# In the Supreme Court of the State of California

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>**Plaintiff and Respondent,**<br>**v.**<br>**CRAIG DANNY GONZALES,**<br>**Defendant and Appellant.** | Case No. S240044 |



Third Appellate District Third, Case No. C078960
Sacramento County Superior Court, Case No. 03F07705
The Honorable Marjorie Koller, Judge

## RESPONDENT'S REPLY BRIEF ON THE MERITS

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## INTRODUCTION

Appellant presents three main arguments as to why Penal Code section 473, subdivision (b), should be read as tacitly incorporating a transactional relationship. (Answer Brief on the Merits ("ABM") 9-25.) Appellant's first argument, that such a relationship should be read into the ambiguous statue based on the Legislative Analyst's statement in the ballot materials, is based on an ambiguity that does not exist, and his reliance on extrinsic evidence of legislative intent is unnecessary. But assuming an ambiguity, extrinsic evidence does not establish an intent to require a transactional relationship between the offenses. Appellant's second argument, that the statute unreasonably allows *subsequent* identity-theft convictions to preclude Proposition 47 relief, is not supported by the statutory language, which reasonably precludes relief based on *concurrent* identity-theft convictions. Finally, appellant has forfeited his third claim, a constitutional challenge to the Electorate's decision to limit the identity-theft exception to concurrent convictions, because he did not raise it in the Superior Court or the Court of Appeal. But on the merits, the statute's distinction between concurrent and separate convictions is rationally related to a legitimate government interest.

## ARGUMENT

### I. SECTION 473, SUBDIVISION (B), REQUIRES A FORGERY CONVICTION AND A DISQUALIFYING IDENTITY-THEFT CONVICTION TO BE CONCURRENTLY ESTABLISHED; THERE IS NO AMBIGUITY

Appellant argues that section 473, subdivision (b), is ambiguous because the word "both" does not clarify the necessary relationship that must exist between a forgery conviction and a disqualifying identity-theft conviction. (ABM 10-15.) Appellant correctly notes that the word "both" encompasses many different relationships, such as an identity-theft

conviction occurring before a forgery conviction, identity-theft and forgery convictions involving the same victim or common scheme, and identity-theft and forgery offenses charged in the same document. (ABM 14.) But that does not render the statute ambiguous. Instead, the statute's use of the conjunctive "both" does not describe a relationship at all. The only relationship between the two offenses is established by the present-tense language: "any person *who is convicted* both of forgery and of identity theft." (OBM 14-17, italics added.) In this text, the word "both" simply stresses that a petitioner "is convicted" concurrently of identity theft and forgery. (*Ibid.*) No further interpretation is required.

Because the statute is clear, extrinsic evidence is unnecessary to interpret its true intent. (ABM 15-19.) But, if consulted, extrinsic evidence does not establish a transactional-relationship requirement. The statement by the Legislative Analyst—that forging a check for $950 or less would now always be a misdemeanor unless "the offender commits identity theft *in connection with* forging a check" (Voter Information Guide, Gen Elec. (Nov. 4, 2014), Analysis of Prop. 47 by the Legislative Analyst, p. 35, italics added)—does not establish that any "transactional relationship" is required between a forgery conviction and a disqualifying identity-theft conviction. As appellant points out, relying on this extrinsic statement as establishing a transactional-relationship requirement actually raises more questions of legislative intent: "Perhaps the electorate intended that the exclusion apply only where the identity theft is used to further the forgery. Perhaps the electorate intended a course of conduct analysis, or intended the exclusion to apply whenever the offenses were committed according to a common scheme or plan." (AMB 18-19.) These unanswered questions addressing an unnecessary relationship between the two offenses demonstrates that the Legislative Analyst's statement is best viewed as a concrete example of the identity-theft exception rather than a narrow

construction of the rule. (OBM 18-19.) In other words, if extrinsic evidence of intent still leaves the scope of appellant's proposed rule unclear, it cannot be said to clarify an ambiguous statute. To the contrary, section 473, subdivision (b), establishes a clear, bright-line rule precluding the reduction of a forgery conviction if the petitioner was also concurrently convicted of identity theft, which can include check forgery committed "in connection" with identity theft.

For this reason, appellant's reliance on the rule of lenity is also misplaced. (ABM 19.) That rule applies only "when two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable." (*People v. Athar* (2005) 36 Cal.4th 396, 404, internal quotation marks omitted.) Stated another way, "the rule of lenity applies only if the court can do no more than guess what the legislative body intended; there must be an egregious ambiguity and uncertainty to justify invoking the rule." (*People v. Avery* (2002) 27 Cal.4th 49, 58, internal quotation marks omitted.) Because section 473, subdivision (b), is unambiguous, it is unnecessary to resort to either the rule of lenity or the Legislative Analyst's statement to determine its operation.

## II. REDUCTION OF A FORGERY CONVICTION IS REASONABLY PRECLUDED BY CONCURRENT, NOT SEPARATE, IDENTITY-THEFT CONVICTIONS

Alternatively, appellant argues that, even if section 473, subdivision (b), is unambiguous, "no reasonable interpretation of the plain language of this statute could encompass" his circumstances because he committed identify theft three years after he had committed forgery. (ABM 20.) He suggests that to follow the statute's plain meaning would frustrate the purpose of Proposition 47 and lead to absurd consequences. (*Ibid.*) Appellant reasons that the electorate could not have "created a new class of

*subsequent convictions* that can be used to increase an offender's sentence for a crime committed several years previously" because such a construction would violate "an entire body of statutory, constitutional, and decisional law" governing the use of prior convictions to increase punishment. (ABM 21, italics added.) The plain language of Proposition 47 refutes appellant's arguments.

First, appellant's argument conflates the *commission* of the offenses with the *convictions* resulting therefrom. Section 473, subdivision (b), references a person who is *convicted* of both forgery and identity theft, regardless of when the offenses were committed. A person is convicted when guilt is ascertained. (OBM 15.) The statute does not reference the *commission* of either offense. Therefore, appellant, whose offenses were resolved together, was not denied relief based on a subsequent identity-theft *conviction*. Instead, as explained, the relevant factor is whether the convictions were suffered concurrently.[1]

Second, the drafters' decision to base the identity-theft exception on concurrent, but not separate, convictions is not absurd and would not frustrate the purpose of Proposition 47. Rather, it is reasonably related to the goal of distinguishing between convicted forgers suitable for

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[1] In any event, Proposition 47 does indeed use subsequent offenses to preclude the reduction of a previously committed offense. Specifically, any person with a "prior" conviction of an offense referred to as a "super strike" is ineligible for Proposition 47 relief. (§ 1170.18, subd. (i), citing §§ 667, subd. (e)(2)(C)(iv) and 290, subd. (c).) These disqualifying "super strikes" include offenses committed *after* the reducible offense. (*People v. Zamarripa* (2016) 247 Cal.App.4th 1179, 1183-1184 ["prior super strike conviction" means prior to the Proposition 47 petition, not prior to the potentially reducible offense]; *People v. Montgomery* (2016) 247 Cal.App.4th 1385, 1391 [same]; *People v. Walker* (2016) 5 Cal.App.5th 872, 879 ["super strike" is a disqualifying "prior" conviction if suffered any time before adjudication of the Proposition 47 petition]; *People v. Casillas* (2017) 13 Cal.App.5th 745 [same].)

Proposition 47 relief and those who are not. It is not uncommon for a person concurrently convicted of forgery and identity theft to have engaged in a more sophisticated pattern of fraudulent conduct. (See, e.g., *People v. Johnson* (2012) 209 Cal.App.4th 800, 802-804 [149 count indictment included four counts of identity theft and 41 counts of forgery stemming from defrauding a non-profit organization]; *People v. Catalan* (2014) 228 Cal.App.4th 173, 176 [guilty plea included one count of identity theft and two counts of forgery in exchange for the dismissal of 15 similar counts involving additional victims]; *People v. Batman* (2008) 159 Cal.App.4th 587, 589 [defendant pled guilty to four counts of forgery and three counts of identity theft].) In contrast, separate convictions may indicate more isolated or singular criminal conduct. (See, e.g., *People v. Jones* (1962) 210 Cal.App.2d 805, 806-807 [defendant convicted of one count of forgery for falsifying a single check in the amount of $93.81].) Therefore, in determining that some forgers are suitable for Proposition 47 relief and some are not, the drafters could have reasonably concluded that a concurrent identity-theft conviction is the best indication of an unsuitable degree of contemporaneous fraudulent conduct. Further, the drafters may have determined that limiting the identity-theft exception to transactionally-related offenses would be overly restrictive in determining suitability because several types of identity theft defined in section 530.5 can be committed without actually using the identifying information. (OBM 19.) Thus, under a transactional test, a person could suffer contemporaneous convictions of identity theft and forgery while engaging in a pattern of sophisticated fraudulent conduct but still remain eligible for Proposition 47 relief. The drafters' decision to base the identity-theft exception on concurrent convictions is reasonably related to the goal of identifying those forgers suitable for Proposition 47 relief.

The fact that appellant's unrelated forgery and identity-theft offenses in this case happened to be consolidated and resolved together, and that they may not necessarily indicate a more dangerous degree of criminality does not undermine the statute. Section 473, subdivision (b), establishes a reasonable, bright-line rule applicable to all petitioners, and the unambiguous statutory text cannot be rewritten "simply because a literal interpretation may produce results of arguable utility." (*In re D.B.* (2014) 58 Cal.4th 941, 948.) "When statutory language is unambiguous, we must follow its plain meaning ' " 'whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature.' " ' " (*Ibid.*; quoting *People v. Weidert* (1985) 39 Cal.3d 836, 843.) Here, the drafters decided that a concurrent identity-theft conviction was the best indication that a convicted forger is unsuitable for Proposition 47 relief. Even if imperfect, this reasonable legislative decision must not be disturbed.

## III. SECTION 473, SUBDIVISION (B), IS CONSTITUTIONAL

Last, appellant challenges the constitutionality of section 473, subdivision (b), on the ground that the denial of Proposition 47 relief based on concurrent, but not separate, forgery and identity-theft convictions violates the principles of equal protection. (ABM 23.) This claim is forfeited because appellant did not raise it in the Superior Court or the Court of Appeal. Appellant's constitutional challenge also falls short on the merits because, as detailed above, the statute's distinction between concurrent and separate convictions is rationally related to a legitimate government interest.

At the outset, appellant's equal-protection claim is forfeited. It does not appear, based on the limited Superior Court record, that appellant argued in the trial court that precluding Proposition 47 relief based on his concurrent identity-theft conviction violated equal-protection principles.

(CT 1-8.) Similarly, in detailed briefing in the Court of Appeal, including appellant's opening brief, supplemental opening brief, and reply brief, appellant did not argue that the statutory language, if unambiguous, is constitutionally irrational. Rather, appellant presented a statutory-construction argument based on the alleged ambiguity of section 473, subdivision (b), and extrinsic evidence of legislative intent. Accordingly, the Court of Appeal was never asked to address any equal-protection claim, which requires the application of a different legal standard and rational than a statutory-construction claim. Therefore, the claim is now forfeited. (*People v. Carpenter* (1997) 15 Cal.4th 312, 362 [equal-protection claim may not be raised for the first time on appeal], abrogated on other grounds in *People v. Diaz* (2015) 60 Cal.4th 1176, 1185-1186; *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14; compare *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118 [*Wheeler* objection preserved *Batson* equal-protection claim because the trial court was required to consider the same facts and apply a similar legal standard].)

Appellant's constitutional claim also fails on the merits. The Fourteenth Amendment of the United States Constitution and Article I, section 7, of the California Constitution entitle all persons to equal protection under the laws. (*People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1372, disapproved on another ground in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888.) A person challenging a statute on equal protection grounds must first show that the state has adopted a classification that affects two or more similarly situated groups, for purposes of the law challenged, in an unequal manner. (*People v. Morales* (2016) 63 Cal.4th 399, 408.) "This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (*People v. Guzman* (2005) 35 Cal.4th 577, 591-592.)

If two groups are similarly situated but treated differently, it must be determined whether such disparate treatment is justified under the applicable level of scrutiny. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836, internal quotations omitted.) Classifications based on invidious characteristics, such as race or national origin, and those classifications affecting fundamental rights are strictly scrutinized, while classifications based on sex and illegitimacy are granted intermediate scrutiny. (*Ibid.*) But when a statutory classification does not apply to suspect classes or infringe upon fundamental constitutional rights, "equal protection of the law is denied only where there is no rational relationship between the disparity of treatment and some legitimate governmental purpose." (*Johnson v. Department of Justice, supra,* 60 Cal.4th at p. 881.) Prisoners are not a suspect class. And the status of incarceration is neither an immutable characteristic (*Frontiero v. Richardson* (1973) 411 U.S. 677, 686) nor an invidious basis of classification (*Plyler v. Doe* (1982) 457 U.S. 202, 216). Accordingly, a defendant "does not have a fundamental interest in a specific term of imprisonment." (*People v. Wilkinson, supra,* 33 Cal.4th at p. 838 [finding rational basis review applicable to identical criminal statutes prescribing different levels of punishment].)

In general, lawmakers are afforded wide latitude in defining and setting the consequences of criminal offenses. (*Johnson,* at p. 887; see also *Wilkinson*, at p. 838 [strict scrutiny of identical criminal statutes that provide different levels of punishment is "incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment."].) Under rational basis scrutiny, a court may speculate as to the justification for the legislative choice. (*Johnson,* at p. 881, citing *Heller v. Doe* (1993) 509 U.S. 312, 320.) The rational basis standard "does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve.

Nor must the underlying rationale be empirically substantiated." (*Johnson,* at p. 881.) "A classification is not arbitrary or irrational simply because there is an imperfect fit between means and ends or because it may be to some extent both underinclusive and overinclusive." (*Ibid.*, quoting *Heller*, at p. 321, internal citations and quotation marks omitted.)

Again, as detailed above, section 473, subdivision (b)'s distinction between those concurrently convicted of identity theft and forgery and those separately convicted is rationally related to the legitimate interest of determining which forgeries are suitable for Proposition 47 relief because concurrent convictions may indicate a more serious type of contemporaneous fraudulent conduct than separate convictions. This distinction falls within the drafters' wide latitude to define the consequences of criminal offenses and is neither arbitrary nor irrational "simply because there is an imperfect fit between means and ends or because it may be to some extent both underinclusive and overinclusive." (*Johnson v. Department of Justice*, *supra*, 60 Cal.4th at pp. 881, 887.) Accordingly, section 473, subdivision (b)'s distinction between separate and concurrent convictions is constitutional.

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## CONCLUSION

For the reasons stated in Respondent's Opening Brief on the Merits and in this Reply Brief on the Merits, respondent respectfully asks this Court to vacate the Court of Appeal's opinion with instructions to reinstate the trial court's order denying appellant's Proposition 47 petition.

Dated: September 29, 2017

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 2,595 words.

Dated: September 29, 2017

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 29, 2017, at Sacramento, California.

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