

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**PEOPLE OF THE STATE OF  
CALIFORNIA,**

Plaintiff and Respondent,

v.

**RAUL O. GUERRERO,**

Defendant and Appellant.

No. S253405

SUPREME COURT  
**FILED**

MAY 29 2019

Jorge Navarrete Clerk

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Deputy

**APPELLANT'S OPENING BRIEF ON THE MERITS**

After the Unpublished Decision of the Court of Appeal,  
Sixth Appellate District, Case No. H041900  
Affirming the Judgment of Conviction  
Filed December 5, 2018

Santa Clara County Superior Court  
Case No. C1476320  
The Hon. Linda R. Clark, Judge

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**APPELLANT'S OPENING BRIEF ON THE MERITS**

QUESTION FOR REVIEW

Did the Court of Appeal properly apply the “some connection or relationship” test of *People v. Gonzales* (2018) 6 Cal.5th 44 in holding that appellant’s conviction for identity theft precluded reducing his forgery conviction to a misdemeanor under the provisions of Proposition 47?

INTRODUCTION

Following a jury trial in September 2014, appellant suffered felony convictions for possession of stolen property (count 2) and forgery (count 4) and misdemeanor convictions for identity theft (count 1) and contempt of court (count 3.) As relevant here, the conviction on count 4 arose from appellant’s possession of a counterfeit \$50 bill, and the conviction on count 1 arose from appellant’s concurrent possession of a driver’s license, a benefits card, and five checks.

After the voters approved Proposition 47 on November 4, 2014, the trial court sentenced appellant on January 5, 2015. The trial court found that Proposition 47 had reduced count 2 to a misdemeanor by operation of law, but did not make the same finding with respect to count 4. The court sentenced appellant to serve a four-year term (double the two-year midterm under the Three Strikes law) on count 4 and to concurrent two-month terms on counts 1, 2 and 3.

The Court of Appeal for the Sixth Appellate District (“Sixth District”) denied appellant’s claim for relief in *People v. Guerrero* (Oct. 11, 2016, H041900) [nonpub. opn.] (*Guerrero I.*) In *Guerrero I.*, the Sixth District found that the passage of Proposition 47 had not reduced appellant’s forgery conviction to a misdemeanor by operation of law because he had also been convicted of identity theft. (*Id.* at pp. 8-16.) The Sixth District reasoned that “the identity theft exception to subdivision (b) of section 473 is not ambiguous and it applies where a defendant is concurrently convicted of both forgery and identity theft, as defined in section 530.5. That is what occurred in this case, and those convictions make subdivision (b) of section 473 inapplicable to defendant.” (*Id.* at p. 13.)

On February 15, 2017, in Case No. S238401, this Court granted review of appellant’s case with briefing deferred. On February 22, 2017, this Court ordered briefing on the following issue: What relationship, if any, must exist between convictions for forgery and



identity theft in order to exclude a forgery conviction from sentencing as a misdemeanor under Penal Code section 473, subdivision (b)?

Briefing in Case No. S238401 concluded June 2, 2017.

However, on August 27, 2018, this Court decided a case presenting a similar issue, *People v. Gonzales* (2018) 6 Cal.5th 44 (*Gonzales*.) In *Gonzales*, this Court reviewed the meaning of section 473, subdivision (b) (hereafter section 473(b)), which provides, in its final sentence, that section 473(b)'s reduction of certain forgery offenses from wobblers to misdemeanors "shall not be applicable to any person who is convicted both of forgery and of identity theft, as defined in Section 530.5." (§ 473(b).) Deciding the scope of this "identity-theft" exception in section 473(b), this Court reasoned:

The relatively similar nature of the offenses mentioned in section 473(b) [...] suggests that the convictions in question must bear some meaningful relationship to each other – beyond the convictions' inclusion in the same judgment. Instead of including two entirely unrelated offenses – such as criminal violation of an environmental law and felony assault, for example – the provision at issue lists two offenses that tend to facilitate each other and, committed together, arguably trigger heightened law enforcement concerns.

(*Gonzales, supra*, 6 Cal.5th at p. 54.) This Court explained:

A person who commits forgery by imitating the victim's signature on a check, for example, will often present identification to falsely represent his or her identity.

The nature of these two offense categories helps explain why it makes sense for these to be included together in section 473(b), and for this provision to be read as relevant to situations where the offenses bear some relationship to each other.

(*Id.* at pp. 54-55.) Thus, this Court concluded:

We can reasonably distinguish – and infer a distinction in a statute mentioning related offenses in present tense – between foreclosing relief to those convicted of felony forgery that was also facilitated by the felony offense of identity theft, and barring relief for anyone who happens to have been convicted, at some point in his or her life, of unrelated forgery and identity theft offenses.

(*Id.* at p. 55.)

And, responding to the view of concurring justices that the identity-theft exception could only apply to identity theft and forgery offenses relating to the same financial instrument, this Court's majority again focused on the Legislature's use of the word "both" in the final sentence of section 473(b). (*Gonzales, supra*, 6 Cal.5th at p. 53 & fn. 6.) This Court reasoned:

Here, the term "both" establishes that *some connection or relationship* is necessary between a forgery and identity theft conviction to disqualify [the defendant] from the benefit of having his sentence recalled. [...]

(*Ibid*, emphasis added.) Applying its "some connection or relationship" test, this Court found that the *Gonzales* defendant's

identity theft offense in 2006 “did not occur ‘in connection with’” his forgery offense in 2003. (*Gonzales, supra*, 6 Cal.5th at p. 56.)

Following issuance of *Gonzales*, on October 16, 2018, this Court ordered the instant matter “transferred to the Court of Appeal, Sixth Appellate District, with directions to vacate its decision and to reconsider the cause in light of the decision in [*Gonzales*].

[Citation.]” However, on December 5, 2018, in *People v. Guerrero* (Dec. 5, 2018, H041900) [nonpub. opn.] (*Guerrero II*), the Sixth District again denied relief, finding that “defendant contemporaneously possessed another person’s personal identifying information and a fictitious \$50 bill. He was not entitled to be sentenced under 473(b) even though the *Estrada* rule applied to his forgery conviction.” (*Id.* at p. 13.)

Appellant petitioned this Court for relief a second time, and in Case No. S253405, this Court accepted appellant’s petition for review and ordered appellant to file an opening brief on the merits no later than May 30, 2019.

As appellant argues herein, the Sixth District has interpreted the controlling language of *Gonzales* too broadly. Appellant’s concurrent possession of personal identifying information and a fictitious \$50 bill does not, without more, establish “some connection or relationship” between his identify theft and forgery offenses. This conclusion follows from the characteristics of the contraband items at issue, because another person’s personal identifying

information cannot facilitate use of a counterfeit \$50 bill. Hence, this Court should make it clear that the “some relationship” test of *Gonzales* requires more than just two crimes committed at the same time. Application of the “identity theft exception” to the right to reclassification of a forgery wobbler to a misdemeanor requires some transactional connection between the forgery and the identify theft such that the latter crime facilitated the former crime. Since that is entirely absent here, this court should reverse the Court of Appeal’s judgment and remand the matter to that court with directions that it be returned to the trial court for further proceedings consistent with this Court’s holding.

#### STATEMENT OF THE CASE

##### **A. The Jury Trial and Sentence**

In a second amended information filed September 4, 2014, the Santa Clara County District Attorney’s Office alleged that appellant Raul O. Guerrero committed the offenses of obtaining and using personal identifying information of another (Pen. Code, § 530.5, subd. (c)(1)<sup>1</sup>; count 1, a misdemeanor), concealing or withholding stolen property (§ 496, subd. (a); count 2), contempt of court (§ 166, subd. (a)(4); count 3, a misdemeanor), and forgery (§ 476; count 4.)

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<sup>1</sup> All subsequent statutory citations are to the Penal Code, unless otherwise noted.

(1CT 154-157.<sup>2</sup>) The prosecution also alleged a “strike” (a prior robbery conviction) within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12.) (1CT 154-157.) On September 10, 2014, a jury convicted appellant on all charges, and the trial court found the strike allegation true. (8RT 730-731, 744-745, 1CT 201-209.)

After the voters approved Proposition 47 on November 4, 2014, and before the court sentenced appellant on January 5, 2015, defense counsel filed a written request asking the court to reduce count 4 (forgery under § 476) from a felony to a misdemeanor pursuant to section 17, subdivision (b). (2CT 345-348.) The request stated that the offense was for possession of a counterfeit \$50 bill. (2CT 345-348.)

At the time of sentencing, the trial court denied the defense request to reduce count 4 to a misdemeanor pursuant to section 17, subdivision (b). (8RT 760.) The court explained the basis of its decision, namely that appellant stood convicted of multiple violations, he had “a long and virtually uninterrupted history of criminal conduct,” and there was nothing in the circumstances of the offense to justify treating it as a misdemeanor. (8RT 760.) The court “recognize[d] that the single check that was made out to the

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<sup>2</sup> 1RT – 6RT and 1CT – 2CT refer to the record filed in Case No. H041900 on April 28, 2015.

defendant” did not exceed \$950, but that was not “the test” under section 17, subdivision (b). (8RT 760.) The court also denied appellant’s *Romero* motion to dismiss his prior strike.<sup>3</sup> (8RT 760-766.)

The parties agreed that the passage of Proposition 47 had reduced count 2 (possession of stolen property) to a misdemeanor by operation of law, and the court deemed the offense a misdemeanor. (8RT 766-767.) The court sentenced appellant to a four-year term (double the two-year midterm under the Three Strikes law) on count 4 and to concurrent two-month terms on counts 1, 2 and 3. (8RT 767.)

#### **B. Post-Sentencing Litigation**

Appellant appealed the trial court’s judgment to the Sixth District. On October 11, 2016, in *Guerrero I*, the Sixth District denied relief. On October 16, 2018, in Case No. S238401, this Court ordered the Sixth District to vacate its decision and to reconsider the cause in light of the decision in *Gonzales, supra*, 6 Cal.5th 44.

On December 5, 2018, in *Guerrero II*, the Sixth District again denied relief. On December 20, 2018, the Sixth District denied appellant’s petition for rehearing. On March 13, 2019, in Case No. S253405, this Court granted appellant’s second petition for review.

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<sup>3</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.

## STATEMENT OF THE FACTS<sup>4</sup>

### **A. The Auto Burglary on February 3, 2014**

In January 2014, Chris Boscia became the treasurer of the Saint Thomas More Society of Santa Clara County (STMS), a Catholic organization for judges, lawyers, law professors and law students. (7RT 494-495.) At that time, Boscia took possession of the STMS financial records, including a checkbook to a Chase Bank account, and he assumed sole responsibility for writing STMS checks. (7RT 497-498.)

On February 3, 2014, Boscia left the STMS financial records in his car, including the STMS checkbook. (7RT 498.) On the following morning, he discovered that the bag containing the records and STMS checkbook had been removed from his car. (7RT 498.)

### **B. Appellant's Arrest on February 12, 2014**

On February 12, 2014, San Jose Police Department officers Wendy Hoskin and Nicholas Speaks investigated a reported disturbance in an apartment on Shortridge Avenue in San Jose. (6RT 231, 7RT 428.) The officers found appellant in his daughter's Leticia Guerrero's apartment, and arrested him for violation of a protective order. (6RT 232-233.)

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<sup>4</sup> This statement omits (1) evidence of appellant's violation of a protective order (count 3), (2) evidence of appellant's prior conduct, (3) evidence that unidentified persons had possessed stolen STMS checks, (4) the defense evidence, and (5) stipulations of fact relevant to the defense.

Officer Speaks searched appellant and removed a wallet from his jacket. (6RT 235-236, 7RT 430, 432-433; Exh. 5.) Correctional officer Richard Durand booked appellant into the county jail and searched his wallet. (6RT 246-247.) Durand found a driver's license belonging to a woman named Akimoto (Exh. 1), a benefits card belonging to Esteban Flores (Exh. 12), a counterfeit \$50 bill (Exh. 13) and five checks, including an STMS check. (6RT 232-233, 247-248, 250-254, 7RT 431-433.)

The STMS check (number 387) was made out for \$400, dated February 10, 2014, and listed a payee with the first name "Raul" and with an indecipherable last name that started with the letter "G." (6RT 248, 7RT 501-503, 519; Exh. 7.) What appeared to be appellant's signature is on the back of the check. (Exh. 7.) Boscia had not signed the check. (7RT 501.) At the time of trial, STMS had no vendors with the first name "Raul" and no one associated with STMS had authorized appellant to possess any STMS check. (7RT 501-502, 519.)

The four other personal checks found in appellant's wallet were from three individuals other than appellant. (6RT 248-249; Exh. 8-11.) One of the personal checks appeared to have been made out to "DMV Renewals," but the name of the original payee had been written over, and the check bore an illegible signature on the back. (Exh. 9.) Two of the checks belonged to Alberta Espinoza, who had lived in the same apartment complex as appellant's



daughter for a period of time in March 2013. (6RT 248; 8RT 633; Exh. 10, 11.) One of Espinoza's checks was made out to "Daniel Rosbach" in the amount of \$380 (Exh. 10) and the other check was blank. (Exh. 11.) A fourth personal check, written on the bank account of a third person, made \$200 payable to "Daniel Rosbach." (Exh. 8.) Both checks made payable to Rosbach bore illegible signatures on the back. (Exh. 8, Exh. 10.)

### ARGUMENT

#### **I. THE SIXTH DISTRICT DID NOT PROPERLY APPLY THE "SOME CONNECTION OR RELATIONSHIP" TEST THIS COURT DEFINED IN *PEOPLE v. GONZALES* FOR WHEN AN IDENTITY THEFT CONVICTION PERMITS FELONY SENTENCING FOR CERTAIN FORGERY OFFENSES**

##### **A. The Relevant Legal Framework and Standard of Review**

Appellant was convicted of forgery (count 4) under section 476, which provides: "Every person who makes, passes, utters, or publishes, with intent to defraud any other person, or who, with the like intent, attempts to pass, utter, or publish, or who has in his or her possession, with like intent to utter, pass, or publish, any fictitious or altered bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of any real or fictitious financial institution as defined in Section 186.9 is guilty of forgery." (§ 476.) Appellant was also convicted of identity theft (count 2) under section 530.5,

subdivision (a), which 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, and upon conviction therefor, shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170.” (§ 530.5, subd. (a).)

Generally, forgery is a “wobbler” crime punishable either as a felony or a misdemeanor. (§ 473, subd. (a).) When voters enacted Proposition 47, the Penal Code gained a new provision reducing punishment to a misdemeanor for “forgery relating to a check, bond, bank bill, note, cashier’s check, traveler’s check, or money order, where the value of the check, bond, bank bill, note, cashier’s check, traveler’s check, or money order does not exceed nine hundred fifty dollars (\$950).” (§ 473(b).) But forgery remains a wobbler – and therefore an offense ineligible for reclassification as a misdemeanor under Proposition 47 – for “any person who is convicted both of forgery and of identity theft, as defined in Section 530.5.” (*Ibid.*) This Court has construed the final sentence of section 473(b) to mean that an otherwise qualifying forgery offense remains a wobbler when there is “some connection or relationship” between an identity

theft offense and the forgery offense at issue. (*Gonzales, supra*, 6 Cal.5th at p. 53, fn. 6.)

Appellant contends that the Sixth District failed to properly apply this Court's "some connection or relationship" test applicable to section 473(b). The scope of section 473(b) is a question of law, so this Court reviews the Sixth District's interpretation of Proposition 47 de novo. (*Apple Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135.) This Court's interpretation of a ballot initiative is governed by the same principles that apply in construing a statute enacted by the Legislature. (*People v. Superior Court (Pearson)* (2010) 48 Cal.4th 564, 571.) This Court first looks to "the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context." (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1216.) The words of a statute must be construed in context, keeping in mind the statutory purpose. (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 849-850.) This Court's principal objective is giving effect to the intended purpose of the initiative's provisions. (*California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 933 [explaining that this Court's "primary concern is giving effect to the intended purpose of the provisions at issue"].) If the provisions remain ambiguous after this Court considers its text and the statute's overall structure, this Court may consider extrinsic sources, such as an initiative's election materials, to glean the electorate's intended purpose. (*Larkin v. W.C.A.B.* (2015) 62 Cal.4th 152, 158

["[W]e may look to various extrinsic sources ... to assist us in gleaning the [voters'] intended purpose".] Finally, this Court presumes that the "adopting body" is aware of existing laws when enacting a ballot initiative. (*In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11.)

**B. This Court's "Some Connection or Relationship" Test Described in *People v. Gonzales***

In *Gonzales, supra*, 6 Cal.5th 44, in a single consolidated proceeding, the defendant pleaded guilty to multiple offenses stemming from three different cases, including pleas of guilty to four counts of check forgery arising from possession and use in 2003 of counterfeit driver's licenses, currency and checks, and a plea of guilty to one count of identity theft arising from use in 2006 of personal identifying information of six individuals to open fraudulent telephone accounts while in custody. (*Id.* at pp. 46-47.)

After California voters enacted Proposition 47, the *Gonzales* defendant petitioned the trial court to reduce his forgery convictions to misdemeanors under new procedures contained in section 473(b). (*Gonzales, supra*, 6 Cal.5th at p. 46.) The trial court denied his petition, but the Court of Appeal for the Third Appellate District ("Third District") reversed, holding that section 473(b) precludes relief only if an identity theft offense is "transactionally related" to a forgery conviction. (*Ibid*, citing *People v. Gonzales* (2016) 6

Cal.App.5th 1067, 1069, review granted February 15, 2017, S240044, aff'd. on another ground (2018) 6 Cal.5th 44.)

On the Attorney General's appeal, this Court affirmed the Third District's opinion, but on different grounds. (*Gonzales, supra*, 6 Cal.5th at p. 56.) This Court's majority differed with the Third District and with concurring justices Corrigan and Chin regarding the scope of the identity theft exception to section 473(b). Justices Corrigan and Chin reasoned that only an identity theft offense relating to the *same instrument* as the forgery offense at issue could disqualify an otherwise-qualified forgery offense from mandatory treatment as a misdemeanor. The concurring justices reasoned:

The first sentence of section 473, subdivision (b) prescribes misdemeanor treatment for a subset of forgeries "relating to" seven types of enumerated instruments valued at \$950 or less when the offender has not suffered certain prior convictions. Because this sentence narrows the class of forgeries eligible for misdemeanor treatment to those "relating to" certain instruments, the most natural reading of the second sentence's exclusion of those "convicted both of forgery and of identity theft" suggests the exclusion applies only if one is also convicted of identity theft "relating to" the same instrument involved in the forgery conviction. [Citation.] This understanding explains the Legislative Analyst's statement that check forgery would be a misdemeanor "'except that it would remain a wobbler crime if the offender commits identity theft in connection with forging a check.'" [Citation.] In other words, if both convictions "relat[e] to" *the same*

*instrument*, misdemeanor treatment for forgery is not allowed. [Citation.]

(*Gonzales, supra*, 6 Cal.5<sup>th</sup> at p. 57, conc. opn. of Corrigan, J., joined by Chin, J., emphasis added.)

Like the concurring justices, this Court's majority found section 473(b) ambiguous, and therefore found it appropriate to "consider Proposition 47's ballot summary and pamphlet to glean the voters' intended purpose and to ascertain the statute's overall purpose." (*Gonzales, supra*, 6 Cal.5<sup>th</sup> at p. 53.) But this Court's majority reasoned that the Legislative Analyst's statement did not limit the identity theft exception to when an identity theft offense and a forgery offense relate to the same instrument. (*Id.* at p. 53 & fn. 6.) While this Court interpreted the identity theft exception to stop "well short of precluding relief for petitioners where the relationship between the two offenses is weak or nonexistent [...]" , it found that the exception would apply where an identity theft offense bears "some connection or relationship" to a forgery offense, even the offenses did not involve the same instrument. (*Ibid.*)

In describing the parameters of the identity theft exception, this Court focused on how an identity theft offense might *facilitate* a forgery offense. (*Id.* at pp. 54-56.) This Court wrote:

Instead of including two entirely unrelated offenses — such as criminal violation of an environmental law and felony assault, for example — the provision at issue lists two offenses that tend to *facilitate* each other and,

committed together, arguably trigger heightened law enforcement concerns.

(*Id.* at p. 54.) And, this Court wrote:

A person who commits forgery by imitating the victim's signature on a check, for example, will often present identification to falsely represent his or her identity.

(*Ibid.*) This Court also wrote:

We can reasonably distinguish – and infer a distinction in a statute mentioning related offenses in present tense – between foreclosing relief to those convicted of felony forgery that was also *facilitated* by the felony offense of identity theft, and barring relief for anyone who happens to have been convicted, at some point in his or her life, of unrelated forgery and identity theft offenses.

(*Id.* at p. 55, emphasis added.) And finally, this Court referred to identity theft offenses facilitating forgery offenses (or vice-versa) when it concluded:

Section 473(b) is best read to require that the offenses resulting in defendant's forgery and identity theft convictions must have been undertaken "in connection with" each other to preclude him from resentencing eligibility.

(*Id.* at p. 56.)

Applying its "some connection or relationship" test, this Court found that the *Gonzales* defendant's identity theft offense in 2006 "did not occur 'in connection with'" his forgery offense in 2003. (*Gonzales, supra*, 6 Cal.5th at p. 56.)

**C. The Sixth District's Application of *Gonzales* to Appellant's Case**

In Part III-A of *Guerrero II*, the Sixth District, having reviewed *Gonzales*, noted that on February 12, 2014, appellant had possessed a counterfeit \$50 bill, and had also possessed a driver's license belonging to Akimoto, a benefits card belonging to Flores, an STMS check owned by Boscia, two personal checks owned by Espinoza, and two personal checks owned by unidentified parties. (*Guerrero II* at pp. 4-5.) Espinoza had lived in the same apartment complex as appellant's daughter for a period of time in March 2013. (*Ibid.*) Other than this potential connection between appellant and Espinoza, the Sixth District found no facts in the record indicating how or when appellant had acquired possession of any of the contraband items. (*Ibid.*) The Sixth District reasoned, however, as follows:

The Supreme Court indicated that the use of the present tense in section 473(b) suggests that its prohibition applies where "at least somewhat related conduct encompass[ed] both forgery and identity theft . . ." [citation] and that "the conviction for the forgery offense must at least occur in a timeframe concurrent with the conviction for identity theft." [Citation.] The court determined that "the statute reflects a somewhat broader concern" with respect to defendants "'convicted both of forgery and of identity theft' (§ 473(b), italics added), not just a forgery done while committing identity theft, or vice versa." [Citation.] It stated that "the requirement that some connection or relationship



exist between the offenses helps explain the Legislative Analyst's statement that check forgery would remain a misdemeanor except in cases where the offender commits identity theft in connection with forging a check. [Citation.]" [Citation.]

In this case, the evidence showed that just such a meaningful connection or relationship existed between defendant's forgery offense and his identity theft offense, both crimes of possession. [Citation.] Here, defendant contemporaneously possessed another person's personal identifying information and a fictitious \$50 bill. He was not entitled to be sentenced under 473(b) even though the *Estrada* rule applied to his forgery conviction.

(*Guerrero II* at pp. 12-13.)

**D. Under *People v. Gonzales*, Contemporaneous Possession of Unrelated Contraband Items Underlying Forgery and Identity Theft Convictions Does Not Satisfy the "Some Connection or Relationship" Test Applicable to Section 473(b)**

In other sentencing contexts, courts have found that offenses premised upon concurrent possession of contraband items bear no meaningful connection or relationship. (See, e.g., *People v. Berry* (1981) 117 Cal.App.3d 184, 196-197 (*Berry*) [vehicle theft sentence not enhanced by concurrent illegal firearm possession when latter offense dismissed pursuant to a plea bargain]; *People v. Beagle* (2004) 125 Cal.App.4th 415, 422 (*Beagle*) [drug conditions of probation not justified for deadly weapon possession offense when count alleging

concurrent drug possession offense dismissed pursuant to a plea bargain].)

More broadly, for purposes of evaluating joinder of offense orders, courts have found that offenses committed at or near the same place and time lacked a sufficiently meaningful relationship. (See, e.g., *People v. Saldana* (1965) 233 Cal.App.2d 24, 29-30 (*Saldana*) [no sufficient connection between rape count and possession of marijuana count despite likelihood of possession during the rape]; *People v. Renier* (1957) 148 Cal.App.2d 516, 519-520 (*Renier*) [no sufficient connection between cases that charged robbery and unlawful driving or taking of a vehicle even when both offenses committed on the same day and the gun used in the robbery found in the stolen vehicle]; *United States v. Singh* (5<sup>th</sup> Cir.2001) 261 F.3d 530, 532-533 (*Singh*) [no sufficient connection between counts alleging firearm possession and harboring aliens even when law-enforcement officers discovered the gun while investigating the defendant for harboring aliens]; see also *Ondarza v. Superior Court* (1980) 106 Cal.App.3d 195, 203 [charging defendant with sale of cocaine when commitment order limited to receiving stolen property improper because “commission of two separate crimes on the same day does not justify an inference that they were necessarily connected”]; *People v. Cardwell* (4<sup>th</sup> Cir.2005) 433 F.3d 378, 386 [joinder of gun possession and murder-for-hire counts permissible

but “we do not believe that a mere temporal relationship is sufficient to show that the two crimes at issue here were *logically* related”].<sup>5</sup>)

In *Gonzales*, unlike in the foregoing cases, this Court dealt with offenses committed in separate calendar years. (*Gonzales, supra*, 6 Cal.5<sup>th</sup> at pp. 46-47.) But, contrary to the Sixth District’s (implicit) view of *Gonzales*, this Court did not opine that concurrent possession

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<sup>5</sup> Conversely, courts have found that concurrent offenses bear meaningful relationships for purposes of sentencing, given their particular factual circumstances. (See, e.g., *People v. Guevara* (1979) 88 Cal.App.3d 86, 92-94 [count charging kidnapping of mother dismissed pursuant to plea bargain but sentence for kidnapping of son properly enhanced because perpetrator had also kidnapped mother]; *People v. Gaskill* (1980) 110 Cal.App.3d 1, 3-4 [assault offense dismissed pursuant to plea bargain but sentence for illegal firearm possession properly enhanced when firearm used to commit assault]; *People v. Bradford* (1995) 38 Cal.App.4<sup>th</sup> 1733, 1738-1739 [firearm possession offense dismissed pursuant to plea bargain but sentence for marijuana cultivation properly enhanced when firearm used as part of continuing marijuana cultivation offense]; *People v. Klaess* (1982) 129 Cal.App.3d 820, 821-823 [two murder counts dismissed pursuant to a plea bargain, but sentence for accessory after the fact proper given defendant’s knowledge of the murders at the time of the offense]; see also *People v. Bland* (1995) 10 Cal.4<sup>th</sup> 991, 1000 [firearm enhancement properly applied to drug possession sentence when “ready access to the assault rifle” aided defendant’s “commission of the drug offense”]; *People v. Estrada* (2017) 3 Cal.5<sup>th</sup> 661, 675 [firearm offense dismissed pursuant to a plea bargain but petition to recall third-strike sentence properly denied when trial court deemed appellant armed with a firearm in the commission of forgery and possession of fraudulent check offenses].)

of personal identifying information and of a separate forged item *must have* some connection or relationship. (*Gonzales, supra*, 6 Cal.5th at pp. 54-55.) To the contrary, this Court focused on how an identity theft offense might facilitate a forgery offense, thereby arguably raising heightened concerns (*ibid*), and this Court described, by way of example, how in the case of a check with a forged signature, an identity theft offense *could* facilitate the forgery offense, *if* the perpetrator presented contraband personal identification information to cash the check. (*Ibid.*) This reasoning did not diverge from the reasoning of prior cases finding concurrent offenses insufficiently related for purposes of sentencing or joinder. (*Berry, supra*, 117 Cal.App.3d at pp. 196-197 [vehicle theft and firearm possession offenses]; *Beagle, supra*, 125 Cal.App.4th at p. 422 [possession of drugs and possession of weapon]; *Saldana* (1965) 233 Cal.App.2d at pp. 29-30 [rape and possession of marijuana]; *Renier, supra*, 148 Cal.App.2d at pp. 519-520 [robbery and unlawful driving or taking of a vehicle]; *Singh, supra*, 261 F.3d at pp. 532-533 [firearm possession and harboring aliens].)

By finding count 4 a wobbler offense based solely on the temporal proximity of appellant's identity theft and forgery offenses, the Sixth District failed to properly apply the test this Court described in *Gonzales*. (*Guerrero II* at p. 13.) Under that test as this Court intended it, appellant's possession of personal identifying information bore no connection or relationship to his possession of

the counterfeit \$50 bill because personal identifying information cannot facilitate use of a counterfeit bill. (*Gonzales, supra*, 6 Cal.5th at p. 55 [a forgery offense may remain a wobbler when it was “facilitated by” an identity theft offense]; *id.* at p. 54 [a forgery offense may remain a wobbler when it and an identity theft offense “bear some meaningful relationship to each other...”].) Similarly, because no facts in this record established where, when, how, or from whom appellant had acquired any of the contraband items, nothing established that “at least somewhat related conduct” accounted for possession of the counterfeit \$50 bill and possession of the personal identifying information, and nothing established that possession of the counterfeit \$50 bill and possession of the personal identifying information “must have been undertaken ‘in connection with’ each other...” (*Gonzales, supra*, 6 Cal.5th at pp. 54, 56.)

As this Court reasoned, section 473(b)’s ambiguity requires recourse to the Legislative Analyst’s statement to the voters that check forgery would be a misdemeanor ““except that it would remain a wobbler crime if the offender commits identity theft *in connection with* forging a check.”” (*Gonzales, supra*, 6 Cal.5th at pp. 52-53, quoting Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis of Prop. 47 by Legis. Analyst, p. 35, italics added.) Hence, contrary to the Sixth District’s view, the voters did not intend, and this Court has neither stated or implied, that mere temporal proximity of identity theft and forgery offenses will establish “some

connection or relationship” between the offenses for purposes of the identity theft exception to section 473(b).

CONCLUSION

After briefing on the merits, this Court should decide the arguments presented in favor of appellant, reverse the Court of Appeal’s judgment, and remand the matter to that court with directions that it be returned to the trial court with directions to impose a misdemeanor sentence on the forgery charge in count 4.

Dated: May 28, 2019

Respectfully submitted,



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Randall Conner, SBN 179122  
Attorney for Appellant  
Raul O. Guerrero

CERTIFICATE OF WORD COUNT

I, Randall Conner, counsel for Raul O. Guerrero, certify pursuant to the California Rules of Court that this document contains 5,054 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504(d)(3). I prepared this document in Microsoft Word 2003, and this program generated the word count stated above. I certify under penalty of perjury under the laws of the State of California that the foregoing is true.

Executed in San Francisco, California, on May 28, 2019.

Respectfully submitted,



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Randall Conner, SBN 179122  
Attorney for Appellant  
Raul O. Guerrero

Re: People v. Raul O. Guerrero

Case No. S253405

**ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE**  
(Code Civ. Proc., § 1013a(2); Cal. Rules of Court., rules 8.71(f) & 8.77)

I, Randall Conner, certify: I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is conner\_law@msn.com and my business address is 315 Montgomery Street, Suite 916A, San Francisco, CA 94104. On May 28, 2019, at 1:00 p.m., I transmitted a PDF version of Appellant's Opening Brief on the Merits by electronic mail to the party(s) identified below using the e-mail service addresses(es) indicated:

Supreme Court of California  
[courts.ca.gov/sct](http://courts.ca.gov/sct)

Court of Appeal, Sixth Appellate District  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 28, 2019, at San Francisco, California.

  
\_\_\_\_\_  
RANDALL CONNER, SBN 179122



Re: People v. Raul O. Guerrero

Case No. S253405

**ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL**  
(Code Civ. Proc., § 1013a(2))

I, Randall Conner, certify: I am an active member of the State Bar of California and am not a party to this cause. My business address is 315 Montgomery Street, Suite 916A, San Francisco, CA 94104. On May 28, 2019, I delivered to the United States Postal Service a copy of the attached Appellant's Opening Brief on the Merits in a sealed envelope with postage fully prepaid, addressed to each the following:

Supreme Court of California  
350 McAllister Street, Room 1295  
San Francisco, CA 94102-4797

Santa Clara County Superior Court  
Hall of Justice, 190-200 West Hedding Street  
San Jose, CA 95110  
Attn: The Honorable Linda R. Clark, Judge

Santa Clara County District Attorney's Office  
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San Jose, CA 95110

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 28, 2019, at San Francisco, California.

  
\_\_\_\_\_  
RANDALL CONNER, SBN 179122