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S231171

SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

GIOVANNI GONZALEZ,
Defendant and Appellant.

D067554
JCF32479

Appeal from the Superior Court of Imperial County
Honorable L. Brooks Anderholt, Judge

Petition For Review After The Published Decision Of The Fourth Appellate District, Division One Affirming The Superior Court's Order Denying Proposition 47 Relief

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By appointment of the Court of
Appeal under the Appellate Defenders,
Inc. Independent Case-System

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SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Giovanni Gonzalez ("appellant") petitions for review of a published opinion issued on November 12, 2015, by Division One of the Fourth Appellate District, affirming the superior court's order denying Proposition 47 relief. (Cal. Rules of Court, rule 8.500.) The opinion of the Court of Appeal is attached hereto as Appendix "A" and the order denying rehearing is attached hereto as Appendix "B" to the California Supreme Court's copies only.

ISSUE PRESENTED FOR REVIEW

1. As the formerly distinct offenses of larceny, embezzlement, and obtaining property by false pretenses have been consolidated since 1927 in Penal Code section 490a/[1] into the single crime of "theft" defined by section 484, is the term "larceny" as used in section 459.5 confined to the common law meaning or does the mandate of section 490a control?

NECESSITY FOR GRANTING REVIEW

A grant of review is necessary because the Court of Appeal's opinion contains a mistake of law which will cause confusion in future cases – specifically, by its interpretation of "larceny," limiting it to its common law meaning and disregarding the expanded statutory definition of larceny/theft, etc, set forth in section 490a. The Court of Appeal here held the act of passing a forged check is a "consensual" taking – thus, not constituting a "larceny" – and, hence, not within the ambit of section 459.5. That conclusion is entirely at odds with section 490a and this Court's precedent analyzing the offenses of "larceny by trick and device" and "theft by false pretenses" (e.g., *People v. Ashley* (1954) 42 Cal.2d 246, 257; *People v. Delbos* (1905) 146 Cal. 734) as well as statutory construction of "traditional" burglary – which is also premised on an intent to commit "larceny," but which includes theft by false pretenses. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 30-31;

/[1]Unless otherwise indicated, subsequent statutory reference is to the Penal Code.

People v. Dingle (1985) 174 Cal.App.3d 21, 29).

More important, the opinion misconstrues and misapplies the holding of *People v. Williams* (2013) 57 Cal.4th 776 (*Williams*), which dealt with the common law elements of *robbery* (in particular, the necessity of a nonconsensual taking) which was incorporated into the California statutory law of robbery and had nothing to do with how larceny, i.e., theft, is to be defined in California (§ 490a), as *Williams, supra*, itself emphasized.

A grant of review is necessary to settle this important question of law dealing with the interpretation of and the application of Proposition 47, specifically as to whether theft by false pretenses meets the statutory definition of section 459.5, based upon section 490a. This question of law is likely to recur in substantial numbers in the future as Proposition 47 litigation continues.

Review is also necessary to secure uniformity of law. (Cal. Rules of Court, rule 8.500(b)(1).) While unpublished,[2] there is conflicting law, namely *People v. Garcia* (Nov. 3, 2015, No. B261447) [2015 WL 6694004; 2015 Cal.App.Unpub.LEXIS 7860] [denial of Prop. 47 relief for second degree burglary based on entering a bank and cashing fraudulent check, reversed]. Further, "The failure of a state to abide by its own statutory commands may implicate a liberty interest

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[2]Appellant is not unmindful of the prohibition against citation of unpublished opinions. (Cal. Rules of Court, rule 8.1115(a).) Appellant is not citing same as authority but solely to demonstrate the lack of uniformity.

protected by the Fourteenth Amendment against arbitrary deprivation by a state." (*Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300.) An erroneous ruling violates appellant's rights to due process and a fair proceeding under the Fifth and Fourteenth Amendments (*Hicks v. Oklahoma* (1980) 447 U.S. 343) and their analogous California counterparts (Cal. Const., art. I, § 15).

STATEMENT OF THE CASE

On January 30, 2014, the District Attorney of Imperial County filed a felony complaint alleging that on or about December 3, 2013, appellant, Giovanni Gonzalez, committed second degree commercial burglary (§ 459) in count one; and forgery (§ 476) in count two. (Clerk's Transcript ["CT"] 1-2.)

On February 19, 2014, appellant entered a plea of guilty to second degree commercial burglary (§ 459) in count one, pursuant to *People v. West*,[3] and the court dismissed count two with a *Harvey*[4] waiver. (CT 12-16; 1 Reporter's Transcript ["RT"] 1-5.)

On January 16, 2015, appellant filed a petition for recall of sentence and request for resentencing pursuant to section 1170.18. (CT 52, 53-55; 5RT 204-206.)

On February 17, 2015, the court denied appellant's section 1170.18 petition. (CT 61-69, 70-76, 77-78; 7RT 307.)

On March 9, 2015, through Appellate Defenders, Inc., appellant

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[3] *People v. West* (1970) 3 Cal.3d 595.

[4] *People v. Harvey* (1979) 25 Cal.3d 754.

filed an amended notice of appeal based on an order after judgment affecting his substantial rights, specifically, the order denying his petition for relief pursuant to section 1170.18. (CT 81.)

In a published opinion, the Court of Appeal affirmed on November 12, 2015. A timely petition for rehearing was denied on November 24, 2015.

STATEMENT OF FACTS/[5]

In December 2013, after taking two checks from his grandmother, appellant went into Bank of America during its normal business hours, and cashed two checks of $125 each. The checks were payable to him and signed with his grandmother's name. His grandmother did not sign the checks and appellant did not have her consent to use her checks. (CT 31.)

/[5]The facts of the offense are taken from the probation report.

ARGUMENT

I.

THE COURT OF APPEAL FAILED TO CONSIDER SECTION 490a, WHICH CONSOLIDATED CERTAIN OFFENSES SUCH AS LARCENY AND THEFT BY FALSE PRETENSES AS "THEFT," WHEN IT DETERMINED APPELLANT'S CONDUCT DID NOT FALL WITHIN THE AMBIT OF SECTION 459.5; REVIEW IS NECESSARY

A. Sections 1170.18, 459.5, and 490a: The Issue Hinges On "Larceny."

Section 1170.18, subdivision (a), requires that someone serving a felony sentence for what would now be a misdemeanor under Proposition 47 must be resentenced "in accordance with" those new or added code sections - unless they have a so-called super-Strike or section 290, subdivision (c), registration:

> A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act.

In section 459.5, shoplifting is defined as:

> . . . entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). . . .

Section 490a states:

> *Whenever any law or statute of this state* refers to or

> mentions *larceny,* embezzlement, or stealing, said law or statute *shall* hereafter be *read and interpreted* as if the word '*theft*' were substituted therefor." (Emphasis added.)

Thus, when section 459.5 refers to "larceny," the statute should be read as including any form of theft, including theft by false pretenses. This is the unambiguous mandate of section 490a.

B. In Its Opinion, The Court Of Appeal Failed To Consider The Applicability Of Section 490a To The Facts Of The Case At Bar And Erroneously Relied On The Analysis In *People v. Williams*, A Case Dealing With Robbery, Not Theft.

Appellant's actions -- entering a Bank of America branch, a commercial establishment, during open business hours, with the intent to commit theft, and taking away $250 cash is not "shoplifting" in the colloquial sense. But colloquial terminology does *not* define a legal term; what is critical is the specific statutory usage. (*People v. Prunty* (2015) 62 Cal.4th 59, 70.)[6] This case, of course, hinges on "larceny."

As noted, it is well-settled that when the term "larceny" is used in a penal statute, the statute is not confined to the common law definition of larceny. The Legislature has expressly so declared in section 490a.

> [T]he 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. . . .

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[6]While section 459.5 is entitled "shoplifting," that is not determinative. Section 10004 provides, "Division, chapter, article, and section headings contained herein shall not be deemed to govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of any division, chapter, article or section hereof."

(*People v. Davis* (1998) 19 Cal.4th 301, 304.)

In its opinion in the case at bar, the Court of Appeal failed to consider the import of section 490a when it discussed the crime of larceny in the context of this Court's opinion in *People v. Williams* (2013) 57 Cal.4th 776, 788, which dealt with the crime of **robbery**:

> [A]s defined by section 459.5, the offense of shoplifting requires an 'intent to commit larceny,' which was not present in this case. (See *People v. Love* (2005) 132 Cal.App.4th 276, 284 ['Statutory construction is a question of law which we decide independently'].)
>
> The meaning of 'larceny' is clear and unambiguous. 'Larceny requires the taking of another's property, with the intent to steal and carry it away. [Citation.] "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* (2008) 43 Cal.4th 249, 254-255, fn. omitted.) '[L]arceny requires a "trespassory taking," which is a taking *without* the property owner's consent.' (*People v. Williams* [*supra]* 57 Cal.4th 776, 788 (italics added) (*Williams*).)

(Slip opn., p. 4.)

In *Williams*, cited in the quoted material above, the sole issue before this Court was whether the common law crime of robbery could be predicated on a theft by false pretenses. (*Williams, supra,* 57 Cal.4th at p. 790.) In *Williams*, the defendant used re-encoded payment cards to buy gift cards at a department store. The store's security guards were alerted to the scam, and they asked the defendant to show them receipts for the gift cards and the payment cards used. The defendant did so. The security guards told him the

numbers on the cards and the numbers on the receipts did not match. Eventually a brief struggle occurred, and the defendant was convicted of several offenses, including robbery. (*Williams, supra*, at p. 779.) This Court stated:

> To determine the meaning of the words 'felonious taking' in our statutory definition of robbery, we have delved into the sources of this statutory definition and, in turn, into the history of the common law crime of larceny and the statutory crime of theft by false pretenses. This review has led us to conclude that the words 'felonious taking' in the robbery definition were intended to refer only to theft committed by larceny and not to theft by false pretenses.

(*Ibid.*)

In other words, what was at issue in *Williams* were the common law elements of robbery (and, hence, the elements of California's statutory robbery founded upon same) and specifically, the necessary element of a nonconsensual taking. The issue ***here*** is the meaning of "larceny" versus "theft" within the context of section 1170.18. The issue in *Williams* and the issue here are not comparable.

Thus, in its opinion, the Court of Appeal cites *Williams* for the premise that because the taking was consensual, the "felonious taking" requirement of robbery was not satisfied. (Slip opn., at p. 4.) In fact, the *Williams* court specifically distinguished section 490a from robbery, which was based on the common law element of larceny. (*Williams, supra,* 57 Cal.4th at p. 789.) This Court stated:

> Because a 'felonious taking,' as required in California's robbery statute (§ 211), must be *without the consent* of the property owner, or 'against his will' (*ibid.*), and Walmart *consented* to the sale of the gift cards, defendant

> did not commit a trespassory (nonconsensual) taking, and hence did not commit robbery. Moreover, unlike the offense of larceny by trick, in which a defendant's fraud vitiates the consent of the victim as a matter of law, the acquisition of title involved in the crime of theft by false pretenses precludes a trespass from occurring. (See pp. 783-784 ante.) Therefore, theft by false pretenses cannot satisfy the 'felonious taking' element of robbery.

(*Williams, supra,* 57 Cal.4th at pp. 788-789, emphasis original.)

The majority opinion referenced Justice Baxter's dissent[7] which proposed a theory not presented in the briefs of the parties. Central to the dissent's reasoning was section 490a – any law or statute that references or mentions larceny or stealing must be interpreted as meaning "theft." The dissent proffered that even though the terms larceny or stealing are not expressly mentioned in section 211, they are indirectly referenced by the words "felonious taking" – "which should be interpreted under section 490a as meaning 'theft,' a crime that includes theft by false pretenses" – which "encompasses defendant's conduct in this case." (*Williams, supra,* 57 Cal.4th at p. 789.)

The majority's response to the dissent was telling:

> The dissent's theory would require us to conclude that, by enacting section 490a, the Legislature intended to alter two of the substantive elements of robbery; asportation and a trespassory taking. (See pp. 787-788, *ante.*) But the 1927 legislation enacting section 490a and the theft consolidation statute (§ 484, subd. (a); Stats. 1927, ch. 619, § 1, p. 1046) left unchanged the elements of theft. (*Ashley, supra*, 42 Cal.2d at p. 258.) We are not persuaded that the Legislature intended to alter the

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[7](Dis. opn. of Baxter, J. at p. 797.)

> elements of *robbery*, to which section 490a makes no reference whatever, while also intending to leave intact the elements of *theft*, to which it explicitly refers. . . .

(*People v. Williams, supra*, 57 Cal.4th at pp. 788-789, emphasis original.)

The Court of Appeal's opinion in the present case fails in two basic spheres. First, it neglects how this court distinguished between the common law requirement of "felonious *taking*" in robbery on the one hand and the larceny species of theft on the other. Second, it ignores – does not even cite, let alone analyze or distinguish – section 490a, which unambiguously provides, with emphasis added: "*Whenever any law or statute of this state* refers to or mentions *larceny,* embezzlement, or stealing, said law or statute *shall* hereafter be *read and interpreted* as if the word '*theft*' were substituted therefor."

The more reasonable conclusion is by its reference to "larceny" in section 459.5, the electorate intended the term to be read as including any form of theft, including theft by false pretenses. This result is further compelled under section 7, part 16, of which the electorate was presumably knowledgeable (*People v. Superior Court* (*Cervantes*) (2014) 225 Cal.App.4th 1007, 1015 [electorate deemed to be aware of existing laws and judicial constructions in effect at the time of enacting legislation enacted by initiative]):

> Words and phrases must be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, must be construed according to such peculiar and

appropriate meaning.

Here, the "approved usage of the language" is that required by section 490a — that "larceny" in any statute is to mean "theft."

The Legislature's mandate in section 490a in the context of "traditional" burglary (§ 459) – upheld by the same division below (*People v. Nguyen, supra,* 40 Cal.App.4th at pp. 30-31; *People v. Dingle, supra,* 174 Cal.App.3d 21, 29) – should control. That is, "traditional" burglary proscribes the entry into particular structures "with intent to commit grand or petit larceny . . . ," but "traditional" burglary has *not* been *limited* to entries with intent to commit common law, classical larceny as does the opinion below. (*Ibid.*) It escapes logic why section 459.5, a form of statutory burglary (albeit denominated as "shoplifting" – but see § 10004), drafted with the same intent to commit "larceny," should be given a different meaning for the same term. Simply stated, section 459.5 is violated when the intent is to commit theft by false pretenses, just as that is true for section 459. Review should be granted.

CONCLUSION

The Court of Appeal not only failed to consider the applicability of section 490a, it also misconstrued and misapplied the reasoning in *Williams* that led to its faulty conclusion: "Because the crime of shoplifting in section 459.5 requires an 'intent to commit larceny,' Gonzale[z]'s offense did not meet the statutory definition of shoplifting." Review must be granted.

Dated: December 11, 2015

Respectfully submitted,

Ava R. Stralla
Attorney for Defendant and
Appellant, Giovanni Gonzalez

CERTIFICATION OF WORD COUNT (Rule 8.500(b)(1))

I hereby certify, pursuant to rule 8.500(b)(1) of the California Rules of Court, that I prepared the foregoing petition for review in WordPerfect X5, and that the word count for this brief is 2,843, exclusive of the cover, declaration of service, and the tables.

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

Dated: December 11, 2015

Respectfully submitted,

Ava R. Stralla

APPENDIX A

Court of Appeal Opinion

Attached To California Supreme Court Copies Only

Filed 11/12/15

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. GIOVANNI GONZALES, Defendant and Appellant.	D067554 (Super. Ct. No. JCF32479)

APPEAL from an order of the Superior Court of Imperial County, L. Brooks Anderholt, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Christen E. Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

Giovanni Gonzales pleaded guilty to second degree commercial burglary in violation of Penal Code section 459 (all statutory references are to this code). The trial court denied Gonzales's petition for recall of his felony sentence. He appeals, contending the trial court erred in denying his petition because: (1) the conduct underlying his

offense meets the statutory definition of misdemeanor shoplifting under section 459.5, a crime added in 2014 by Proposition 47, the Safe Neighborhoods and Schools Act (the Act); and (2) section 1170.18 impliedly applies to convictions pursuant to section 459. We reject Gonzales's arguments and affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2013, Gonzales took two bank checks from his grandmother. He went into a Bank of America twice during regular business hours and cashed the checks. The checks were for $125 each, written payable to Gonzales, and signed with his grandmother's name. Gonzales's grandmother stated she did not sign the checks and Gonzales did not have permission to use her checks.

The District Attorney charged Gonzales with second degree commercial burglary in violation of section 459 and forgery. Gonzales pleaded guilty to the commercial burglary and the District Attorney agreed to dismiss the forgery charge. The trial court suspended imposition of sentence, placed Gonzales on formal probation for three years, and ordered him to serve 50 days in county jail with credit for time served.

In January 2015, Gonzales petitioned for recall of his sentence and requested to have his felony conviction reduced to a misdemeanor pursuant to section 1170.18. Gonzales argued that his offense qualified as "shoplifting" under section 459.5. Alternatively, Gonzales argued the court should liberally construe the Act, which would permit it to change his felony to a misdemeanor under section 459. The trial court denied Gonzales's petition, reasoning that his offense did not qualify as "shoplifting" under

section 459.5 because there was no larceny. The court also rejected Gonzales's request to reduce his commercial burglary to a misdemeanor.

DISCUSSION

I. *Shoplifting Under Section 459.5*

Gonzales contends the trial court should have granted his petition for recall and resentencing because his offense met the statutory definition of shoplifting under section 459.5. We disagree.

On November 4, 2014, the voters enacted Proposition 47, the Act, which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) The Act reclassified certain theft- and drug-related crimes from felonies to misdemeanors unless they were committed by ineligible defendants. (*Id.* at p. 1091.) It also established a procedure for qualifying defendants to petition for recall and modification of their prior convictions and sentences. (§ 1170.18, subd. (a).)

Among its reclassifying provisions, Proposition 47 added a new crime, shoplifting (§ 459.5). Section 459.5 provides:

> "(a) . . . shoplifting is defined as entering a commercial establishment *with intent to commit larceny* while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary. Shoplifting shall be punished as a misdemeanor, except [when the defendant has a disqualifying prior conviction].
>
> "(b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property." (Italics added.)

Gonzales contends that although his offense does not appear to meet the colloquial definition of "shoplifting," his actions do meet the statutory definition as set forth in section 459.5. Specifically, he asserts that his acts of entering a Bank of America branch, a commercial establishment, during regular open business hours, with the intent to commit larceny, and taking away $250 in cash meets the definition of shoplifting in section 459.5. Based on our independent review, we reject Gonzales's argument because as defined by section 459.5, the offense of shoplifting requires an "intent to commit larceny," which was not present in this case. (See *People v. Love* (2005) 132 Cal.App.4th 276, 284 ["Statutory construction is a question of law which we decide independently."].)

The meaning of "larceny" is clear and unambiguous. "Larceny requires the taking of another's property, with the intent to steal and carry it away. [Citation.] '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* (2008) 43 Cal.4th 249, 254-255, fn. omitted.) "[L]arceny requires a 'trespassory taking,' which is a taking *without* the property owner's consent." (*People v. Williams* (2013) 57 Cal.4th 776, 788 (italics added) (*Williams*).)

In *Williams*, our high court considered the definition of larceny as related to the crime of robbery. In that case, the defendant used a credit card, which was encoded with a third party's credit card information, to purchase gift cards at Walmart. (*Williams*, *supra*, 57 Cal.4th at p. 780.) In discussing the " 'felonious taking' " requirement of robbery, the court found that the defendant did not commit larceny because his taking was consensual. (*Id.* at p. 788.) The court explained, "Walmart, through its store

employees, consented to transferring title to the gift cards to defendant. Defendant acquired ownership of the gift cards through his false representation, on which Walmart relied, that he was using valid payment cards to purchase the gift cards. Only after discovering the fraud did the store seek to reclaim possession. Because 'felonious taking,' as required in California's robbery statute [citation], must be *without the consent* of the property owner, or 'against his will' [citation], and Walmart *consented* to the sale of the gift cards, defendant did not commit a *trespassory* (nonconsensual) taking, and hence did not commit robbery." (*Id.* at pp. 788-789.)

As in *Williams*, the taking in this case was consensual. Bank of America consented to transferring title and possession to $250 to Gonzales. Gonzales used false representations that he was cashing valid checks made out to him to obtain the money from Bank of America. Relying on those representations, which the bank must have believed to be true, it consented to giving Gonzales the money. Larceny requires a taking *without* consent (*Williams*, *supra*, 57 Cal.4th at p. 788). That element was not satisfied in this case.

Because the crime of shoplifting in section 459.5 requires an "intent to commit larceny," Gonzales's offense did not meet the statutory definition of shoplifting.

II. *Resentencing Based on Section 459*

Gonzales contends the trial court should have resentenced him to a misdemeanor under section 459. Although Gonzales recognizes that section 459 is not expressly specified in section 1170.18, he contends that because that section allows for

resentencing for other theft offenses involving property under the threshold of $950, it also permits resentencing of section 459 offenses. We reject this argument.

The Act allows a defendant to petition for resentencing if he or she is serving a sentence for a crime that the Act now designates as a misdemeanor. (§ 1170.18, subd. (a); *Rivera, supra*, 233 Cal.App.4th at p. 1092.) Section 1170.18, subdivision (a), identifies those crimes by statute: "Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act."

The statutory construction rule of expression *unius est exclusion alterius* "provides that where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed in the absence of a clear legislative intent to the contrary. [Citations.] 'A statute should be construed with reference to the whole system of law it is enacted to govern and the scheme should be interpreted so that sections are harmonized with one another.' " (*People v. Guillen* (2013) 212 Cal.App.4th 992, 996; see *People v. Gray* (1979) 91 Cal.App.3d 545, 551 [the inclusion of only four crimes as exceptions to the sentence enhancement for great bodily injury demonstrated the legislative intent to exclude other crimes from the list].)

Here, Gonzales was convicted of second degree commercial burglary in violation of section 459, a felony. He contends that the court should have resentenced him to a misdemeanor under that section. However, section 459 is not listed in section 1170.18, the resentencing statute. Section 1170.18, however, does include several theft-related offenses that qualify for misdemeanor sentencing if the property in question had a value

less than $950. (§§ 459.5 [shoplifting], 473 [forgery], 476a [issuing checks without sufficient funds], 490.2 [petty theft], 496 [receiving stolen property].) Section 1170.18's failure to include section 459 in this list demonstrates an intent to exclude it from the resentencing provisions of the Act. Thus, Gonzales was not eligible for resentencing based on section 459.

DISPOSITION

The order is affirmed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.

APPENDIX B

Court of Appeal Order Denying Rehearing

Attached To California Supreme Court Copies Only

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

GIOVANNI GONZALES,

Defendant and Appellant.

D067554

(Super. Ct. No. JCF32479)

ORDER DENYING REHEARING

THE COURT:

The petition for rehearing is denied.

McINTYRE, Acting P. J.

Copies to: All parties

Ava R. Stralla
Attorney at Law
PO Box 28880
San Diego, CA 92198

D067554

DECLARATION OF SERVICE BY MAIL
(Cal.Rules of Court, rules 1.21, 8.50)

I, Ava R. Stralla declare: I am, and was at the time of service hereinafter mentioned, at least 18 years of age and not a party to the above entitled action. My business address is PO Box 28880, San Diego, CA. 92198; I am employed in San Diego County, California. I served the foregoing Petition for Review on December 11, 2015, by depositing copies thereof in the United States mail in San Diego, California, enclosed in sealed envelopes, with postage fully prepaid, addressed to:

Kelly Jafine, Deputy
Office of the Public Defender
895 Broadway Street
El Centro, CA 92243

Heather Trapnell, Deputy
Office of the District Attorney
940 West Main Street, Ste 102
El Centro, CA 92243

Giovanni Gonzalez
Appellant
c/o Kelly Jafine
895 Broadway Street
El Centro, CA 92242

Hon. L. Brooks Anderholt
c/o Clerk, Superior Court
Department 9
939 West Main Street
El Centro, CA 92243

PROOF OF SERVICE BY ELECTRONIC SERVICE
(Cal.Rules of Court, rules 2.251(i)(1)(A-D) & 8.71(f)(1)(A-D))

Furthermore, I, Ava R. Stralla, declare I electronically served from my electronic service address of stralla140988@gmail.com the same referenced above document on December 11, 2015, to the following entities:

Appellate Defenders, Inc. e-service-criminal@adi-sandiego.com

Attorney General's Office: ADIEservice@doj.ca.gov

Court of Appeal, Fourth Appellate District, Division One, via e-submission.

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

Executed on December 11, 2015

Ava R. Stralla