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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LLOYD RAMOS FERNANDO,

Defendant and Appellant.

B268243

(Los Angeles County  
Super. Ct. No. GA086543)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jessica Perrin Silvers, Judge. Reversed and remanded with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra and Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Chung L. Mar and Andrew S. Pruitt, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court denied Lloyd Ramos Fernando's petition to recall his sentence on the ground Fernando's two prior felony convictions for theft of an access card were categorically ineligible for reclassification as misdemeanors and resentencing under Proposition 47. While Fernando's appeal from that order was pending, the Supreme Court decided *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*), holding the offense of theft of access card account information is eligible for Proposition 47 relief if the petitioner can establish the value of the access card information did not exceed \$950. The Court also held value for this purpose is determined by the reasonable and fair market value of the information when sold in an illicit market.

After the Supreme Court issued its opinion in *Romanowski*, we invited, and received, further briefing from the parties. Both parties agree *Romanowski* governs this case. We now reverse the trial court's order denying Fernando's petition and remand to the trial court with directions to grant Fernando leave to amend to give him the opportunity to allege the facts identified in *Romanowski* as necessary to obtain relief and, if warranted, to hold an evidentiary hearing on the reasonable and fair market value of the stolen access cards to determine whether Fernando can establish his eligibility for Proposition 47 resentencing.

## FACTUAL AND PROCEDURAL BACKGROUND

On June 19, 2012 Fernando pleaded no contest to two counts of grand theft of an access card under Penal Code section 484e, subdivision (d),<sup>1</sup> a felony, and was sentenced to an aggregate state prison term of one year four months.

In November 2014 the voters passed Proposition 47, part of The Safe Neighborhoods and Schools Act (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 14, p. 73) designed to reduce the punishment for certain drug and theft offenses by reclassifying them from felonies to misdemeanors. (See § 1170.18; *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.) Among other things, Proposition 47 reclassified a variety of grand theft crimes to petty theft offenses when the value of the money, labor, real or personal property taken did not exceed \$950. (See § 490.2, subd. (a) [“[n]otwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft and shall be punished as a misdemeanor”].) It also authorized those convicted and serving sentences for since-reclassified felony offenses to petition for recall of sentence and resentencing under certain circumstances. (§ 1170.18.)

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<sup>1</sup> Statutory references are to this code.

Section 484e, subdivision (d), provides, “Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder’s or issuer’s consent, with the intent to use it fraudulently, is guilty of grand theft.”

On February 20, 2015 Fernando petitioned for recall of his sentence. The court denied his petition without a hearing, concluding the crime of theft of an access card under section 484e was not a Proposition 47-eligible offense. Fernando appealed.

### DISCUSSION

On March 27, 2017 the Supreme Court in *Romanowski* decided the issue presented in this appeal: The section 484e offense of theft of an access card—which includes theft of credit and debit card information—is eligible for Proposition 47 relief if the petitioner can demonstrate the reasonable and fair market value of the card does not exceed \$950. (*Romanowski, supra*, 5 Cal.5th at p. 914 [value of “stolen access card account information” is to be determined by the “reasonable and fair market value” of the information as prescribed in section 484]; § 484 [“in determining the value of property obtained . . . the reasonable and fair market value shall be the test”].) The Court made clear (1) the petitioner bears the burden of demonstrating the reasonable and fair market value of the stolen access card, and (2) that valuation may include evidence relating to the value of the access card information in the illicit market. (See *Romanowski*, at p. 915 [“[w]hen a defendant steals property that is not sold legally, evidence related to the possibility of illegal sales can help establish ‘reasonable and fair market value’”].)

The Court recognized that in some cases the “uncontested information in the petition and the record of conviction may be enough for the petitioner to establish this eligibility” for recall of sentence. (*Romanowski, supra*, 2 Cal.5th at p. 916.) “But in other cases, eligibility for resentencing may turn on facts that are not established by either the uncontested petition or the record of conviction. In these cases, an evidentiary hearing may be

‘required if, after considering the verified petition, the return, any denial, any affidavits or declarations under penalty of perjury, and matters of which judicial notice may be taken, the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner’s entitlement to relief depends on the resolution of an issue of fact.’” (*Ibid.*, quoting Cal. Rules of Court, rule 4.551(f).)

Both parties agree Fernando should be given a new opportunity to allege the facts necessary for relief as identified in *Romanowski*. However, they disagree on the proper disposition of this case. The Attorney General urges us to affirm the trial court’s order denying Fernando’s petition “without prejudice” to permit Fernando to file a new petition. Fernando requests that we reverse the trial court’s order and direct the trial court to allow him to amend his petition to allege facts entitling him to relief and, if necessary, to hold an evidentiary hearing on the reasonable and fair market value of the stolen access cards. Fairness and judicial economy weigh in favor of Fernando’s approach.

### DISPOSITION

The order denying Fernando’s petition to recall sentence is reversed. On remand the trial court is directed to grant Fernando leave to amend his petition to allege the fair market value of the stolen access cards did not exceed \$950 and to conduct further proceedings not inconsistent with this opinion.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.