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Supreme Court No._____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTHONY LOPEZ, Defendant and Appellant.	DCA Case No. F074581 Tulare County Case No. VCF314447

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, FIFTH APPELLATE DISTRICT, AFFIRMING THE JUDGMENT OF CONVICTION

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On Appeal from the Judgment and Order of the
Superior Court of California, Tulare County
Honorable Kathryn Montejano

PETITION FOR REVIEW AFTER THE PUBLISHED DECISION OF THE COURT OF APPEAL, FIFTH APPELLATE DISTRICT, AFFIRMING THE JUDGMENT OF CONVICTION

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

This petition for review follows the published decision of the Court of Appeal, Fifth Appellate District, filed on July 27, 2018. A copy of the opinion is attached to this petition as an appendix.

QUESTION PRESENTED

1. Did the Court of Appeal err when it declined to apply the plain language of Penal Code section 459.5, subdivision (b)—which states, "No person who is charged with shoplifting may also be charged with . . . theft of the same property"—and instead found that a defendant may be charged with both shoplifting and theft whenever the intent element of shoplifting is "in question"?

NECESSITY FOR REVIEW

The relevant language of Penal Code section 459.5[1], subdivision (b) is plain and unconditional: "*No person* who is charged with shoplifting may also be charged with burglary or theft of the same property." (Emphasis added.) Here, the prosecution did exactly that when it first charged appellant with felony shoplifting, and then added a charge of felony petty theft with a prior for the same property. The jury convicted appellant of the theft charge but could not reach a verdict on shoplifting. Appellant's sole argument on appeal was that his theft conviction must be reversed because section 459.5, subdivision (b) prohibited the prosecution from adding that charge.

Despite the unambiguous plain language of the statute, the Court of Appeal found that section 459.5, subdivision (b) did not prohibit the prosecution from adding the theft charge and affirmed appellant's

[1]All subsequent statutory references are to the Penal Code unless otherwise specified.

conviction. (Opn. at 10.) In doing so, the court noted that shoplifting requires proof of intent to commit larceny at the time of *entry* into the commercial establishment, while theft does not. (Opn. at 6.) Given that, the court found that applying the plain language of section 459.5, subdivision (b) would have the "absurd result that criminal conduct would go unpunished because a prosecutor was restricted to charging only shoplifting when an element of that offense potentially could not be proven." (Opn. at 10.) Thus, the court found that alternative charging must be permitted whenever "the element of intent upon entering the commercial establishment is . . . in question." (Opn. at 8.) In other words, the court found that the plain language of the statute must yield wherever the prosecution might be unable to secure a shoplifting conviction. The court's ruling is erroneous for several reasons.

First, the court's decision contradicts the plain language of section 459.5, subdivision (b), and without sufficient justification. "The plain meaning controls if there is no ambiguity in the statutory language." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) There is no dispute about the plain meaning of the relevant statutory language. As the Court of Appeal recognized, "The People acknowledge the literal language of section 459.5, subdivision (b) appears unambiguous." (Opn. at 6.) And, to the extent that

there was ever any question, in *People v. Gonzales* (2017) 2 Cal.5th 858, 876-877 this Court confirmed that subdivision (b) constitutes an "explicit limitation on charging," that "expressly prohibits alternate charging" and mandates that a "defendant must be charged only with shoplifting when the statute applies." As such, the court's opinion contradicts both the language of the statute and this Court's decision in *Gonzales*.

Second, while it is true that a court may override the plain language of a statute in order to avoid "absurd results" that the voters did not intend (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276), the plain language of section 459.5, subdivision (b) creates no such result. Though the Court of Appeal focused on the notion that a hypothetical defendant may escape prosecution as a result of the charging limitation, a rule of criminal procedure is not absurd simply because it creates the mere *possibility* that the prosecution will be unable to convict a given defendant. Indeed, there are many rules of criminal procedure that impose much more significant limits on the prosecution's ability to secure convictions, even where it may be readily apparent that a crime has been committed—the clearest example being the exclusionary rule of the Fourth Amendment jurisprudence.

Moreover, while prosecutors generally enjoy broad and largely unreviewable charging authority—a tool that can typically be used to mitigate the risk of failure to prove the elements of one particular charge—the voters were quite explicit in their intent to disrupt the *status quo* in this narrow category of cases. While the consequences of the decision might be undesirable for prosecutors, they are not absurd. As such, the Court of Appeal overstepped its role in returning alternative charging authority to prosecutors after the voters explicitly took it away.

Not only are the consequences of a literal application not absurd, they are wholly consistent with the purposes of the legislation. Section 459.5 was enacted in November of 2014 as part of the Safe Neighborhoods and Schools Act (Proposition 47). "One of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative. [Citations.]" (*Gonzales, supra,* 2 Cal.5th at p. 870.) By prioritizing prosecution of shoplifting over other offenses, the plain language of section 459.5 advances that intent. For example, defendants convicted of the felony form of shoplifting are potentially eligible for a local custody sentence under section 1170, subdivision (h), unlike the felony form of petty

theft with a prior. (Compare § 459.5, subd. (a) with § 666, subd. (a).) In addition, misdemeanor petty theft with a prior has a maximum possible penalty of one year in jail, while misdemeanor shoplifting has a maximum penalty of only six months. (*Id.*) This is consistent with a general intent of the voters to reduce penalties for certain nonviolent crimes. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), analysis of Prop. 47 by Legis. Analyst, p. 35.)

Thus, prohibiting alternative charges, even if that occasionally results in an inability to secure a conviction, is at most a debatable policy choice of exactly the kind the voters were permitted to make and to which the Court of Appeal should have deferred. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165 [though statutory interpretation is meant to avoid "absurd" results, "it is presumed that the [voters] intended reasonable results consistent with [the statute's] expressed purpose . . ."].)

Similarly, though the Court of Appeal cast the possibility that a defendant might "avoid liability" as an "unforeseen" consequence of the statute (Opn. at 9), there is no reason to believe this is so. The consequence is not a latent one. Indeed, the same voters who enacted section 459.5, subdivision (b), simultaneously created the crime of shoplifting in

subdivision (a). Having done so, the voters certainly knew that the intent element of shoplifting is distinct and potentially more onerous than that required for theft. A readily apparent consequence of that distinction is that shoplifting will, in some cases, be more difficult to prove than a theft charge. In that context, the court's finding that an application of the plain language would result in a consequence not foreseen by the voters is not supportable.

Finally, the effect of the court's opinion will be far reaching because it creates an exception that swallows the rule. The court purports to allow alternative charging only in situations where the intent element of shoplifting is "in question." (Opn. at 8.) The Court of Appeals' opinion never directly states who makes that determination, when, or under what standard, but suggests that the prosecution may charge both crimes whenever "the evidence may not demonstrate the defendant entered the commercial establishment with the intent to commit larceny as required for shoplifting." (Opn. at 8-9.) But, except in a truly unusual case—where perhaps the defendant has made clear that he intends to concede the intent element at trial—there will always be some question as to whether a jury will find it proven beyond a reasonable doubt. Thus, under the rule created in this case, the prosecution will nearly always be able to successfully argue that alternate

charging is permitted because it does not yet know whether the jury will accept its proof on that point. In that way, the Court of Appeals' published opinion all but nullifies the prohibition on alternate charging of shoplifting and theft.

Accordingly, appellant asks this court to grant review in order to settle an important question of law that is of statewide importance and likely to recur. (Cal. Rules of Court, rule 8.500(b)(1).) If it stands, the published decision in this case means that—in direct contradiction to the plain language of a statute adopted by the voters—the prosecution will be permitted to alternatively charge theft and shoplifting in virtually every case. This court should grant review to give effect to the section 459.5, subdivision (b), and limit the prosecution's charging authority in the way the voters explicitly set out to do.

STATEMENT OF CASE AND FACTS

I. Procedural History

A complaint filed March 12, 2015, charged appellant with a single count of felony shoplifting, in violation of section 459.5. (CT 8.) At the start of the preliminary hearing on September 17, 2015, the prosecution moved to add an additional count of felony petty theft with a prior. (CT 32.) Defense counsel did not object and the court held appellant to answer on both charges. (CT 43.)

Thus, in an information filed September 28, 2015, the prosecution charged appellant with felony shoplifting (§ 459.5) *and* felony petty theft with a prior (§§ 484, 666). (CT 68, 70.)[2]

A jury trial began on August 29, 2016 and concluded the following day. (CT 236-238.) After requesting a read back of testimony and asking three questions regarding the intent element of shoplifting (1 RT 230-239), the jury found appellant guilty of petty theft with a prior but was unable to

[2] The information also alleged appellant had suffered one prior strike conviction and served three prior prison terms. (CT 69, 71.) The trial court subsequently dismissed the strike allegation pursuant to section 1385. (CT 99.) The prison priors were found true at a court trial, as well as an allegation that appellant had been convicted of a registerable offense under section 290 (a fact that elevated the theft charge to a felony pursuant to section 666). (1 RT 40, 252-254.)

reach a verdict on the shoplifting charge. (1 RT 243-244.) The people moved to dismiss the shoplifting charge and the court granted the motion. (1 RT 244.)

A sentencing hearing was held on November 9, 2016. The court sentenced appellant to the middle term of two years on the theft conviction but did not impose two prison priors. (2 RT 275.)

A timely notice of appeal was filed on November 15, 2016. (CT 273.) Appellant's sole claim on appeal was that the theft charge was impermissible under section 459.5, subdivision (b). The Court of Appeal issued its opinion affirming the conviction on July 27, 2018. Following a request from the Attorney General, the court order its opinion published on August 20, 2018.

II. Facts of the Underlying Offense

Jerry Hairabdenian, an asset protection officer at Wal-Mart, testified that during his shift on February 12, 2015, he observed appellant placing items on the bottom of a cart and inside of a white Wal-Mart bag. (1 RT 78-80.) Appellant's female companion also put some items in the same cart. (1 RT 81.) The two went to a register together, where the woman removed her items from the cart and paid for them. (1 RT 81.) Appellant did not pay for his items, which remained inside the cart. (1 RT 81.) After the woman completed her transaction, she and appellant headed towards the exit. (1 RT

81.) Hairabdenian followed appellant into the parking lot where he stopped him and asked about the unpaid items. (1 RT 83.) Appellant told him that they had not been paid for. (1 RT 83.) Hairabdenian asked appellant to come to his office, which appellant did. (1 RT 83.) He recovered the items from the cart and determined that their combined value totaled $496.37. (1 RT 87.) He then called the Dinuba Police Department. (1 RT 88.)

Officer Chad Georges responded to the store. (1 RT 121.) He transported appellant back to the police station, where he read appellant his *Miranda* rights and asked him to explain what happened. (1 RT 125.) Georges testified that appellant told him that he had gone to Wal-Mart to purchase a few small items and only had $5 with him. (1 RT 126.) He testified that appellant told him he had no intention of stealing anything, but once he was inside he decided that he needed money. (1 RT 126.) He told the officer that he was sorry and that he had never done anything like this before. (1 RT 126.) Georges testified that appellant seemed apologetic. (1 RT 127.)[3]

In closing arguments, the prosecution pointed to appellant's alleged admission to Georges that he took the items. (1 RT 191.) The prosecution also argued that appellant must have taken an empty Wal-Mart bag into the

[3] The parties also stipulated that appellant had a "prior qualifying theft-related offense as required by Penal Code section 666." (1 RT 141.)

store with him, demonstrating that he had a plan to steal the items when he entered the store, and was therefore guilty of shoplifting in addition to theft. (1 RT 196, 219.)

The defense did not call any witnesses but argued that appellant's act of walking out of the store without paying for the items could easily have been the result of an absentminded mistake. (1 RT 207-208.) As to the shoplifting charge, the defense argued the evidence did not prove beyond a reasonable doubt that appellant had the intent to steal the merchandise when he entered the store. (1 RT 216.)

ARGUMENT

I. APPELLANT'S THEFT CONVICTION MUST BE REVERSED BECAUSE SECTION 459.5 PROHIBITED THE PROSECUTION FROM CHARGING HIM WITH THEFT AFTER IT HAD ALREADY CHARGED HIM WITH SHOPLIFTING.

A. The Plain Language of Section 459.5, subdivision (b), unconditionally prohibits the type of alternate charging that occurred in this case.

Section 459.5 created the crime of shoplifting. Subdivision (a) provides, in relevant part:

> Notwithstanding Section 459, 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).

Subdivision (b) places explicit limits on prosecutorial charging decisions with respect to shoplifting and related offenses:

> 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*.

(Emphasis added.)

There is no question in this case as to the plain meaning of that statutory language. As the Court of Appeal recognized, "The People acknowledge the literal language of section 459.5, subdivision (b) appears unambiguous." (Opn. at 6.) There is also no dispute that in applying a statute, "the intent of the enacting body is the paramount consideration." (Opn. at 8 [quoting *Gonzales, supra,* 2 Cal.5th at p. 868].) As this Court has made clear, "statutory language generally provides the most reliable indicator of that intent." (*People v. Lawrence* (2000) 24 Cal.4th 219, 230.) As such, appellate courts first examine the words of the statute, applying their usual, ordinary, and common-sense meaning, and construing them in context. (*In re Rojas* (1979) 23 Cal.3d 152, 156.)

Here, the statutory language prohibited the prosecution from charging appellant with a theft offense after it had already charged him with

shoplifting. The complaint charged appellant *only* with felony shoplifting. (CT 8.)[4] At that juncture, appellant became a "person who is charged with shoplifting"—meaning he could not also be charged with "theft of the same property." (§ 459.5, subd. (b).) Thus, the addition of a theft charge to the information was prohibited under the plain language of section 459.5, subdivision (b).

Any question about the meaning of section 459.5, subdivision (b) was resolved in *Gonzales, supra,* 2 Cal.5th at pp. 876-877, where this Court made clear that subdivision (b) constitutes an "explicit limitation on charging," that "expressly prohibits alternate charging" and mandates that a "defendant must be charged only with shoplifting when the statute applies." It is true, as the Court of Appeal pointed out, that the procedural posture in *Gonzales* was different than the one presented here. (Opn. at 7-8.) Specifically, *Gonzales* involved a "retroactive" scenario because it involved a pre-existing conviction and a request for resentencing, whereas this case involves an application of subdivision (b) at the charging stage. However, nothing in *Gonzales* suggested the holding was limited to retroactive applications.

[4] Because appellant has a prior conviction for an offense requiring registration under section 290, prosecution for the felony form of shoplifting was permitted. (459.5, subd. (a).) The parties agreed that appellant was eligible for the felony charge. (1 RT 152.)

Indeed, the relevant language in *Gonzales* comes from a portion of the opinion addressing an argument directly germane to this case.

Gonzales involved a defendant who had been convicted of second-degree burglary on the theory that he entered a bank with the intent to commit theft by false pretenses. (*Gonzales, supra,* 2 Cal.5th at p. 862.) After the passage of Proposition 47, the defendant petitioned for recall of his sentence and resentencing under section 1170.18 based on the fact that his conduct would have constituted shoplifting had section 459.5 been in existence at the time of his case. (*Ibid.*) The Attorney General's primary argument was that the type of second degree burglary committed could not constitute shoplifting. (*Id.* at pp. 868-869.) This Court rejected that argument, finding that the shoplifting statute included the conduct at issue. (*Id.* at p. 862.)

However, the Attorney General also argued that even if the conduct constituted shoplifting, section 1170.18 still did not apply because the defendant could *also* have been charged with burglary based on a second theory of intent to commit identity theft—an intent distinct from that which would support the shoplifting charge. (*Gonzales, supra,* 2 Cal.5th at p. 876.) The defendant argued that, "even assuming he entered the bank with an intent to commit identity theft, section 459.5, subdivision (b) would have precluded

a felony burglary charge because his conduct *also* constituted shoplifting." (*Id.* at p. 876, emphasis in original.) The court agreed with the defendant:

> Defendant has the better view. Section 459.5, subdivision (b) requires that any act of shoplifting "*shall be charged* as shoplifting" and no one charged with shoplifting "may also be charged with burglary or theft *of the same property*." (Italics added.) A defendant must be charged only with shoplifting when the statute applies. It expressly prohibits alternate charging . . .
>
> (*Ibid*, emphasis in original.)

Thus, in *Gonzales,* this Court confronted the very question presented here: can a defendant be charged with shoplifting and another property offense based on the same act? Consistent with the plain language of section 459.5, subdivision (b), the Court determined that such a charging decision is prohibited.

Here, after apparently deciding that appellant's conduct constituted shoplifting, the prosecution charged appellant with that crime. Having made that decision, the prosecution triggered the relevant charging limitation and was prohibited from later adding a theft charge. The plain language of section 459.5, subdivision (b), and this Court's decision in *Gonzales*, are dispositive.

B. Applying the Plain Language of Section 459.5, subdivision (b), does not lead to unforeseen or absurd results, and the Court of Appeal erred in finding otherwise.

In overriding the statutory language of subdivision (b), the Court of Appeal relied on the doctrine that a statute will not be applied literally when doing so would create unintended "absurd results." (Opn. at 9-10 [citing *People v. Birkett* (1999) 21 Cal.4th 226, 231].) The absurd result predicted is that, "criminal conduct would go unpunished because a prosecutor was restricted to charging only shoplifting when an element of that offense potentially could not be proven." (Opn. at 10.) But this theoretical consequence is not absurd, does not conflict with the stated purposes of Proposition 47, and would have been readily apparent to the voters who enacted section 459.5.[5]

First, the fact that a given statute or rule might make obtaining a conviction more difficult, does not create an absurd result. Many rules of criminal procedure result in precisely the same outcome, such as the exclusionary rule of the Fourth Amendment. Indeed, some rules—such as

[5] It is also worth noting that, even in this case, that result has not come to fruition. Appellant was not acquitted of shoplifting—the jury merely hung on that point. Without conceding the point at this stage, appellant is not presently aware of any rule that would prohibit retrial on that count, should his theft conviction be reversed.

those that place a statute of limitations on certain crimes—can prevent prosecution all together. These examples demonstrate a fundamental point: the goal of our criminal justice system is not conviction at all costs. There are other interests at stake, and the legislature and voters are often called upon to weigh those interests against the desire to punish crime. That the People, or the Court of Appeal, might have weighed those interests differently in the case of section 459.5, does not give an appellate court license to disregard the plain language of the statute.

Moreover, as explained above, requiring prosecutors to proceed solely on charges of shoplifting is fully consistent with the stated purposes of Proposition 47—which included lowering the numbers of nonviolent offenders in state prison, and using cost savings to invest in other programs. (*Gonzales, supra,* 2 Cal.5th at p. 870; Voter Information Guide, Gen. Elec. (Nov. 4, 2014), analysis of Prop. 47 by Legis. Analyst, p. 35-37.) Relative to certain other forms of theft crimes, a shoplifting conviction leaves open the possibility of a local custody sentence under 1170 (rather than prison time) and provides for shorter jail penalties. (Compare § 459.5, subd. (a) with § 666, subd. (a).)

Finally, though the Court of Appeals found that section 459.5 creates an "unforeseen" possibility that a given defendant might go unpunished, there is no reason to believe that was unforeseen. Indeed, the same voters that enacted subdivision (b) created the crime of shoplifting—meaning they would be well aware of its intent requirement, and that it might make some prosecutions more difficult. Thus, there is every reason to believe that the voters understood and considered the relevant consequences of requiring exclusive prosecution of shoplifting. Because there is no reason to assume they were ignorant of the relatively apparent consequence at issue here, the plain language of the statute should be given effect. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165 [though statutory interpretation is meant to avoid "absurd" results, "it is presumed that the [voters] intended reasonable results consistent with [the statute's] expressed purpose . . ."].)

II. THIS COURT SHOULD REVIEW THE SUBSTANCE OF APPELLANT'S CLAIM, EITHER BECAUSE FORFEITURE SHOULD NOT BE APPLIED OR BECAUSE TRIAL COUNSEL WAS INEFFECTIVE.

Appellant's trial counsel did not object to the addition of the theft charge. Nonetheless, appellant's claim should be reviewed on the merits, either because forfeiture should not apply, or because counsel was ineffective

in failing to object. The Court of Appeal did not explicitly resolve the forfeiture question but reviewed the merits of appellant's claim in light of his contention of ineffective assistance of counsel. (Opn. at 5.)

Forfeiture should not apply because a claim that presents a question of law based on undisputed facts in the record may be raised for the first time on appeal. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118; *People v. Borland* (1996) 50 Cal.App.4th 124, 129; *People v. Whitfield* (1993) 19 Cal.App.4th 1652, 1657, fn. 6; *People v. Carr* (1974) 43 Cal.App.3d 441, 444-445.) Resolving this case involves a simple application of an unambiguous statute to a limited set of undisputed facts. Thus, this court should find that forfeiture does not apply.

Moreover, an appellate court has the discretion to excuse a defendant's lack of objection in areas other than the admission or exclusion of evidence. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6; *People v. Ellison* (2003) 111 Cal.App.4th 1360, 1369-1370; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 649.) Therefore, even if this court finds that forfeiture applies, it should exercise its discretion to decide the claim regardless. Appellant was convicted of a crime that the prosecution was statutorily prohibited from charging him with. Resolution of this case is

straightforward and will provide an opportunity to clarify the limitations imposed by the relatively new section 459.5. Under these circumstances, and to the extent forfeiture applies, appellant asks this court to exercise its discretion to review his claim.

If forfeiture does apply to this claim, then trial counsel was ineffective for failing to make an objection on the basis of section 459.5, subdivision (b). The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution guarantee the right to effective assistance of counsel in a criminal case. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To establish ineffective assistance of counsel, an appellant must demonstrate that (1) counsel's representation was deficient in falling below an objective standard of reasonableness, and (2) counsel's deficient representation was prejudicial, meaning there is a reasonable probability that, but for counsel's error, the result would have been more favorable to the defense. (*Strickland, supra,* 466 U.S. at p. 687; *Ledesma*, *supra,* 43 Cal.3d at p. 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra,* 466 U.S. at p. 694.)

To show deficient performance, an appellant must demonstrate that the alleged error was not sound trial strategy. (*Strickland v. Washington, supra,* 466 U.S. at p. 689.) When the record contains no explanation of counsel's decision, an appellant can meet his burden by demonstrating there is no legitimate tactical reason for counsel's error. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

Counsel has a duty to know the applicable law. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) Reasonably effective assistance also includes the filing of appropriate motions (*In re Neely* (1993) 6 Cal.4th 901, 919; *People v. Farley* (1979) 90 Cal.App.3d 851, 868) and making proper objections (*People v. Borba* (1980) 110 Cal.App.3d 989, 994; *People v. Nation* (1980) 26 Cal.3d 169, 181-182.). Here, as explained above, section 459.5, subdivision (b) squarely prohibited the prosecution from charging appellant with theft after it had already charged him with shoplifting. Thus, counsel had a meritorious basis for either objecting to the addition of the theft charge at the preliminary hearing, or filing a motion to dismiss the charge after the filing of the information.

There could be no reasonable tactical justification for the lack of such an objection or motion. There was no possible benefit to appellant that

flowed from being charged with both theft and shoplifting, rather than shoplifting alone. (See *People v. Burnett* (1999) 71 Cal.App.4th 151, 181 ["there could be no satisfactory explanation" for counsel's failure to object to an amended information that invalidly charged an offense not shown at preliminary hearing].) Accordingly, the existing record is sufficient to decide this claim on direct appeal. (*People v. Fosselman, supra,* 33 Cal.3d at p. 581.)

The prejudice that flows from counsel's error is manifest. Had counsel objected the case would have proceeded on the shoplifting charge alone. Appellant would never have been charged with the theft count, let alone convicted of it. In other words, the result of the proceedings would have been more favorable to appellant—meaning prejudice has been established. (*Strickland, supra,* 466 U.S. at p. 687.)

CONCLUSION

Appellant respectfully requests that this Court grant review and reverse the judgment of the lower courts.

DATED: August 23, 2018

Respectfully submitted,

/s/ CAITLIN M. PLUMMER
Attorney for Appellant

APPENDIX

People v. Lopez (July 27, 2018, F074581)

Filed 7/27/18; Modified and Certified for Pub. 8/20/18 (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY LOPEZ, Defendant and Appellant.	F074581 (Super. Ct. No. VCF314447) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Caitlin M. Plummer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, R. Todd Marshall and F. Matt Chen, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Poochigian, Acting P.J., Smith, J. and Ellison, J. [†]

[†] Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

INTRODUCTION

Appellant Anthony Lopez stands convicted of petty theft with a prior, pursuant to Penal Code[1] sections 484, subdivision (a) and 666, subdivision (a). The court found true a prior strike conviction, three prior prison terms, and five felony convictions within the meaning of section 1203, subdivision (e)(4). Lopez contends his conviction must be reversed because section 459.5 precludes alternate charging. Alternatively, he contends defense counsel rendered ineffective assistance by failing to object to the alternate charging.

We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On February 12, 2015, Lopez and a female companion were inside a Walmart store. Lopez was observed placing a home stereo unit and several small items inside a Walmart bag in a shopping cart. Lopez did not pay for the items before exiting the store. Outside the store, an asset protection officer stopped Lopez; Lopez admitted he had not paid for the items. The value of the unpaid items was determined to be $496.37.

Lopez told police he had gone to Walmart to purchase a few items, but only had five dollars with him. Lopez claimed he had no intention of stealing anything prior to entering the store, but formed the intent to steal once inside. He admitted placing items inside his cart and leaving the store without paying for them.

On March 12, 2015, a complaint was filed charging Lopez with shoplifting in violation of section 459.5. Because Lopez is a section 290 registrant, the count was charged as a felony. (§ 459.5, subd. (a).) In addition, the complaint alleged that Lopez had been convicted of multiple prior felonies and served prior prison terms.

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1 All statutory references are to the Penal Code.

At the September 17, 2015, preliminary hearing, the People commenced by stating, "we'll be looking for a bindover for PC 666 as well. 459.5 on the rap also supports PC 666." At the conclusion of testimony, the trial court stated:

> "If you wanted to enter a plea, I'd be inclined to maybe put the sentencing over for a couple months so he can get his affairs in order, if he wants to take advantage of the two-year sentence.
>
> "Otherwise, I'll bind it over on both counts and he's probably looking at three years with the prior prison commitment, possibly four given his prior record. Looks like he's been to prison a couple times."

At this point, there was a pause in the proceedings, after which defense counsel stated Lopez "would like to proceed with his case." The People then moved to hold Lopez to answer to the charge of shoplifting in the complaint, and the additional charge of petty theft with a prior. The trial court inquired if defense counsel had any response, and defense counsel replied, "Submitted." The trial court replied, "The Court will hold him to answer on both those charges with all the special allegations."

In an information filed September 28, 2015, the People charged Lopez with felony shoplifting pursuant to section 459.5, subdivision (a) and petty theft with a prior pursuant to section 484, subdivision (a) and 666, subdivision (a). The information also alleged Lopez had suffered a prior strike conviction; served three prior prison terms within the meaning of section 667.5, subdivision (b); and had five prior felony convictions within the meaning of section 1203, subdivision (e)(4).

Before trial, Lopez asked the trial court to exercise its authority pursuant to section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, to strike the prior strike allegation. The trial court heard and granted the motion on June 30, 2016.

A jury trial commenced on August 29, 2016. During closing argument, the People argued the facts showed Lopez had an intent to steal when he entered the Walmart store because he only "had $5 on him when he came to Wal-Mart, but then he also brought a

[Walmart] plastic bag with him." The People argued that Lopez bringing a Walmart bag with him "seemed to indicate that he had decided previously to commit the theft."

The defense argued that the shoplifting charge was "a little more specific" than the petty theft charge because the People had to prove "what his intention was the moment he walked into the store."

After retiring to deliberate, the jury asked for a read back of testimony. The jury then asked a question, "Can we use the instructions from 1800 to determine the intent from the shoplifting charge? We just need clarification." The trial court discussed with both counsel the appropriate response to the question and provided a response to the jury.

A second question was asked by the jury, "[C]an we use the prior conviction we used to show the intent for shoplifting?" The trial court again discussed the appropriate response with both counsel and provided a response to the jury. A third question was received from the jury asking, "Does number 2 of 1700 mean prior intent or intent once he enters the store?" Again, the trial court discussed the response to be provided the jury with both counsel.

On August 30, 2016, the jury indicated they had reached a verdict as to one count and were unable to reach a verdict on the other count. The jury returned a verdict of guilty on count 1, the charge of petty theft with a prior. No verdict was reached on the count 2 charge of shoplifting. The trial court declared a mistrial as to count 2 and the People dismissed count 2.

In a bifurcated court trial on the allegations, the trial court found all of the remaining allegations true. The trial court imposed a total term of two years at the November 10, 2016, sentencing.

Lopez filed a timely notice of appeal on November 15, 2016.

DISCUSSION

Lopez contends his conviction should be reversed because section 459.5, subdivision (b) prohibited the People from charging him with any offense other than

shoplifting. He contends that if we conclude this issue is forfeited, defense counsel rendered ineffective assistance.

Forfeiture

The People amended the charges at the preliminary hearing to add the petty theft with a prior count, in addition to the shoplifting charge. There was no objection by Lopez. The People contend Lopez has forfeited any challenge to the filing of the amended information and the additional charge of petty theft with a prior. Generally, a defendant's failure to object to an amended information forfeits his right to assert the error on appeal. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057; *People v. Carbonie* (1975) 48 Cal.App.3d 679, 691; *People v. Spencer* (1972) 22 Cal.App.3d 786, 799-800; *People v. Collins* (1963) 217 Cal.App.2d 310, 313.)

Anticipating the forfeiture argument, Lopez contends defense counsel rendered ineffective assistance. Therefore, we address the merits of Lopez's contention.

Section 459.5 – Shoplifting

Proposition 47 created the new crime of "shoplifting," set forth in section 459.5. (*People v. Gonzales* (2017) 2 Cal.5th 858, 862 (*Gonzales*).) Section 459.5 provides:

> "(a) Notwithstanding Section 459, 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 that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.

> "(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."[2]

Lopez contends that because he was charged with shoplifting pursuant to section 459.5, he could not also be charged with petty theft with a prior pursuant to sections 484 and 666. The People argue that in order to avoid absurd results, this court should interpret section 459.5 to permit alternate charging of shoplifting and petty theft.

The purpose of the preliminary hearing is to determine whether a defendant should be bound over for trial and on what charges he or she is to be tried. (*People v. Esmaili* (2013) 213 Cal.App.4th 1449, 1459.) The evidence at the preliminary hearing was that Lopez maintained he formed no intent to steal until after entering Walmart. If true, then the charge of shoplifting would not lie as Lopez did not have the intent to commit larceny when he entered Walmart. (§ 459.5, subd. (a).) The prosecutor charged Lopez with shoplifting, the only charge that could be brought if he entered Walmart with the intent to commit larceny. The prosecutor also asked that Lopez be held to answer on a charge of petty theft with a prior, which does not require that Lopez have *entered* Walmart with the intent to commit larceny.

The People elected to proceed on both shoplifting and petty theft with prior charges after the preliminary hearing and the jury verdict reflects the People's concerns with proof of intent. The jury failed to convict on the shoplifting charge; their questions indicate they struggled to find intent to commit larceny at the time of entry into Walmart.

Lopez argues, however, that section 459.5, subdivision (b) explicitly limits the prosecutor's charging discretion and that no charge of petty theft with a prior could be brought when he is charged with shoplifting. The People acknowledge the literal language of section 459.5, subdivision (b) appears unambiguous. The People contend that a literal reading of "section 459.5 presumes that it will be clear whether a defendant's

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[2] Section 459 generally defines the crime of burglary.

conduct constitutes shoplifting or not, before the prosecutor makes the charging decision." The People argue that prohibiting alternative charging under the facts of Lopez's case is not what the voters intended when they enacted Proposition 47.

Whether to prosecute and what charges to file are decisions that generally rest in the prosecutor's discretion. (*United States v. Batchelder* (1979) 442 U.S. 114, 123-124.) Section 954 allows the prosecutor to charge "two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts." As the Supreme Court in *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552 stated:

> "[T]he prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from " 'the complex considerations necessary for the effective and efficient administration of law enforcement' " [Citations.] The prosecutor's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch."

However, prosecutorial discretion on charging can and has been limited in certain instances. (See e.g., *People v. Murphy* (2011) 52 Cal.4th 81, 87; *People v. Rader* (2014) 228 Cal.App.4th 184, 194-200; *People v. Kilborn* (1996) 41 Cal.App.4th 1325, 1332-1333.)

The Supreme Court has held the language of section 459.5, subdivision (b) precludes alternate charging of "any act of shoplifting." (*Gonzales*, *supra*, 2 Cal.5th at p. 876.) *Gonzales* stated section 459.5, subdivision (b) expressly prohibits alternate charging for the "underlying described conduct." (*Gonzales*, at p. 876.) *Gonzales* applied section 459.5 essentially in a retroactive situation because it addressed section 459.5 in the context of a petition for recall of a sentence and resentencing. (*Gonzales*, at p. 862.) *Gonzales* did not address the circumstances where a prosecutor charged

shoplifting and another offense because of potential evidentiary problems in proving the requisite intent upon entry into a commercial establishment required for a shoplifting conviction.

We do not construe section 459.5 or the *Gonzales* case as restricting a prosecutor's ability to charge another theft offense when the element of intent upon entering the commercial establishment is absent or in question. In statutory construction, an appellate court adheres to the plain language of the statute "unless doing so would lead to absurd results the Legislature could not have intended." (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) In construing " 'statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration.' " (*Gonzales, supra,* 2 Cal.5th at p. 868.)

Subdivision (b) of section 459.5 provides that "[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting." Shoplifting is defined as requiring an intent to commit larceny at the time of entering the commercial establishment. (§ 459.5, subd. (a).) In our view, the intent of section 459.5, subdivision (b) is clear: if a defendant enters a commercial establishment with the intent to commit larceny, the only charge that will lie is shoplifting under section 459.5, subdivision (a). In other words, a prosecutor may not elect to charge shoplifting under section 459.5 and second degree burglary under sections 459 and 460. (§ 459.5, subd. (b).) Nor may a prosecutor pursue a theft charge other than shoplifting when all the elements of shoplifting, including intent upon entry, are present. (§ 459.5, subd. (b).)

Section 954 "permits the charging of the same offense on alternative legal theories, so that a prosecutor in doubt need not decide at the outset what particular crime can be proved by evidence not yet presented." (*People v. Ryan* (2006) 138 Cal.App.4th 360, 368.) Section 459.5 limits a prosecutor's charging discretion under section 954 with respect to crimes where the defendant enters a commercial establishment during regular business hours *with the intent* to commit larceny. Section 459.5 does not preclude the

filing of an alternate charge of petty theft, when the evidence may not demonstrate the defendant entered the commercial establishment with the intent to commit larceny as required for shoplifting. The prosecution should not be precluded from charging different offenses based upon the evidence that may be adduced at trial.

As for effectuating the voters' intent, our construction of section 459.5, subdivision (b) does effectuate the voters' intent. The voters gave shoplifting a narrower, or more specific, definition than under common law by requiring entry into the commercial establishment with intent, as opposed to any theft.[3] The *Gonzales* court stated that section 459.5 provides a specific definition of shoplifting and in doing so, "it creates a term of art, which must be understood as it is defined, not in its colloquial sense." (*Gonzales, supra,* 2 Cal.5th at p. 871.) Section 459.5's definition of shoplifting "as an *entry* into a business with intent to steal, rather than as the taking itself," is a deviation from the "colloquial understanding of that term." (*Gonzales,* at p. 871.)

The requirement of intent upon entry could easily have been omitted from the statutory language, but was not. We will not construe the entry with intent language in section 459.5 as surplusage without meaning. (*People v. Valencia* (2017) 3 Cal.5th 347, 357.)

Where uncertainty exists as to the meaning of statutory language, "consideration should be given to the consequences that will flow from a particular interpretation." (*People v. Valencia, supra,* 3 Cal.5th at p. 358.) To adopt Lopez's interpretation of section 459.5 and preclude alternate charging in all instances where shoplifting is charged would have the unforeseen consequence the People complain of on appeal—forcing the prosecutor to choose at the charging stage when evidence of intent is weak and allowing a defendant to avoid liability for his or her criminal conduct.

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3 The common definition of shoplifting as found in Webster's Third New International Dictionary (1981) at page 2101, is "the stealing of goods on display in a store."

Precluding the prosecutor from filing a charge for petty theft with a prior when the evidence adduced at the preliminary hearing may not establish the necessary intent upon entry for shoplifting would lead to the absurd result that criminal conduct would go unpunished because a prosecutor was restricted to charging only shoplifting when an element of that offense potentially could not be proven. We do not believe that was the intent of voters and we will not so construe section 459.5, subdivision (b); the purpose of Proposition 47 was to reduce certain offenses to misdemeanors, not eliminate liability for criminal conduct. (See *Gonzales, supra,* 2 Cal.5th at p. 870.)

No Ineffective Assistance of Counsel

The standard of review when questioning whether a defendant received effective representation is well established. "In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. [Citation.] To demonstrate deficient performance, defendant bears the burden of showing that counsel's performance ' " ' "fell below an objective standard of reasonableness . . . under prevailing professional norms." ' " ' [Citation.] To demonstrate prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different." (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

As we have concluded the prosecutor was not prohibited from charging Lopez both with shoplifting and petty theft with a prior, Lopez has failed to demonstrate that defense counsel's failure to object to the addition of the petty theft with a prior charge was either deficient performance or prejudicial.

DISPOSITION

The judgment is affirmed.

Filed 8/20/18

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY LOPEZ, Defendant and Appellant.	F074581 (Super. Ct. No. VCF314447) **ORDER MODIFYING OPINION AND GRANTING REQUEST FOR PUBLICATION** **[No Change in Judgment]**

It is hereby ordered that the opinion filed on July 27, 2018, be modified as follows:

1. On page 9, the first sentence of the first full paragraph commencing, "As for effectuating the voters' intent …." is modified to read:
   "Our construction of section 459.5, subdivision (b), effectuates the voters' intent."

There is no change in the judgment. Except for the modification set forth above, the opinion previously filed remains unchanged.

The Attorney General has requested the opinion filed July 27, 2018, be certified for publication. It appears our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The request is granted.

The opinion filed on July 27, 2018, and modified pursuant to this order, is ordered published in the Official Reports.

_____
Smith, J.

WE CONCUR:

_____
Poochigian, Acting P.J.

_____
Ellison, J. †

† Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.360(b)(1), I certify that this brief contains 4,671 words, based on the word-count feature of my word-processing program.

DATED: August 23, 2018

Respectfully submitted,

/s/ CAITLIN M. PLUMMER
Attorney for Appellant

Re: *People v. Lopez*, No. F074581

ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY MAIL
(Code Civ. Proc., § 1013a, subd. (2); Cal. Rules of Court, rules 8.71(f) and 8.77)

I, Caitlin M. Plummer, 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 cplummer.lplaw@gmail.com and my business address is 10556 Combie Rd., PMB # 6685, Auburn, CA 95602. On August 23, 2018, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **Petition for Review** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service in Auburn, CA, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

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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 August 23, 2018, at Grass Valley, California.

/s/ Caitlin M. Plummer
DECLARANT
SBN 309053

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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Supreme Court of California

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