asportation is considered ongoing until a place of temporary safety is reached, the use of force or fear during the asportation supports a robbery conviction, and it is not required that the force or fear be employed in the caption of the property. (*People v. Gomez, supra,* 43 Cal.4th at p. 256; *People v. Estes, supra,* 147 Cal.App.3d at p. 28; *People v. Pham* (1993) 15 Cal.App.4th 61, 65.)

The continuing and ongoing nature of the asportation component of

the taking element led to what has become known as the "*Estes* robbery" doctrine (*People v. Estes, supra,* 147 Cal.App.3d 28 ("*Estes*"). Under *Estes* and its progeny, a robbery is committed if the force or fear is used at any part of the caption or the asportation element of the taking, unless and until the perpetrator has reached a position of temporary safety. *People v. Pham, supra,* 15 Cal. App. 4th at p. 65 ["to support a robbery conviction, the taking, either the gaining possession or the carrying away, must be accomplished by force or fear"].)

Estes began with a classic larceny. Estes entered a Sears store, put on a vest and jacket, and walked out of the store without paying for them. A security guard observed these actions and accosted Estes outside the store. Estes produced a knife and used it to get away, at least temporarily. (*Estes, supra,* 147 Cal.App.3d at p. 25.) The Court of Appeal held that the security guard was deemed to be in possession of the store's property, and thus qualified as a victim of the taking. (*Id.*, at p. 27.) Moreover, the court held "[t]he crime of robbery includes the element of asportation, the robber's escape with the loot being considered as important in the commission of the crime as gaining possession of the property," such that the use of force or fear during that aspect constituted robbery. (*Id.*, at p. 28.)

This Court reiterated these principles in *People v. Gomez, supra*, 43 Cal.4th at p. 257, writing that *"[i]n order to support a robbery conviction, the taking, either the gaining possession or the carrying away, must be accomplished by force or fear*. [Citation.] Thus, these cases implicitly hold that the asportation component of the taking continues while the loot is carried away, and does not end on slight movement." [Italics in original.]

By contrast, theft by false pretenses has no taking requirement, and especially no requirement of asportation. Thus, there is no act that constitutes one of the elements that can be said to be ongoing or continuing after the transfer of the property. Put another way, the crime is both complete and completed, that is, finished, when the transfer is made.

People v. Wooten (1996) 44 Cal.App.4th 1834, states the elements of false pretenses as "(1) the defendant made a false pretense or representation to the owner of property; (2) with the intent to defraud the owner of that property; and (3) the owner transferred the property to the defendant in reliance on the representation." (*Id.* at p. 1842.) These elements are contained, though stated in different language, in CALCRIM No. 1804, Theft by False Pretenses, with which the jurors in appellant's case were instructed. (4 RT 1532-1534, CT 116-117.) Significant for this analysis is

the third element, namely, that "the owner transferred the property to the defendant in reliance on the representation" (from *People v. Wooten, supra*) or, as the jurors were instructed from the pertinent language in the third element of the CALCRIM instruction, "the owner or the owner's agent let the defendant take possession and ownership of the property . . . ."

Under these elements the crime is finished or completed once the facts supporting this element have occurred, that is, once the title and ownership of the property have been transferred. In appellant's case, the theft on which the robbery conviction was purportedly based ended when he obtained the $200 gift card from cashier Ortiz. There is no other element of false pretenses that can be said to be continuing. The deception or false representation was made and is done; the requisite intent to deceive has been completed; and the transfer has been completed. Thus, the premise that robbery is a continuing offense because the taking element of larceny (in particular, the asportation component of that element) continues until a place of relative safety is reached cannot exist when the crime has already been completed.

It is therefore logically not possible to apply the *Estes* doctrine to theft by false pretenses. To attempt otherwise ignores the substantive

distinctions between false pretenses and larceny. The Court of Appeal, however, concluded that "[e]ssentially what occurred here was an *Estes* robbery," adding that "[t]here is simply no public policy justification for treating theft by false pretenses differently from theft by larceny or by trick when, as in the case at bar, the defendant uses force or fear after the property owner, who consented to deliver ownership, immediately recognizes that he or she is a victim of a scam and tries to reclaim the property." (Slip Op., p. 12.)

Public policy justification aside (addressed in part III, *post*) the reasoning of the Court of Appeal effectively grafts a new element into the robbery statute and, in so doing, increases the reach of the crime of robbery to an extent that was unforeseeable and that cannot be reasonably circumscribed. In effect, the Court holds that a robbery is committed any time a property owner parts with property as the result of some form of unlawful taking and then "immediately realizes he or she is a victim of a scam and tries to reclaim the property," during which effort forcible resistance is employed by the perpetrator. While it can be imagined that the Legislature might create such a crime, the offense would have to have, as elements, factors such as "the perpetrator has unlawfully obtained

property from the victim; the victim immediately [this term would have to be defined] realizes that this has occurred and attempts to regain the property; and the perpetrator utilizes force or fear to prevent such attempt." Clearly, this is not the law of robbery as it now stands. Were it to occur, it would be a wholesale expansion of that crime. (Part III, *post.*) Too, if the Legislature did create such a crime, then the jurors would have to be instructed on those elements.

The reasoning of the Court of Appeal, in concluding that the facts here establish "essentially" an "*Estes*" robbery, grafted those additional elements onto the crime of robbery. Otherwise, the Court's conclusion makes no sense. Under that reasoning, the same result would be reached if the taking ("scam") were an embezzlement or a forgery or an insufficient-funds check or obtaining drugs by a false prescription, provided the victim "immediately recognizes that he or she is a victim of a scam and tries to reclaim the property." The law of robbery was never so intended, and should not now be so judicially expanded.

The Court of Appeal concluded that "the broad language of the robbery statute" allowed the result it reached: "Section 211 defines robbery as the 'felonious taking' of property using force or fear. The word 'taking'

is not limited by statute or case law to only certain theft crimes." (Slip Op., p. 13.) The Court acknowledged that "many cases refer to robbery as 'aggravated larceny,'" but dismissed this fact as indicative only that "most robberies are accomplished by larceny." (Slip Op., p. 13.) In these assertions the Court of Appeal is mistaken.

This Court has stated more than once that section 211 is predicated on the common law of robbery. "Robbery is, therefore, a species of aggravated larceny." (*People v. Gomez, supra,* 43 Cal.4th at p. 254, quoting *People v. Ortega, supra,* 19 Cal.4th at p. 694 [internal quotation marks omitted].) In a footnote, this Court added that "[s]ection 211, enacted in 1872, incorporates common law robbery requirements." (*People v. Gomez, supra,* 43 Cal.4th at p. 254, fn. 2, citing *People v. Tufunga, supra,* 21 Cal.4th at pp. 945-947.) "By adopting the identical phrase 'felonious taking' as used in the common law with regard to both offenses [larceny and robbery], the Legislature in all likelihood intended to incorporate the same meanings attached to those phrases at common law." (*People v. Tufunga, supra,* 21 Cal.4th at p. 946.) "Since robbery is but larceny aggravated by the use of force or fear to accomplish the taking of property from the person or presence of the possessor [citation], the felonious intent requisite to robbery

is the same intent common to those offenses that, like larceny, are grouped in the Penal Code designation of 'theft.'" (*People v. Green, supra,* 27 Cal.3d at p. 54, disapproved on another point in *People v. Dominguez* (2006) 39 Cal.4th 1141, 1155, fn. 8.) "[L]arceny is an essential part of robbery . . . ." (*People v. Sheasby, supra,* 82 Cal.App. at p. 463.) "Robbery is larceny, committed by violence, from the person of another." (*People v. Nelson, supra,* 56 Cal. at p. 80.) Indeed, even as appellant's case was pending in the Court of Appeal, this Court wrote that "[r]obbery is larceny with the aggravating circumstances that 'the property is taken from the person or presence of another . . .' and 'is accomplished by the use of force or by putting the victim in fear of injury.'" (*People v. Anderson* (2011) 51 Cal.4th 989, 994.)

The assertion by the Court of Appeal that these statements are happenstance, not law, is not sustainable. "Under the doctrine of *stare decisis,* all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction. Otherwise, the doctrine of *stare decisis* makes no sense. The decisions of this court are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 455.) The

quoted statements are clear. Aside from the doctrinal inconsistencies inherent in the holding of the Court of Appeal (i.e., the absence of an ongoing taking requirement, explained *ante*, and no ongoing possession, explained *post*), these authorities demonstrate that "felonious taking" as used in section 211 is, in fact, limited to a taking based on larceny.

The requirement of a larcenous taking as the predicate to the offense of robbery eliminates the dilemmas and uncertainties that the Court of Appeal has created. Existing law punishes appellant for his conduct by imprisonment in the state prison. Theft by false pretenses in the amount involved here is a felony, and that fact—coupled with appellant's prior convictions and other sentencing enhancements—provides the court with sentencing parameters that are appropriate to the conduct. It may be as well that the evidence would also have supported various misdemeanor assaultive crimes committed against the Wal-Mart personnel, had those offenses been charged. But there was no robbery.

C. A Robbery may not be Predicated on Theft by False Pretenses because Once the Underlying Theft is Completed, the Store Employees do not have "Possession" of the Property.

Equally important is the fact that, in order for there to be a robbery where the force or fear is used during the asportation rather than the caption

of the property, the person against whom the force or fear is used must be legally deemed to be in possession of the store's property. This element of possession cannot exist where the underlying theft was false pretenses because the store has yielded both title and possession of the property to the perpetrator. It is not possible for this transfer of ownership to have occurred and at the same time to state that the loss prevention officer remains in possession of the property when the force or fear was brought to bear.

In *Estes,* the defendant argued that the store security personnel were not owners of the store's property, nor were they in possession of it. (*Estes, supra,* 147 Cal.App.3d at p. 26.) The Court of Appeal rejected this contention, noting that "[i]t is not necessary that the victim of the robbery also be the owner of the goods taken. Robbery is an offense against the person who has either actual or constructive possession over the goods." (*Estes, supra,* 147 Cal.App.3d at p. 26.) The Court explained, "[t]he victim was employed by Sears to prevent thefts of merchandise. As the agent of the owner and a person directly responsible for the security of the items, [the security guard] was in constructive possession of the merchandise to the same degree as a salesperson." (*Estes, supra,* 147 Cal.App.3d at p. 27.)

As noted, in theft by false pretenses there is no trespassory taking.

Instead, both title to and possession of the property are transferred to the perpetrator, albeit in reliance on the latter's fraud. Such transfer having occurred, however, as of that moment the cashier (here Ortiz) and other store personnel no longer have possession of the property. It follows that the same is true of the loss prevention officers, whose constructive possession, according to *Estes,* exists "to the same degree as a salesperson." (*Estes, supra,* 147 Cal.App.3d at p. 27.) As the salesperson has no right to possession of the property, neither does a loss prevention officer for the store.

When the store security personnel contacted appellant, at best the only information they had was that a sales person had sold gift cards to somebody who used a credit card, in violation of the store's internal policies. The Wal-Mart gift cards were no longer in the actual or constructive possession of either Wal-Mart or its security personnel. The element of a possessory interest on the part of the victim of the robbery is missing.

Thus, wholly independent of the absence of an ongoing element of taking, once the fraudulent transaction is completed, the loss prevention officer may not legally be deemed to be in constructive possession of the

store's property. The element of "from the person or immediate presence" logically cannot ever by established where the taking occurred by false pretenses.

III.

THE DECISION OF THE COURT OF APPEAL IS SUCH A WHOLESALE REVISION OF THE LAW OF ROBBERY THAT SUCH A SWEEPING CHANGE, IF DESIREABLE, SHOULD BE LEFT TO THE LEGISLATURE.

To the extent that the Court of Appeal interpreted the term "felonious taking" as used in section 211 as not being "limited by statute or case law to only certain felony crimes" (Slip Op., p. 13), the implications to *stare decisis* are particularly significant. "The burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." (*People v. Latimer, supra,* 5 Cal.4th at p. 1213.)

In fact, what has occurred in appellant's case is that the Court of Appeal crossed the line between interpreting the law and creating a new crime. The decision in appellant's case created a new, court-made crime that may be described as "using of force or fear against a property owner or his agents if contacted immediately after any unlawful acquisition of property is committed." However, there are no common law crimes in

California; instead, the power to create crimes "is vested exclusively in the Legislature." (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.)

To allow such a wholesale judicial enlargement of the law of robbery raises concerns of notice and fundamental fairness as well. "[A] judicial enlargement of a criminal statute that is not foreseeable, applied retroactively, operates in the same manner as an ex post facto law." (*People v. Morante* (1999) 20 Cal. 4th 403, 431.) Such a wholesale revision of the robbery law, if deemed desirable, must come from the Legislature rather than from the judicial branch.

Similar considerations were found controlling in *People v. Nguyen, supra,* 24 Cal.4th 756. As in petitioner's case, in *Nguyen* the Court of Appeal approved a conviction for robbery based on circumstances not contemplated by the statute or the common law, holding that a visitor on the premises of a computer assembly business in which a robbery occurred was a victim of the robbery. The defendants robbed employees of the business of computer parts valued at $400,000, as well as of items of personal property in the possession of the employees. (*People v. Nguyen, supra,* 24 Cal.4th at p. 758.) Also present at the time was the husband of one of the employees, who had no connection with the business and from whom no

personal property was taken, though force and fear were applied to him to accomplish the computer robbery. (*Ibid.*) Defendants' convictions for the robbery of that person were affirmed by the Court of Appeal. (*Id.* at p. 759.)

This Court reversed the convictions for the robbery of the visitor. The Court noted that, under section 222.1 of the Model Penal Code and under the robbery law of several states, a possessory interest in the property taken is not required, because that code defines robbery "to include the use of force or fear against any person during the commission of a theft." (*People v. Nguyen, supra,* 24 Cal.4th at p. 763, at fn. 8.) The Court emphasized, however, that California law of robbery is different:

> Section 211 reflects, instead, the traditional approach that limits victims of robbery to those persons in either actual or constructive possession of the property taken. We take no position on which of these differing approaches is preferable. Our Legislature has adopted the traditional approach, as reflected in the language of section 211. It is up to the Legislature to implement any change that may be desirable.

(*People v. Nguyen, supra,* 24 Cal.4th at p. 764.)

This Court's holding in *Nguyen* is significant. It demonstrates again that California hews to the common law elements of robbery, even if—as the Court of Appeal asserted in appellant's case—"there is simply no public

policy justification" for the distinction. Because the change wrought by the Court of Appeal to the robbery statute in petitioner's case is even greater than that made by the Court of Appeal in *Nguyen,* this Court's observation that "it is up to the Legislature" to implement such a change is particularly *a propos.* Here, as in *Nguyen,* the Court of Appeal declined to follow established common law principles the Legislature contemplated when it enacted section 211, simply because it determined that its interpretation of the law was preferable. As this Court held in *Nguyen*, it was not up to the Court of Appeal to determine which approach was preferable, given the language of section 211 and the common law heritage of that language. Such a significant departure must come from the Legislature or not at all.

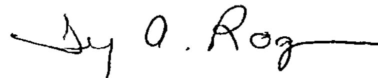
CONCLUSION

"The rule of law commands respect only through the orderly adjudication of controversies, and individuals, institutions and society in general are entitled to expect that the law will be as predictable as possible." (*Board of Supervisors v. Local Agency Formaton Com.* (1992) 3 Cal.4th 903, 921, citing *Payne v. Tennessee* (1991) 501 U.S. 808 [111 S.Ct. 2597, L.Ed.2d 720].) The decision of the Court of Appeal is impossible to reconcile with the law of robbery and the clear decisional authority of this

Court. The guilty verdicts rendered against appellant in counts 1-4 amount to findings of guilt of non-crimes. Those convictions must be reversed.

DATED: January 1, 2012

Respectfully Submitted,



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CERTIFICATION OF WORD COUNT

As required by California Rules of Court, Rule 8.520(c), I certify that this brief contains 9,326 words, as determined by the word processing program used to create it.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed January 1, 2012, in San Diego, California.

Tracy A. Rogers
State Bar No. 190562

DECLARATION OF SERVICE BY MAIL

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Case Number: S195187

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, and not a party to the subject cause. My business address is 3525 Del Mar Heights Rd. #193, San Diego, California. I served the **Appellant's Brief on the Merits**, of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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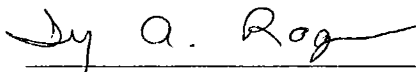

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