

SUPREME COURT NO. S248130

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

<p>THE PEOPLE , Plaintiff and Respondent, v. Si H.Liu, Defendant and Petitioner.</p>	<p>Court of Appeal No. B279393 Superior Court No. GA090351</p>	<p>SUPREME COURT FILED SEP 17 2018 Jorge Navarrete Clerk Deputy</p>
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APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES
COUNTY

Honorable Robert P. Applegate, Judge

PETITIONER'S OPENING BRIEF ON THE MERITS

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Issue Presented

This court ordered on June 20, 2018, under California Rules of Court, rule 8.516, that the issue to be briefed and argued is limited to the first issue stated in petitioner's petition for review. That issue is:

"This court held in *People v. Romanowski* (2017) 2 Cal.5th 903 [*Romanowski*] that theft of access card information under Penal Code section 484, subdivision (d)¹ is eligible for reclassification under Proposition 47 if the value of the card is \$950 or less. Is the valuation of the card determined by its fair market value as stated by this court in *Romanowski*, or by the amount of money obtained from use of the card, as stated by the Court of Appeal?"

Statement of the Case

On September 9, 2013, the Los Angeles County District Attorney filed an information charging petitioner with 23 theft-related counts, including fraudulent acquisition and retention of access card information. (Clerk's Transcript [CT] 1-11.) A jury convicted appellant on all counts. (CT 19-23; Second District Court of Appeal's October 30, 2015, Unpublished Opinion in *People v. Liu*, No. B254655 [B254655], p. 2.) After petitioner was unable to make restitution, the court sentenced her to a total of ten years in state prison. (CT 29, 32-33, 49, 51-52.)

On October 30, 2015, the Court of Appeal reversed the judgment of conviction on one count of access card theft and affirmed the convictions on all other counts. (B254655, p. 25.) On April 8, 2016,

¹ All further undesignated statutory references are to the Penal Code.

petitioner filed petitions to reclassify six counts of theft of access card information (§ 484e, subd. (d)) and one count of obtaining the identifying information of ten or more people (§ 530.5, subd. (c)) as misdemeanors under Proposition 47. (CT 53-80.) On May 11, 2016, the trial court denied the petitions on the ground that the offenses were not eligible. (CT 81-82; Reporter's Transcript [RT] 1-2.) Appellant filed her notice of appeal on December 27, 2016, six days after the Court of Appeal granted her application for relief from default to file a timely notice of appeal. (CT 83-84.)

The Court of Appeal affirmed the judgment as to four counts of theft of access card information and the one count of obtaining identifying information and reversed and remanded as to two counts of access card theft,² after which this court granted the petition for review (*People v. Liu* (2018) 21 Cal.App.5th 143, 153, review granted June 13, 2018, S248130.)

Statement of Facts

Petitioner was convicted of five counts of theft of access card information under section 484e, subdivision (d).³

As to count 2, petitioner acquired the driver's license, social security card, and several credit cards belonging to Yuan Zhao, under

² The application for relief on one of the counts of access card theft was rendered moot by the Court of Appeal's reversal in appellant's earlier appeal. (*People v. Liu, supra*, 21 Cal.App.5th at p. 146, fn. 2.)

³ The other 17 counts are discussed only to the extent they are relevant to the counts at issue.

the pretense that she would help Ms. Zhao obtain a loan to remodel her home. (*People v. Liu, supra*, 21 Cal.App.5th at p. 147.) Ms. Zhao later noticed nearly \$7,000 in fraudulent charges on her credit accounts. (*Ibid.*) Following her conviction, defendant was ordered to make restitution of \$6,665 to Ms. Zhao. (*Ibid.*) With respect to Ms. Zhao, petitioner was also convicted of two counts of grand theft by use of an illegally obtained access card (§484g, subd. (a)), one of which was reversed in the first appeal. (B254655, pp. 3, 15, 25.)

As to count 6, Mr. Ping Guo sought petitioner's help to obtain a loan to pay for his brother's cancer treatments, and provided petitioner with his driver's license and two credit cards. (*People v. Liu, supra*, 21 Cal.App.5th at p. 147.) He noticed an unauthorized charge of \$2,500 to one of his accounts. (*Ibid.*) Petitioner was ordered to pay over \$7,000 in restitution to Mr. Guo. (*Ibid.*) As to Mr. Guo, petitioner was also convicted of one count of grand theft by use of an illegally obtained access card (§ 484g, subd. (a)) and two counts of grand theft for taking Mr. Guo's money (§ 487, subd. (a)). (B245655, p. 6.)

As to count 14, petitioner obtained credit cards and other personal information from Jenny You for the ostensible purpose of obtaining a loan for Ms. You. (*People v. Liu, supra*, 21 Cal.App.5th at p. 147.) Ms. You discovered unauthorized charges totaling \$8,000 to her cards. (*Ibid.*) Petitioner was ordered to pay Ms. You restitution of

\$2,816.50. (*Ibid.*) As to Ms. You, appellant was convicted of two additional counts of grand theft of access card information (§ 484e, subd. (d)) and one count of petty theft for taking Ms. You's money (§ 487, subd. (a)). (B245544, p. 8.)

As to count 21, Mr. Chun Ouyang provided his driver's license and credit card to petitioner to help his friend obtain a loan. (*People v. Liu, supra*, 21 Cal.App.5th at p. 147.) Petitioner opened a new line of credit in Mr. Ouyang's name, and purchased \$500 in gift cards on the new line of credit. (*Ibid.*) Petitioner was ordered to pay restitution of \$161.52 to Mr. Ouyang. (*Ibid.*)

As to count 23, Mr. Ting Wei Sun gave petitioner his debit card and driver's license. (*People v. Liu, supra*, 21 Cal.App.5th at p. 147.) She opened a new line of credit at Walmart for Mr. Sun, and purchased \$150 in gift cards. (*Ibid.*) No restitution was ordered for Mr. Sun. (*Ibid.*)

The Court of Appeal's Opinion

The Court of Appeal rejected petitioner's argument that the valuation of the access cards for Proposition 47 analysis is the fair-market value test as this court articulated in *Romanowski*. Instead, the court held that where the access card information was actually used to procure goods or services, the unauthorized charges are proof of at least the minimum value of the access card information. (*People v. Liu, supra*, 21 Cal.App.5th at p.

149.) The court affirmed the denial of Proposition 47 relief for counts 2, 6, and 14 because the record showed that more than \$950 was charged to each of the victims' accounts. (*Id.* at p. 149.) The court reversed and remanded for further proceedings on the other two counts because the evidence showed that less than \$950 was charged to each victim's credit line. (*Id.* at pp. 149-150.)

Argument

- I. **The proper valuation of a stolen access card for Proposition 47 analysis is its value on the black market.**
 - A. **Petitioner's convictions for theft of access card information may be reclassified as misdemeanors under Proposition 47.**

As this court has explained,

“Approved by the voters in 2014, Proposition 47 (the ‘Safe Neighborhoods and Schools Act’) reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies. To that end, Proposition 47 amended or added several statutory provisions, including new Penal Code section 490.2, which provides that ‘obtaining any property by theft’ is petty theft and is to be punished as a misdemeanor if the value of the property taken is \$950 or less. A separate provision of Proposition 47, codified in Penal Code section 1170.18, subdivision (a), establishes procedures under which a person serving a felony sentence at the time of Proposition 47's passage may be resentenced to a misdemeanor term if the person ‘would have been guilty of a misdemeanor under [Proposition 47] had this act been in effect at the time of the offense.’ (Pen. Code, § 1170.18, subd. (a).)”

(*People v. Page* (2017) 3 Cal.5th 1175, 1179.)

This court held in *Romanowski, supra*, 2 Cal.5th 903 that under section 490.2's language and its statutory context, "obtaining any property by theft" encompasses theft of access card information. (*Id.* at p. 910.)

B. The reasonable and fair market value of a stolen access card is its value on the illicit market.

In *Romanowski, supra*, 2 Cal.5th 903, this court held that valuation of an access card for Proposition 47 purposes is the same for theft, namely reasonable and fair market value. (*Id.* at p. 915.)

"[R]easonable and fair market value' requires courts to identify how much stolen access card information would sell for. (§ 484, subd. (a))" (*Ibid.*) The fair market value is the highest price a willing buyer will pay to a willing seller. (*Ibid.*) Because access cards are not sold legally, the court may look to evidence of illegal sales to establish value. (*Ibid.*) "Only in cases where stolen property would command no value on any market (legal or illegal) can courts presume that the value of stolen access information is de minimis." (*Ibid.*)

This court explained:

"But because we hold that section 490.2 reduces the punishment for theft of access card information valued at less than \$950, we must answer a second question: how do courts determine whether the value of stolen access card information exceeds \$950? After all, section 484e, subdivision (d) punishes the theft of an access card or access card information itself, not of whatever property a defendant may have obtained using a stolen access card or stolen information. Fraudulent *use* of access cards or account

information is punished as a separate crime. (See § 484g.) This means a defendant can be convicted of violating section 484e, subdivision (d), even if he or she never uses the stolen account information to obtain any money or other property. So the \$950 threshold for theft of access card information must reflect a reasonable approximation of the stolen information's value, rather than the value of what (if anything) a defendant obtained using that information.”

(Romanowski, supra, 2 Cal.5th at p. 914, original italics.)

In the present case, the Court of Appeal noted that the *Romanowski* opinion did not state or imply that the defendant had used the access card information to obtain property. (*People v. Liu, supra, 21 Cal.App.5th at p. 149.*) The court opined, “Where as here, the access card information was actually used to procure goods or services, common sense tells us that the unauthorized charges are proof of at least the minimum value of the access card information.” (*Ibid.*)

The Court of Appeal’s reasoning defies logic and conflicts with *Romanowski*. The appeals court overlooked this court’s reasoning that “[S]ection 484e, subdivision (d) punishes the theft of an access card or access card information itself, not of whatever property a defendant may have obtained using a stolen access card or stolen information.” (*Romanowski, supra, 2 Cal.5th at p. 914.*) In fact, petitioner was convicted of multiple counts of grand theft for taking property from the victims using the cards.

The Court of Appeal's notion that the value of a stolen access card is at least the amount of unauthorized charges makes no sense. A thief who purchased stolen cards for the maximum amount possible to extract from them would soon be out of business.

According to a report published by the McAfee, the cybersecurity company, stolen payment card numbers fetch between \$5 and \$30 on the black market in the United States, depending on the amount of data. (McAfee, *The Hidden Data Economy, The Marketplace for Stolen Digital Information* (Dec. 2015), p. 5, <<https://www.mcafee.com/us/resources/reports/rp-hidden-data-economy.pdf#page=5>> (as of Sept. 12, 2018).) Online payment service accounts fetch from \$20 to \$40 for online payment service account balances from \$400 to \$1,000; from \$50 to \$120 for balances of \$1,000 to \$2,500; \$120 to \$200 for balances of \$2,500 to \$5,000; and \$200 to \$300 for balances of \$5,000 to \$8,000. (*Id.* at p. 7.) Put another way, the black-market value of an online payment account ranges from about 3 to 5 percent of the available balance. It stands to reason that the street value of payment cards themselves will be similarly discounted.

Petitioner's approach to valuation is consistent with the theft statutes in general. In *Romanowski*, this court explained,

“How to value stolen access card account information is elucidated in part by the Penal Code's definition of ‘theft,’ which requires courts to determine the value of property obtained by

theft based on ‘reasonable and fair market value. (§ 484, subd. (a) [‘In determining the value of the property obtained, for the purposes of this section, the reasonable and fair market value shall be the test.’].) Though section 484, subdivision (a), says ‘for the purposes of this section,’ section 484 is a definitional section. It sets the ground rules for how theft crimes are adjudicated—for example, how various terms are defined, how value must be calculated, and how certain evidentiary presumptions operate. Specific theft crimes are set out in a variety of other sections, and courts have long required section 484’s ‘reasonable and fair market value’ test to be used for theft crimes that contained a value threshold, such as violations of section 487, subdivision (a). (See, e.g., *People v. Tijerina* (1969) 1 Cal.3d 41, 45; *People v. Farell* (2002) 28 Cal.4th 381, 392.) Acceptance of this approach was part of the backdrop against which Proposition 47 was enacted, and Proposition 47 does not refer to any other approach to valuation. We thus see no basis for an alternative approach to valuation either in the original statutory scheme or in the provisions enacted by Proposition 47. Courts must use section 484’s ‘reasonable and fair market value’ test when applying section 490.2’s value threshold for theft crimes.”

(*Romanowski*, *supra*, 2 Cal.5th at p. 914.)

In regular commerce, the price charged by a retail store from which merchandise is stolen is sufficient to establish the value of the merchandise within the meaning of sections 484 and 487 absent proof to the contrary. (*People v. Tijerina*, *supra*, 1 Cal.3d at p. 45.) This court in *Romanowski* applied the same rule to value purloined access cards sold on the illicit market—equivalent to a retail “thieves’ market.”

(*Romanowski*, *supra*, 2 Cal.5th at p. 915.) Nothing in this common-sense formula suggests that the value of stolen access cards be adjusted upward or downward based on the thief’s ultimate use of the cards as suggested by the Court of Appeal. Fair-market value is dictated by a

willing buyer and a willing seller when the transaction occurs, and is not based on ex post facto results. (See *id.* at pp. 915-916.)

Petitioner's position on valuation is also consistent with the voters' intent. "One of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992, citing Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70; *People v. Montgomery* (2016) 247 Cal.App.4th 1385, 1389-1390.) In *People v. Gonzales* (2017) 2 Cal.5th 858, this court explained that the pamphlet for Proposition 47 "indicated the offenses would constitute misdemeanors if the value of the property was no more than \$950." (*Id.* at p. 870, citing Voter Information Guide, *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35.) The value of the access cards that petitioner stole should not be inflated above their fair-market value to convert her non-violent thefts into felonies.

Conclusion

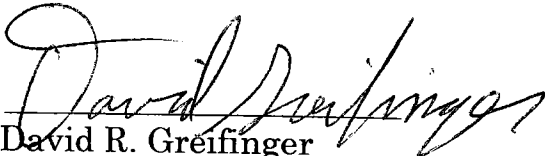
This court should confirm that the valuation of stolen access cards for Proposition 47 analysis equals the value of those cards on the open market and not the amount fortuitously obtained by using those cards. This court should reverse the Court of Appeal's decision denying Proposition 47 relief for the three counts of access card theft and remand

for a new hearing with valuation to be determined by fair market value.

DATED: September 12, 2018

Respectfully Submitted,

David R. Greifinger
CA Bar No. 105242

By: 
David R. Greifinger
Attorney for Petitioner

Certificate of Word Count

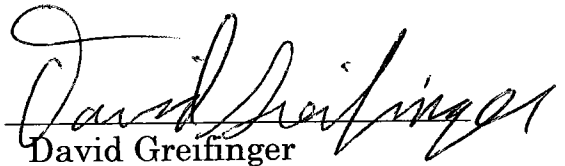
(Cal. Rules of Court, Rule 8.204(c)(1))

This opening brief on the merits contains approximately 2,625 words per a computer-generated word count.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 12, 2018, at Pacific Palisades, California

By:


David Greifinger

PROOF OF SERVICE

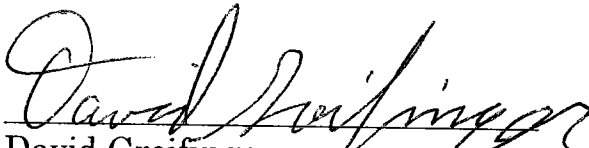
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is 15515 Sunset Blvd., No. 214, Pacific Palisades, California 90272.

On September 12, 2018, I served the following document(s) described as: **PETITIONER'S OPENING BRIEF ON THE MERITS** on all interested parties to the action by transmitting a true copy by electronic mail or by placing a true copy enclosed in sealed envelope(s) addressed as indicated on the attached service list, in the United States Mail, first class postage fully prepaid. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on September 12, 2018, at Pacific Palisades, California.


David Greifinger

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