IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff-Respondent, v. ERNEST OROZCO, Defendant-Appellant.	Case No. S249495

Fourth District Court of Appeal, Division One, Case No. D067313
San Diego County Superior Court Case No. SCN335521

APPELLANT'S OPENING BRIEF ON THE MERITS

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Appellant's Opening Brief on the Merits

Appellant Ernest Orozco respectfully submits this Opening Brief on the Merits.

Issue on Review

1. Section 496 makes buying or receiving "any property that has been stolen" a misdemeanor, if the property is worth less than $950 and the defendant is not disqualified. Section 496d applies to receiving a certain type of stolen property, an automobile. Is a conviction under section 496d reducible to a misdemeanor, if the automobile was worth less than $950 and the other requirements are met?

Summary of argument

As modified by Proposition 47, section 496, subdivision (a), applies to possession of "any property" and mandates that if the property is worth less than $950, the offense is a misdemeanor. Section 496d applies to a possession of a specific type of property, automobiles. The Legislature that created section 496d in 1998 did so to track such crimes, not to change the punishment or definition of the crime. The crimes in section 496d and section 496 are identical in all respects, with the exception of the type of property possessed.

This Court has already held that "any property" includes automobiles, and noted that one of the electorate's explicit purposes in enacting Proposition 47 was to eliminate statutes that made theft a felony based on the type of property alone, including when that property is "cars." Furthermore, Proposition 47 expressly requires a "broad" and "liberal" construction to effectuate its purposes of saving money by treating nonviolent theft crimes as misdemeanors and focusing resources on more serious crimes. It would be illogical for the voters to make theft of low-value cars a misdemeanor, but leave the later possession of those same stolen cars as a felony.

The plain text of section 496, the electorate's intent in enacting Proposition 47, and this Court's precedents all counsel the same result: possession of a stolen automobile under section 496d is reducible to a misdemeanor under Proposition 47 where that automobile is worth less than $950.

Statement of the case and facts

On August 7, 2014, the police pulled Orozco over and a routine license plate check showed the car Orozco was driving had been reported stolen. Orozco was the vehicle's sole occupant, the car's ignition was damaged, and it was running without a key. The police report listed the car's value at $301. (CT[1] 13, 44.) Orozco pleaded guilty to the substantive counts of taking and driving a vehicle in count 1 (Veh. Code, § 10851, subd. (a)), and unlawfully buying, receiving, concealing, selling, or withholding a stolen vehicle in count 2 (§ 496d, subd. (a)). (CT 1–10, 59; 1 RT[2] 1–11.)

Voters enacted Proposition 47 on November 4, 2014. The new laws became effective the following day. (Cal. Const., art. 11, § 10, subd. (a).) On December 11, 2014, after pleading guilty but before sentencing, Orozco moved to have his convictions reduced to misdemeanors under the newly-enacted Proposition 47. (CT 33–44.) Orozco's motion included the fact that the car was worth $301. (CT 36.) The sentencing court denied Orozco's motion and sentenced Orozco as a felon. (CT 61, 2 RT 17–18, 24.) Orozco appealed. (CT 48, 56.)

On January 21, 2016, the Court of Appeal, Fourth Appellate District, Division One, affirmed the trial court's ruling as to both counts. (*People v. Orozco* (Jan 21, 2016, D067315 [nonpub. opn.]) This Court granted review (*People v. Orozco* [nonpub. opn.], review granted Aug. 10, 2016, S235603) and eventually transferred the matter to the Court of Appeal on March 21, 2018, for reconsideration in light of *People v. Page* (2017) 3 Cal.5th 1175

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[1]"CT" denotes "Clerk's Transcript."

[2]"RT" denotes "Reporter's Transcript."

(*Page*.) *Page* held that a conviction under Vehicle Code section 10851 may be reduced under Proposition 47. (*Id.* at p. 1183.)

On May 24, 2018, the Court of Appeal issued a new published opinion. Following *Page*, the Court of Appeal affirmed the trial court's denial of Orozco's petition in count 1 without prejudice to Orozco's filing an amended petition making the necessary showing that Orozco's conviction in count 1 involved theft. (*People v. Orozco* (2018) 24 Cal.App.5th 667, 673.) As to count 2, the Court of Appeal held that section 496d is not covered by Proposition 47's revisions to section 496. (*Id.* at p. 674.) The Court of Appeal noted that Proposition 47's new theft statute, section 490.2, refers to "'any other provision of law defining grand theft.'" Section 496 contains no such broad language, and section 490.2 does not apply to stolen property offenses. (*Ibid.*)

On August 15, 2018, this Court granted review.

Argument

I. Proposition 47 makes receiving stolen property offenses, including the statute of conviction here, misdemeanors where the value of the property is less than $950.

A. Standard of review and applicable statutory construction law.

The scope of Proposition 47 is a question of law which is reviewed de novo. (*People v. Gonzales* (2018) 6 Cal.5th 44, 49.) In construing a voter initiative, the Court first looks to the plain meaning of the words in the statute, construing them in context and keeping in mind the statutory purpose. If the statute remains ambiguous, the Court may look to extrinsic sources, such as the initiative's election materials, to glean the electorate's intended purpose. The Court's "principal objective" is to give the initiative's provisions their intended effect. (*Id.* at pp. 49–50.)

B. Proposition 47 amended section 496 to make possession of "any property" that has been stolen a misdemeanor if that property was worth less than $950.

Proposition 47 amended the general receiving stolen property statute, section 496, to make receiving stolen property a misdemeanor whenever the property at issue is worth less than $950.

As amended by Proposition 47, Penal Code section 496, subdivision (a) now provides:

> "Every person who buys or receives *any property* that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. *However, if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor*, punishable only by imprisonment in a county jail not exceeding one year, if such person has no 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."

(§ 496, subd. (a), emphasis added.)

"An automobile is personal property." (*Page*, *supra*, 3 Cal.5th at p. 1183.) By its terms, section 496, subdivision (a), applies to possession of a

stolen automobile and the use of the term "any property" encompasses *all* types of property.

C. Section 496d is a type of Receiving Stolen Property.

Orozco was convicted in count 2 of violating section 496d, subdivision (a). Section 496d is a form of receiving stolen property. (See *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425 (*Russell*), disapproved on another point in *People v. Covarrubias* (2016) 1 Cal.5th 838, 874, fn. 14.)

Section 496d, subdivision (a) provides:

> Every person who buys or receives any motor vehicle, as defined in Section 415 of the Vehicle Code, any trailer, as defined in Section 630 of the Vehicle Code, any special construction equipment, as defined in Section 565 of the Vehicle Code, or any vessel, as defined in Section 21 of the Harbors and Navigation Code, that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any motor vehicle, trailer, special construction equipment, or vessel from the owner, knowing the property to be so stolen or obtained, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or three years or a fine of not more than ten thousand dollars ($10,000), or both, or by imprisonment in a county jail not to exceed one year or a fine of not more than one thousand dollars ($1,000), or both.

(§ 496d, subd. (a).)

In *Russell*, the Court of Appeal held section 496d requires the prosecution to prove the same elements as generic receiving stolen property: (1) the property was stolen, (2) the defendant knew the property was stolen, and (3) the defendant had possession of the stolen property. (*Russell, supra,* 144 Cal.App.4th at p. 1425; *People v. King* (2000) 81 Cal.App.4th 472, 476 [elements of generic receiving stolen property].) The elements of sections 496d and 496 are identical; the only difference is the type of property stolen.

Section 496d was enacted by SB 2390 in 1998. According to the legislative analysis, the purpose of creating a separate possession-of-stolen-property crime specific to vehicles was to track statistics related to such crimes: The Bill would "create a new Penal Code Section for receiving stolen property, specific to vehicles, in order to better track this offense. This addition would not change criminal penalties or expand the definition of a crime." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assembly Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998; see also, Assem. Floor Com. on Public Safety, Rep. on Assemb. Bill No. 2390 (1997-1998 Reg. Sess.) as amended April 13, 1998 ["This proposal would allow persons convicted of this section to be identified along with vehicle thieves for the purposes of establishing priors, for statistical purposes and/or to target those persons involved in vehicle theft"].)

The only difference between section 496 and section 496d is the type of property stolen. This circumstance distinguishes this case from *People v. Bush* (2016) 245 Cal.App.4th 992, which held that theft from an elder under section 368, subdivision (d), was not covered by Proposition 47. (*Id.* at p. 1101.) Among other reasons, the Court of Appeal noted that section 368

"punishes offenders who prey on vulnerable elders and dependent adults," and is therefore considered a more serious crime than the theft crimes covered by Proposition 47. (*Id.* at p. 1004–1005.) Here, section 496d does not cover a more serious type of crime—it covers an identical crime, differentiated only by the type of property possessed. As this Court has recognized, the electorate in Proposition 47 deliberately sought to eliminate distinctions between theft of low-value property based solely on the type of property stolen. (*People v. Romanowski* (2017) 2 Cal.5th 903, 910 (*Romanowski*).)

D. This Court has held that Proposition 47 offenses applying to "any property" include automobiles, a type of property.

The Court of Appeal noted that section 496d is "not among the statutes listed in section 1170.18[,]" Proposition 47's resentencing provision. (*People v. Orozco* (2018) 24 Cal. App.5th 667, 674.) This Court has repeatedly held, however, that whether a code section is enumerated in section 1170.18 is not dispositive. (*People v. Martinez* (2018) 4 Cal.5th 647, 652; *Page*, *supra*, 3 Cal.5th at p. 1184.) As explained in *Page*, section 1170.18 lists code sections under which defendants may be *resentenced*—a defendant's *original* sentence need not have been under one of the enumerated code sections. (*Page*, *supra*, 3 Cal.5th at p. 1184.) This is apparent because some of the listed code sections were not in existence prior to Proposition 47—no defendant could have a prior felony conviction for these offenses to later be reduced to a misdemeanor. (*Id.* at 1185.)

Similarly in *Romanowski, supra,* this Court held that theft of access card information under section 484e was covered by Proposition 47, even though that statute was not specifically enumerated. (*Romanowski, supra,* 2 Cal.5th at p. 910.) Although Proposition 47 did not specifically refer to

section 484e, Proposition 47's theft statute, section 490.2, "broadly reduced punishment for 'obtaining any property by theft' where the value of the stolen information is less than $950." (*Id.* at p. 906.) The conduct criminalized by section 484e amounts to "obtaining property by theft," and such conduct is a misdemeanor under section 490.2 when the property is worth less than $950. (*Id.* at pp. 911–913 [rejecting Attorney General's argument that section 484e is not primarily a theft crime].)

Under Proposition 47, the question is not whether a defendant's statute of conviction is listed in section 1170.18, but whether a defendant could have been guilty of a misdemeanor under one of the listed code sections if they had been in effect at the time of the defendant's crime. (*Page*, *supra*, 3 Cal.5th at p. 1184.) *Page* is again instructive on this point. *Page* examined Vehicle Code section 10851, which may apply to car theft. (*Page*, *supra*, 3 Cal.5th at p. 1183.) Vehicle Code section 10851 is not listed in Proposition 47. But another statute, section 490.2, is listed. That section makes it a misdemeanor to "'obtain[] any property by theft' where the property is worth no more than $950." Because "[a]n automobile is personal property," section 490.2 covers the theft form of Vehicle Code section 10851 by its plain terms. (*Ibid.*) The same is true here: section 496, subdivision (a), applies to "*any property* that has been stolen" and mandates that "if the value of the property does not exceed nine hundred fifty dollars ($950), the offense shall be a misdemeanor[.]" (Italics added.) "An automobile is personal property." (*Page*, *supra*, 3 Cal.5th at p. 1183.) By its terms, section 496, subdivision (a), applies to possession of a stolen automobile.

Furthermore, there is clear evidence the voters intended this result: in the voter guide for Proposition 47, the Legislative Analyst explained that

theft of certain property could be charged as a felony even if the property was worth less than $950. The example given was "cars." (*Page, supra,* 3 Cal.5th at p. 1187; *People v. Romanowski, supra,* 2 Cal.5th at p. 910.) In enacting Proposition 47, the voters intended that theft of low-value property would be treated as a misdemeanor, regardless of "the type of property involved." (*Page, supra,* 3 Cal.5th at p. 1187, *Romanowski, supra,* 2 Cal.5th at 910.) Although the voter guide refers to "theft," it would be illogical for the voters to make theft of low-value cars a misdemeanor, but leave the later possession of those same stolen cars as a felony.

The Court of Appeal in *People v. Williams* (2018) 23 Cal.App.5th 641, followed the reasoning above:

> "Section 496d is not expressly listed in section 1170.18. However, section 1170.18 does permit resentencing to a misdemeanor under section 490.2 for obtaining property by theft if the property is worth $950 or less. Thus, our Supreme Court has held that theft crimes involving property of a value of $950 or less come within the ambit of Proposition 47 even if they are not expressly listed in section 1170.18. (*People v. Page* (2017) 3 Cal.5th 1175 []; *People v. Romanowski* [*supra,* 2 Cal.5th at p. 910].)"

(*Williams, supra,* 23 Cal.App.5th at p. 647.)

> "Proposition 47 reduced the section 496 offense of receiving stolen property to a misdemeanor in cases in which the property involved is valued under $950. However, Section 496d which applies to a person who buys or receives a stolen vehicle is not explicitly listed. There does not seem to be any logical basis to distinguish between the receipt of stolen

> property and receipt of a stolen vehicle under Proposition 47. In *Page*, the Supreme Court noted that an automobile is personal property. (*Page*, *supra*, 3 Cal.5th at p. 1183.) Relying on the reasoning in *Romanowski*, we see no reason to assume that a reasonable voter would conclude that receipt of a stolen vehicle worth less than $950 is a serious and violent crime outside the reach of Proposition 47 when receipt of any other form of stolen property is not. (*Romanowski*, supra, 2 Cal.5th at p. 909.)"

(*Williams*, *supra*, 23 Cal.App.5th at p. 649.)

And, if the voters had wished to exclude a type of property from section 496's description of "any property," they would have done so. In 2016 the electorate passed Proposition 63, which qualified section 490.2's reference to "any property" by adding subdivision (c): "This section shall not apply to theft of a firearm." (§ 490.2, subd. (c); Ballot Pamp., Gen. Elec. (Nov. 8, 2016) test of Prop. 63, p. 177.) The voters are capable of excluding automobiles from section 496, if they wished to do so. (See also *People v. Gollardo* (2017) 17 Cal.App.5th 547, 558 [electorate in Proposition 47 provided more restrictive language in forgery crime (§ 473)].)

In sum, this Court has already held that when Proposition 47 speaks of "any property," it includes cars. A defendant who stole or possessed a stolen car worth less than $950 prior to Proposition 47 would have been guilty of a misdemeanor under an offense enumerated in section 1170.18—section 496, subdivision (a)—and can therefore be resentenced under that code section. And this result is not an accident: the voters who enacted Proposition 47 intended to treat theft of *all* low-value property as a misdemeanor, including—explicitly—"cars."

E. This result is consistent with the voters' intent in enacting Proposition 47.

The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) In construing a voter initiative, the Court's "principal objective" is to give the initiative's provisions their intended effect. (*People v. Gonzales, supra,* 6 Cal.5th at pp. 49–50.) Here, the voters' intent was to save money by reclassifying low-level felonies as misdemeanors. The ballot material for Proposition 47 explained in part:

> Here's how Proposition 47 works:
>
> - Prioritizes Serious and Violent Crimes: Stops wasting prison space on petty crimes and focuses law enforcement resources on violent and serious crimes by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors.
>
> . . .
>
> - Saves Hundreds of Millions of Dollars: Stops wasting money on warehousing people in prison for nonviolent petty crimes, saving hundreds of millions of taxpayer funds every day.

(http://vig.cdn.sos.ca.gov/2014/general/pdf/complete-vig.pdf.)

As noted above, voters intended to eliminate crimes which made theft a felony based solely on the type of property involved, including when that property was "cars." (*Page, supra,* 3 Cal.5th at p. 1187.) Furthermore, Proposition 47 expressly requires a "broad" and "liberal" construction to effectuate its purposes. (*Ibid.*) To the extent there is any ambiguity in Proposition 47's application to section 496d, that ambiguity must be

resolved to effect the voters' intent not to spend taxpayer money on incarcerating low level offenders.

Nor is there any countervailing legislative intent that outweighs Proposition 47's goal of "reduc[ing] 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." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.) As noted above, section 496d was added in 1998 not to "change criminal penalties or expand the definition of a crime," but to better track the offense. (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assembly Bill No. 2390 (1997-1998 Reg. Sess.) as amended June 23, 1998.) Such tracking has been possible for approximately 20 years, and will remain possible for all but the lowest-value stolen vehicles—those which the voters have deemed a non-serious, non-violent crimes to be treated as misdemeanors.

To the extent the interaction between Proposition 47 and section 496d presents a conflict between "two separate statutory schemes—one enacted by the Legislature, and one by the public[,]" it is presumed that the "electorate weighed the costs and benefits of Proposition 47." (*Romanowski, supra*, 2 Cal.5th at pp. 907, 914.) Both the plain language of section 496, which applies to "any property" worth less than $950, and Proposition 47's mandate that it be construed broadly, indicate that the voters intended possession of low-value stolen cars to be a misdemeanor, even if the 1998 Legislature's goal of tracking such crimes is marginally diminished as a result.

F. The case should be remanded with instructions for the trial court to grant the motion as to count 2.

The offenses in this case occurred before Proposition 47's effective date, but Orozco was not sentenced until after the effective date. Proposition 47 applies directly to such cases.[3] Where a change in the law benefits defendants by redefining the elements of an offense in their favor, the new law applies automatically to defendants tried or sentenced after the change goes into effect. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287, citing, inter alia, *In re Estrada* (1965)63 Cal.2d 740, 746; *People v. Rossi* (1976) 18 Cal.3d 295, 299 ["a statute mitigating punishment applie[s] to acts committed before its effective date as long as no final judgment ha[s] been rendered"].) This is so even if the defendant committed the criminal conduct before the effective date of the change. (*Tapia*, at pp. 286-287, 300-301; *Rossi*, at pp. 298-302.)

Thus, Orozco's motion should have been granted if he made the necessary showings—which he did, establishing that the value of the car was $301. (CT 36.) The trial court's denial of the motion should be reversed, and the motion should be granted. (Compare, *Williams*, *supra*, 23 Cal.App.5th at p. 651–652 [where petition did not establish value of car, affirming without prejudice to filing an amended petition].)

Conclusion

As modified by Proposition 47, section 496, subdivision (a), applies to possession of "any property" and mandates that if the property is worth less than $950, the offense is a misdemeanor. This Court has already held

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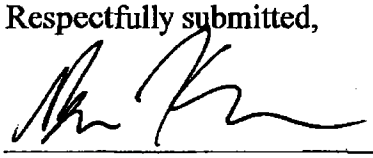
[3]This issue is before the Court in *People v. Lara*, S243975, review granted September 9, 2017.

that "any property" used by the electorate in enacting Proposition 47 legislation, namely section 490.2, includes automobiles, and noted that one of the electorate's explicit purposes in enacting Proposition 47 was to eliminate statutes that made theft a felony based on the type of property alone, including when that property is "cars." (*Page*, *supra*, 3 Cal.5th at pp. 1183, 1187.) Just as "any property" in section 490.2 includes automobiles, so too does "any property" in section 496, subdivision (a)—also modified by Proposition 47. A conviction for possessing a stolen car worth less than $950 is a misdemeanor under Proposition 47.

The case should be remanded with instructions to grant Orozco's motion for a reduction as to count 2.

Respectfully submitted,



Dated: November 21, 2018

BENJAMIN KINGTON
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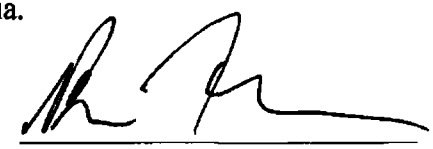
Certificate of Word Count

I, Benjamin Kington, counsel for appellant certify pursuant to the California Rules of Court, rule 8.504(d)(1) that this brief contains 3741 words as calculated by the Word Perfect software in which it was created.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 21, 2018, at San Diego, California.



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People v. Orozco
Case No. S249495

Proof of service

I, the undersigned declare that: I am over the age of 18 years and not a party to the case; I am a resident of the County of San Diego, State of California, where the mailing occurs; and my business address is 934 23rd Street, San Diego, California 92102.

I further declare that I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business.

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c/o 934 23rd Street
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I then sealed each envelope and, with postage thereon fully prepaid, I placed each for deposit in the United States Postal Service, this same day, at my business address shown above, following ordinary business practices.

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Furthermore, I declare that I electronically served from my electronic service address of mj@boyce-schaefer.com on November 21, 2018, to the following entities:

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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 November 21, 2018, at San Diego, California.

Mary Elena Joslyn