IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANTHONY LOPEZ, Defendant and Appellant.	No. S250829

On Review of a Decision of the Court of Appeal
Fifth Appellate District, Case No. F074581

On Appeal from the Superior Court of California
Tulare County No. VCF314447
Honorable Kathryn Montejano

APPELLANT'S OPENING BRIEF ON THE MERITS

Caitlin M. Plummer
State Bar Number 309053
10556 Combie Rd., # 6685
Auburn, CA 95602
Telephone: (530) 268-1608
cplummer.lplaw@gmail.com

Attorney for Appellant
By appointment of the California Supreme Court
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ISSUES PRESENTED

This Court granted review in this case to consider the following issues:

(1) Can the prosecution charge theft and shoplifting of the same property, notwithstanding Penal Code section 459.5, subdivision (b), which provides that "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) If not, was trial counsel ineffective for failing to object to the theft charge?

Assuming, and without prejudice to any contrary argument, that Penal Code section 459.5, subdivision (b), prohibits the prosecution from charging both shoplifting and theft of the same property under any circumstances,

(3) Did defendant forfeit the argument under Penal Code section 459.5 by failing to object to the prosecution's charging both shoplifting and theft?

(4) If defendant had objected, what should the trial court's ruling have been? Might it have ordered the prosecution to choose between a shoplifting charge and a theft charge? If so, and given the potential difficulty in proving the intent required for shoplifting, might the prosecution have chosen to charge only petty theft with a prior? In that event, would defendant have been prejudiced by the failure to object?

(5) Was petty theft with a prior a lesser included offense of shoplifting under the accusatory pleading test? If so, could the trial court have instructed the jury on shoplifting as the charged offense and on petty theft as a lesser included offense? (See *People v. Reed* (2006) 38 Cal.4th 1224, 1227-1231.) If not, and assuming defendant had objected to charging both crimes, could the prosecution have moved to amend the charging document to make the theft charge a lesser included offense of shoplifting under the accusatory pleading test? If that had occurred, could the trial court have instructed on shoplifting as the charged offense and on petty theft as a lesser included offense? In that event, would defendant have been prejudiced by the failure to object?

STATEMENT OF CASE

A complaint filed March 12, 2015, charged appellant with a single count of felony shoplifting, in violation of Penal Code section 459.5.[1] (CT 8.) At the start of the preliminary hearing, held on September 17, 2015, the prosecution told the court that it would be "looking for a bindover" on petty theft with a prior as well. (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 petty theft with a prior (§§ 484, 666) *and* misdemeanor shoplifting (§ 459.5). (CT 47, 49.) In an amended information filed March 15, 2016, the prosecution charged both counts as felonies. (CT 68, 70.) The information also alleged appellant had suffered one prior strike conviction and served three prior prison terms. (CT 69, 71.) Before trial, the court dismissed the strike allegation pursuant to section 1385. (CT 99, 1 RT 11.)

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

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

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

At a court trial, the court found the prison prior allegations true, as well as an allegation that appellant had been convicted of a registerable offense under section 290 (1 RT 40, 252-254)—a fact that made the theft charge punishable as a felony under section 666, rather than a misdemeanor under section 484.[2] A sentencing hearing was held on November 9, 2016. (CT 269.) The court sentenced appellant to the middle term of two years on the theft conviction and declined to impose the two prison priors. (2 RT 275.)

A timely notice of appeal was filed on November 15, 2016. (CT 273.) The Court of Appeal issued its opinion affirming the conviction on July 27, 2018. Following a request from the Attorney General, the court ordered its opinion published on August 20, 2018

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[2] At trial, the parties had also stipulated that appellant had a "prior qualifying theft-related offense as required by Penal Code section 666." (1 RT 141.) A defendant must have both a prior theft offense for which he served time in a penal institution, and either (1) a conviction under section 667, subdivision (e)(2)(C)(iv), (2) a registerable offense under section 290, or (3) a conviction for elder abuse under section 368, subdivision (d) or (e), in order to be punished under section 666.

STATEMENT OF FACTS

I. The Incident

On February 12, 2015, appellant was observed inside of Wal-Mart placing items on the bottom of a cart and inside of an otherwise empty white Wal-Mart bag. (1 RT 78-80.) Appellant then left the store without paying for the items. (1 RT 81.) An asset protection officer confronted him in the parking lot. (1 RT 83.) Appellant told him he had not paid for the items. (1 RT 83.) The combined value of the items was $496.37. (1 RT 87.)

After the asset protection officer called the police, Officer Chad Georges responded to the store. (1 RT 88, 121.) According to Georges, 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.) Appellant told him he had no intention of stealing anything, but once he was inside he decided that he needed money. (1 RT 126.)

II. Prosecution and Defense Theories

In closing arguments, on the theft charge, the prosecution pointed to appellant's admission to Georges that he intended to take the items without paying for them. (1 RT 191.) On the shoplifting count, the prosecution argued that appellant brought an empty Wal-Mart bag into the 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.)

In response, the defense argued that appellant's act of walking out of the store without paying could have been the result of an absentminded mistake and asked the jury to view Georges' testimony regarding appellant's statement with skepticism because it had not been recorded. (1 RT 207-208, 214.) As to the shoplifting charge, the defense argued that there was no evidence about where the empty bag came from (1 RT 205) and argued that the prosecution did not prove beyond a reasonable doubt that appellant had the intent to steal the merchandise when he entered the store (1 RT 216).

In addressing the shoplifting charge in rebuttal, the prosecution argued that a bag would not be "just readily available laying around the store. They're only available at the check-out stands. The defendant must have taken that bag with him." (1 RT 219.)

ARGUMENT

I. SECTION 459.5, SUBDIVISION (B), PROHIBITS A PROSECUTOR FROM CHARGING A DEFENDANT WITH SHOPLIFTING AND THEFT OF THE SAME PROPERTY, WITHOUT EXCEPTION.

A. Introduction

The plain language of section 459.5, subdivision (b) requires that an act of shoplifting be charged as such, and prohibits the prosecution from charging a defendant with theft[3] of the same property. These points appear undisputed. Nonetheless, the Court of Appeal overrode the plain language, finding that a literal application would create an "absurd result." Namely, that prohibiting a theft charge may allow otherwise criminal conduct to go unpunished if the prosecutor is ultimately unable to prove that the conduct constituted shoplifting. Thus, the Court of Appeal interpreted the statute to allow a theft charge whenever the prosecution might be unable to secure a shoplifting conviction. (*People v. Lopez* (2018) 26 Cal.App.5th 382, 391.) This interpretation must be rejected because it is foreclosed by the plain language, there is no "absurd result" that flows from a literal application, and it would thwart the intent of the voters.

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[3] As stated above, appellant was charged with and convicted of petty theft with a prior (§ 666) rather than petty theft (§ 484). However, for the sake of clarity, throughout this brief appellant will typically use the more general term "theft." The element that distinguishes petty theft with a prior from petty theft—the existence of certain prior convictions—is not at issue in this appeal.

B. Under the Plain Language of Section 459.5, Subdivision (b), a Prosecutor May not Charge a Defendant with Both Shoplifting and Theft of the Same Property.

1. Legal Principles

"In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration." (*In re Lance W.* (1985) 37 Cal.3d 873, 889.) "Because statutory language generally provides the most reliable indicator of that intent [citation]" (*People v. Lawrence* (2000) 24 Cal.4th 219, 230), courts first examine the words of the statute, applying their usual, ordinary, and common sense meaning, and construing them in context. (*People v. Loeun* (1997) 17 Cal.4th 1, 9). "If there is no ambiguity, then [courts] presume the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)[4]

2. The Plain Language of Section 459.5, Subdivision (b)

Section 459.5, enacted in November of 2014 as part of the Safe Neighborhoods and Schools Act ("Proposition 47"), created the crime of "shoplifting." Subdivision (a) provides, in relevant part,

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[4] The same rules of construction employed for interpreting statutes apply to interpretation of a voter initiative. (*People v. Rico* (2000) 22 Cal.4th 681, 685.)

> 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).

In effect, section 459.5 operated to "carv[e] out" this "lesser crime" from the "preexisting felony" of burglary. (*People v. Martinez* (2018) 4 Cal.5th 647, 651.)[5]

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

> 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.) This case turns on the meaning of subdivision (b).

By its plain language, subdivision (b) requires prosecution for shoplifting—and shoplifting *alone*—when that provision applies. A prosecutor may not also charge "burglary or theft of the same property." This charging limitation contains no exceptions or qualifiers. In other words, section 459.5, subdivision (b) creates an exception to the general rule under section 954 that "[a]n accusatory pleading may charge two or

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[5] Shoplifting is typically a misdemeanor, but may be charged as a felony when the defendant has either a conviction under section 667, subdivision (e)(2)(C)(iv) or a conviction for registerable offense under section 290. (§ 459.5, subd. (a).)

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."

Indeed, the plain meaning of section 459.5, subdivision (b) is not disputed. As the Court of Appeal recognized, "The People acknowledge the literal language of section 459.5, subdivision (b) appears unambiguous." (*People v. Lopez, supra,* 26 Cal.App.5th at p. 389.) Thus, the voters are presumed to have "meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana, supra,* 25 Cal.4th at p. 272.)

3. *People v. Gonzales* (2017) 2 Cal.5th 858

The meaning of section 459.5, subdivision (b) is confirmed by this Court's decision in *People v. Gonzales* (2017) 2 Cal.5th 858. There, the 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." (*Id.* at pp. 876-877.) Nonetheless, the Court of Appeal distinguished *Gonzales*, relying on the fact that it involved a "retroactive" application of section 459.5, subdivision (b) to a request for resentencing, whereas this case involves application at the charging stage. (*People v. Lopez, supra,* 26 Cal.App.5th at p. 390.) However, nothing in *Gonzales* suggested the holding was limited to retroactive applications. Indeed, the relevant

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

In *Gonzales*, the defendant had been convicted of second-degree burglary on the theory that he entered a bank with the intent to commit theft by false pretenses (by cashing a forged check). (*People v. Gonzales, supra,* 2 Cal.5th at pp. 862, 864.) The defendant petitioned for recall of his sentence and resentencing under section 1170.18, arguing his conduct would have constituted shoplifting had section 459.5 been in existence at the time of his conviction. (*Ibid.*) The Attorney General's primary argument was that entry into a commercial building with the intent to commit theft by false pretenses, rather than theft by larceny, did not constitute shoplifting under section 459.5. (*Id.* at pp. 868-869.) This Court rejected that argument, finding that the shoplifting statute applies to all forms of theft, not just larceny. (*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. (*People v. 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].) This Court agreed with the defendant, stating,

> 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 and ensures only misdemeanor treatment for the underlying described conduct.

(*Ibid.* [emphasis in original].) Thus, *Gonzales* confirms that appellant's interpretation of section 459.5, subdivision (b) is correct.

C. A Literal Application of Section 459.5, Subdivision (b) is Consistent With the Voters' Broader Intent in Passing Proposition 47, and Does Not Lead to Absurd Results.

The Court of Appeal declined to apply the statute literally because it found that doing so would create an absurd result. (*People v. Lopez, supra,* 26 Cal.App.5th 382, 391-392.) It is true that courts do not apply the literal language of a statute when "doing so would lead to absurd results the [enacting body] could not have intended." (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) However, this concept is inapplicable here because the charging limitation is consistent with the overall purposes of Proposition 47 and does not create an absurd result. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1165 [Courts presume that an enacting body

"intended reasonable results consistent with [the statute's] expressed purpose . . . ."].)

1. Applying the Literal Language is Consistent with the Purposes of Proposition 47.

The Voter Information Guide for Proposition 47 directly referenced the restriction on charging, as it would relate to burglary, stating,

> Under current law, shoplifting property worth $950 or less (a type of petty theft) is often a misdemeanor. However, such crimes can also be charged as burglary, which is a wobbler. Under this measure, shoplifting property worth $950 or less would always be a misdemeanor and could not be charged as burglary.

(Official Voter Information Guide ["Voter Guide"], Analysis by Legislative Analyst, Proposition 47, pg. 35.) Though this passage references burglary, it demonstrates that Proposition 47 was adopted with the express intention of limiting charging authority.

This is also demonstrated by reference to one of the arguments made against Proposition 47, which stated, "California has plenty of laws and programs that allow judges and prosecutors to keep first-time, low-level offenders out of jail if it is appropriate. *Prop. 47 would strip judges and prosecutors of that discretion.*" (Voter Guide, Argument Against Proposition 47, pg. 39 [emphasis added].) Thus, voters were directly warned that Proposition 47 would limit prosecutorial discretion, and voted to adopt it regardless.

The act of limiting prosecutorial discretion serves the greater purposes of 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.]" (*People v. Gonzales, supra,* 2 Cal.5th at p. 870.) Relatedly, it was also intended to "reduces penalties for certain offenders convicted of nonserious and nonviolent property and drugs crimes." (Voter Guide, Analysis by Legislative Analyst, pg. 35.)

Requiring exclusive prosecution of shoplifting (when it applies)—rather than theft—furthers these goals. This is true specifically as it relates to petty theft with a prior, the alternative charge at issue here. Defendants convicted of the felony form of shoplifting are eligible for a local custody sentence under 1170, subdivision (h). (§ 459.5, subd. (a).) On the other hand, the felony form of petty theft with a prior[6] requires a prison sentence. (§ 666, subd. (a).) Furthermore, the maximum penalty for misdemeanor shoplifting (six months) is half that of misdemeanor petty theft with a prior (one year). (§§ 19, 490, 666, subd. (a).) Thus, with respect to the alternative theft charge at issue here, the charging limitation both reduces the number of nonviolent offenders in prison and reduces the penalty for the offense.

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[6] Petty theft with a prior may be charged as either a felony or misdemeanor. (§ 666, subd. (a).)

Restricting alternate charging of shoplifting and theft of the same property also prevents a defendant from incurring multiple convictions for a single course of conduct—thereby reducing the overall consequences of conviction that flow from nonviolent property crimes.[7] And, requiring a prosecutor to proceed with a single charge also simplifies plea negotiations and trial proceedings, thereby saving money and resources for more serious cases or other priorities. Both of these results are consistent with the purposes of lessening punishment for minor property crimes and shifting resources to other priorities. (Voter Guide, Analysis by Legislative Analyst, pg. 35 ["(T)he measure requires any state savings that result from the measure be spent to support truancy (unexcused absences) prevention, mental health and substance abuse treatment, and victim services."].)

2. The Doctrine of "Absurd Results" is Reserved for a Narrow Category of Cases.

Courts may not ignore the literal language of statute merely because the results are "troubling," "unwise," or "disagreeable." (*In re D.B.* (2014) 58 Cal.4th 941, 944, 948.) Nor is it sufficient that "reasonable minds may

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[7] In most cases, Penal Code section 654 would nonetheless prevent punishment for both shoplifting and theft. (See *People v. Islas* (2012) 210 Cal.App.4th 116, 130 ["[w]hen a defendant is convicted of burglary and the intended felony underlying the burglary, section 654 prohibits punishment for both crimes"].) But, without the limits of section 459.5, subdivision (b), a defendant could still suffer multiple convictions.

debate the wisdom of the chosen approach." (*Id.* at p. 948.) Instead, the results must be so unreasonable that the enacting body could not have intended them. (*Ibid.*)

Cases from this Court emphasize that judicial rewriting of statutes must be done with caution. (See, e.g., *People v. Weidert* (1985) 39 Cal.3d 836, 843 ["When statutory language is unambiguous, we must follow its plain meaning whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature."]; *California Teachers Assn. v. Governing Bd. of Rialto Unified Sch. Dist.* (1997) 14 Cal.4th 62, 633 ["It cannot be too often repeated that due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature. This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed."].)

In the end, the judiciary's function "is not to judge the wisdom of statutes." (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1099.) It follows that the absurd result doctrine should be "used most sparingly by the judiciary and only in extreme cases . . . ." (*Unzueta v. Ocean View School Dist.* (1992) 6 Cal.App.4th 1689, 1698.) As explained below, this is not such a case.

3. The Mere Possibility That a Low-Level, Non-Violent Property Offense Will go Unpunished Is Not an Absurd Result that Could Not Have Been Intended by the Voters.

The "absurd result" envisioned by the Court of Appeal stems from the fact that shoplifting requires proof of intent to commit theft at the time of entry into a commercial establishment. (*People v. Lopez*, *supra*, 26 Cal.App.5th at pp. 390-392.) 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." (*Id.* at p. 392.) In other words, the court's concern was that—even in a scenario where the defendant did ultimately commit a theft inside the store—the prosecutor might still be unable to secure a conviction for shoplifting because a jury may not be convinced that the defendant intended to commit that theft at the moment of entry, rather than developing the intent later. The Court of Appeal's solution was to interpret section 459.5, subdivision (b) to permit alternative charging whenever "the element of intent upon entering the commercial establishment is *absent or in question*." (*Id.* at p. 390 [emphasis added].)

The Court of Appeal erred in finding that this hypothetical consequence justified ignoring the plain language of the statute. For one

thing, the likelihood that any given defendant will escape punishment entirely is minimal—for several reasons. First, this could only happen in a case that proceeds to trial. As is well recognized, the overwhelming majority of cases are resolved by guilty pleas. (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) If a defendant pleads guilty, there is no danger that his conduct will go unpunished.

Second, in a case where the intent element of shoplifting is "absent," the prosecution would be free to charge the defendant with theft because the act would not constitute shoplifting. That defendant's conduct would be punished as a theft.

Third, if a prosecutor is concerned that the evidence may not support intent at the time of entry—i.e. the element is "in question"—the prosecutor can simply charge the conduct as theft. If the defendant objects on the grounds that the conduct should be charged as shoplifting under section 459.5, subdivision (b), the trial court can resolve the matter during pretrial proceedings. Precisely how the court would decide such an objection is not at issue in this case—given that the prosecutor here chose to charge shoplifting rather than theft. Nonetheless, a standard could be crafted that gave the prosecutor meaningful discretion to pick the appropriate charge.

Lastly, even where conduct must be charged as shoplifting, when a subsequent theft has occurred, it will not typically be especially difficult to

prove intent at the time of entry. The intent element of burglary—of which shoplifting is a subset—is generally proved by circumstantial evidence and may be inferred from the relevant facts and circumstances. (*People v. Holt* (1997) 15 Cal.4th 619, 669.) Evidence that a theft actually occurred will typically be powerful evidence that a defendant entered with the intent to commit that theft. (See *People v. Jones* (1962) 211 Cal.App.2d 63, 71–72 ["Burglarious entry may be inferred from the fact that appellant unlawfully and forcibly entered the home of another; there is no better proof that a burglar entered with intent to commit theft than a showing that he did commit it."].) Even in this case, the jury did not acquit appellant of shoplifting, it was merely unable to reach a unanimous verdict.

Thus, the likelihood that the plain language of section 459.5, subdivision (b) will result in criminal conduct going unpunished is slight. Nonetheless, the prospect that a rule of criminal procedure *might* result in criminal conduct going unpunished is not an absurd result. This point flows indisputably from numerous examples—the exclusionary rule of the Fourth Amendment, statutes of limitation, and many rules of evidence—to name a few. All of these rules can make it difficult, or even impossible, to punish criminal conduct. And, for that reason, they illustrate that the goal of the 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 Court of Appeal might have weighed those interests differently than the voters who adopted Proposition 47—placing more emphasis on the goal of punishing minor property crimes—does not establish that the limits of section 459.5, subdivision (b) create an "absurd result." (Cf. *People v. Gonzales*, *supra*, 2 Cal.5th a p. 874 ["(T)he culpability levels of the various theft offenses are policy decisions for the electorate to make. Its decision to treat various theft offenses similarly may be debated but it is not absurd."].)

The Court of Appeal found that the voters could not have intended the result envisioned because, "the purpose of Proposition 47 was to reduce certain offenses to misdemeanors, not eliminate liability for criminal conduct." (*People v. Lopez*, *supra*, 26 Cal.App.5th at p. 392.) Appellant agrees that the primary intent was not to eliminate criminal liability. But the fact that this *could*, in rare cases, be a side effect of the larger statutory scheme does not mean the plain language leads to absurd results. It reflects a balancing of priorities that the voters were entitled to make.

This is especially true when one considers the broader context of Proposition 47—which, as explained, aimed to reduce punishment for nonviolent property crime. Thus, the Court of Appeal's certainty that the

voters could not have intended or accepted this result is unwarranted. It is just as likely, if not more so, that the voters accepted the minimal risk that such crime would go unpunished—a category of crime they already found deserved less focus—in service of other interests. (*Harris v. Capital Growth Investors XIV, supra,* 52 Cal.3d at p. 1165 [Courts presume that an enacting body "intended reasonable results consistent with [the statute's] expressed purpose . . . ."].) Though the Court of Appeal might have found the risk of a nonviolent property offender escaping conviction "troubling," "unwise," or "disagreeable" (*In re D.B., supra*, 58 Cal.4th at p. 948), this did not justify discarding the plain language of the statute. At most, section 459.5, subdivision (b) represents a debatable policy choice of exactly the kind the voters were permitted to make and to which the Court of Appeal should have deferred.

D. The Interpretation Adopted by the Court of Appeal Will Frustrate the Voters' Intent Because It Will Largely Eliminate the Charging Limitation.

It is the Court of Appeals' proposed interpretation of the statute, not the plain language, which will thwart the will of the voters. The court purported to allow alternative charging only in situations where the intent element of shoplifting is "absent or in question." (*People v. Lopez*, *supra*, 26 Cal.App.5th at p. 390.) However, the court provided no guidance on who makes that determination, when, or under what standard. It merely

stated 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." (*People v. Lopez*, *supra*, 26 Cal.App.5th at p. 391 [emphasis added].)

But, except in a truly unusual case, until the defendant has either pled guilty or the jury has rendered a verdict, it is always possible that the prosecution will fail to prove the intent element of shoplifting. Thus, under the rule created by the Court of Appeal, in nearly every case the prosecution will be able to successfully argue that alternate charging is permitted. In that way, the Court of Appeal's opinion all but nullifies the prohibition on alternate charging of shoplifting and theft.

The voters were quite explicit in their intention to limit prosecutorial discretion in this context. An application of section 459.5, subdivision (b) that so clearly invalidates that choice must be rejected. (*People v. Prather* (1990) 50 Cal.3d 428, 437 [finding a ballot initiative should not be interpreted in a way that would "thwart the intent of the voters and framers"].)

E. Because the Plain Language of Section 459.5, Subdivision (b) Controls, Appellant's Theft Conviction Must be Reversed

Here, the plain statutory language requires reversal of appellant's conviction. The complaint charged appellant *only* with shoplifting (CT 8)—

a charge the prosecution pursued through the remainder of the case. Thus, from the outset, appellant was a "person who is charged with shoplifting"—meaning he had to be charged with that crime alone and could not also be charged with "theft of the same property." (§ 459.5, subd. (b).) Accordingly, the prosecution was prohibited from adding a petty theft with a prior charge and appellant's conviction on that count must be reversed. (See *People v. Murphy* (2011) 52 Cal.4th 81, 94-95 [finding that where a defendant was improperly charged under a general statute, rather than an applicable specific one, the remedy was reversal on the improperly charged count].)

II. APPELLANT'S CLAIM WAS NOT FORFEITED BY LACK OF OBJECTION.

Trial counsel did not object to the addition of the theft charge. The Court of Appeal did not explicitly resolve the question of forfeiture, but rather chose to address the merits of the case in light of appellant's claim of ineffective assistance of counsel. (*People v. Lopez, supra,* 26 Cal.App.5th at p. 388.) No other authority addresses whether the failure to object forfeits a claim involving the charging limitation contained in 459.5, subdivision (b). However, reference to broader principles and analogous cases demonstrates that appellant's claim has not been forfeited.

First, a claim that presents a question of law based on undisputed facts may be raised for the first time on appeal. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118 [stating the "well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts"].) Issues of statutory construction are questions of law. (See, e.g., *People v. Gonzales* (2018) 6 Cal.5th 44, 49 ["The scope of section 473(b) is a question of law . . . ."]; *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 389-390 ["These contentions implicate interpretation of the relevant statutes, which is a question of law on which this court exercises independent judgment."].) Thus, because this case turns on a question of statutory interpretation, forfeiture does not apply.

Analysis of decisions involving claims similar to appellant's also supports this conclusion. One analogous claim arises from the rule established in *In re Williamson* (1954) 43 Cal.2d 651, which held that the existence of a more specific criminal statute will, in some circumstances, preclude a charge under a more general statute that covers the same conduct. (*Id.* at p. 654.) Like the claim made here, this amounts to an argument that a charge was improper as a matter of law. At least one panel of the Court of Appeal has decided to address such a claim even in the absence of an objection below, stating, "given that the issue is one of law based on undisputed facts, we believe it is appropriate for us to address the

merits of [defendant's] arguments." (*People v. Henry* (2018) 28 Cal.App.5th 786, 791, fn. 3.)

The decision in *People v. Shabtay* (2006) 138 Cal.App.4th 1184 is also instructive. There, the court addressed an argument that the prosecutor improperly charged two counts under a single statute, where only one count was permitted. (*Id.* at p. 1187.) The court rejected the Attorney General's argument that the claim had been forfeited by lack of objection below, finding, "[w]hile a demurrer does lie to challenge an improper charging of more than one offense under section 954, the failure to demur does not justify a multiple-conviction that is improper as a matter of law." (*Id.* at p. 1192.)

More broadly, a claim involving an unauthorized sentence can be raised at any time, even without an objection in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*Ibid.*) This principle is also analogous to appellant's case. If section 459.5, subdivision (b) prohibited charging appellant with a theft offense, then any conviction for that offense—and therefore any sentence for that offense—would be unauthorized. (Cf. *People v. Iniguez* (2002) 96 Cal.App.4th 75, 81 ["The sentence herein, having been imposed for a nonexistent offense, necessarily is unauthorized and cannot stand."].)

Thus, all of the available authority supports a finding that appellant's claim is not subject to forfeiture. However, though not explicitly deciding the issue, the Court of Appeal suggested otherwise. The court stated, "Generally, a defendant's failure to object to an amended information forfeits his right to assert the error on appeal. [Citations]." (*People v. Lopez, supra,* 26 Cal.App.5th at p. 388.) The Court cited four cases for this proposition. But these cases are distinguishable because they do not involve claims that are similar to appellant's. (See *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057 [claim that court violated section 1009 by amending the information, depriving appellant of notice]; *People v. Carbonie* (1975) 48 Cal.App.3d 679, 691 [defendant claimed lack of notice based on irregularities in the information]; *People v. Spencer* (1972) 22 Cal.App.3d 786, 799-800 [defendant argued the information was improperly amended to include a charge not shown at the preliminary hearing]; *People v. Collins* (1963) 217 Cal.App.2d 310, 313 [argument that prosecutor improperly amended the information to add an offense when the defendant had not been committed for that offense].) These cases all raise claims that a count was improper because of the *time or manner* in which it was charged. That type of claim is distinct from appellant's—which is a claim that the charge was improper as a *matter of law*, under any

circumstances. As explained above, in considering claims of that nature, courts have found forfeiture inapplicable.

However, should this Court disagree, it may nonetheless exercise its discretion to review the claim regardless. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party."].) Appellant was convicted of a crime that the prosecution was statutorily prohibited from charging him with. Resolution of this case on the merits will provide an opportunity to clarify the limitations of 459.5, subdivision (b). Under these circumstances, and to the extent forfeiture applies, appellant asks this Court to exercise its discretion to review his claim on the merits. Regardless, should this Court ultimately apply forfeiture, appellant has raised an alternative ineffective assistance claim below. (*Infra*, Argument III.)

III. IF THIS COURT FINDS THAT APPELLANT'S CLAIM WAS FORFEITED, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE THEFT CHARGE.

A. Legal Principles

If forfeiture does apply to appellant's 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.)

B. Counsel's Failure to Object Was Objectively Unreasonable.

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 objecting to the theft charge. The failure to do so was objectively unreasonable.

To show deficient performance, an appellant must also 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.)

Here, there could be no reasonable tactical justification for not objecting. 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.)

C. The Error Was Prejudicial

The prejudice that flows from counsel's error is manifest. Had counsel objected the case would have proceeded on the shoplifting charge alone. The theft count would have been dismissed, and he could not have been convicted of that charge. 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.)

In its supplemental briefing order, this Court asked for briefing on a series of questions related to the prejudice prong of *Strickland.* Though they relate to the question of prejudice, for the sake of clarity and organization, appellant addresses these issues in separate headings below.

IV. HAD COUNSEL OBJECTED TO THE ADDITION OF THE THEFT CHARGE, THE PROSECUTOR WOULD HAVE BEEN REQUIRED TO GO FORWARD ON THE SHOPLIFTING COUNT ALONE.

This Court has asked the parties to discuss—while assuming that section 459.5, subdivision (b) prohibited alternate charging—what the trial court's ruling should have been had defense counsel objected to the addition of the theft charge. And, whether it could have ordered the prosecutor to choose between theft and shoplifting.

Under the language of section 459.5, subdivision (b), the only proper ruling would have been dismissal of the theft charge. The court would not have been permitted to give the prosecution a choice between shoplifting and theft. Doing so would have violated the first sentence of section 459.5, subdivision (b), which requires that, "*Any act of shoplifting* as defined in subdivision (a) *shall be charged as shoplifting.*" (Emphasis added.) Again, the meaning of this language is plain and was confirmed by this Court in

Gonzales. (*People v. Gonzales, supra,* 2 Cal.5th at p. 876 ["A defendant must be charged only with shoplifting when the statute applies."].)

If any difficulty arises from applying this provision it stems from the fact that the statute does not explain how one determines whether conduct constitutes shoplifting at the charging stage. However, that difficulty is not presented by this case. Here, the People chose to charge appellant's conduct as shoplifting—indeed initially *only* as shoplifting. (CT 8.) Whatever the scope of the first sentence of section 459.5, subdivision (b), the most obvious application occurs when the People decide that the conduct constitutes shoplifting for the purposes of charging the defendant. Having made the decision to do so, and to pursue that charge through trial, the People brought themselves within the limits of section 459.5, subdivision (b). Moreover, the magistrate issued a holding order on shoplifting. (CT 43.) On these facts, the question of whether appellant's conduct constituted shoplifting for purposes of charging is not a close one.

Indeed, had defense counsel objected, the only way the People could have maintained the theft count would have been by arguing that appellant's conduct did not actually constitute shoplifting for purposes of charging. Having charged him with shoplifting from the outset, appellant fails to see how the People could have credibly made such an argument. Appellant also fails to see how the People could credibly argue that at this

juncture. Having charged shoplifting, pursued (and obtained) a holding order on that charge, and then argued to the jury that it had proven shoplifting beyond a reasonable doubt, any argument that the conduct did not actually constitute shoplifting should be rejected. (See *Ernst v. Searle* (1933) 218 Cal. 233, 240-241 ["The rule is well settled that the theory upon which a case is tried must be adhered to on appeal."]; *Saville v. Sierra College* (2006)133 Cal.App.4th 857, 872 [under the "theory of the trial doctrine," a party is "not permitted to change [its] position and adopt a new and different theory on appeal"].)

Moreover, even in a case where it is less clear whether the conduct constitutes shoplifting for purposes of section 459.5, subdivision (b), the charging limitation can still be applied without significant difficulty. Section 459.5, subdivision (b) merely requires the People to choose at the start of the case whether to pursue shoplifting or theft. If the People choose shoplifting, then there is no issue under section 459.5, subdivision (b)—so long as they do not attempt to add a theft charge later. If the People choose to charge theft, the defense could, in theory, object on the grounds that the conduct should be charged as shoplifting. If that occurred, the trial court can resolve the question in a pretrial proceeding—one where the prosecution's discretion to pick the appropriate charge can be given meaningful deference. Nonetheless, the precise contours of such a hearing

need not be decided to resolve this case. Having made the decision to charge appellant with shoplifting, under section 459.5, subdivision (b), the People were obligated to pursue that charge alone.

Finally, even if this Court finds that the prosecution would have been permitted to go forward on theft, prejudice is still established. To establish prejudice, appellant need only prove that there is a reasonable probability that the result of the proceedings would have been more favorable had counsel objected. (*Strickland, supra,* 466 U.S. at p. 687.) In other words, prejudice is established in this case if there is a reasonable probability that—even if given a choice—the prosecution would nonetheless have chosen shoplifting. That probability exists here. At the start of the case, the prosecution chose to pursue a shoplifting charge *alone*—a charge it then pursued through trial. In considering what charge the prosecution would have chosen had it been forced to pick, the most natural place to look would be the choice it made in the first instance. Having chosen shoplifting at that juncture—presumably with a reason for doing so—there is a reasonable probability it would have pursued shoplifting over theft had counsel objected.

V. THE TRIAL COURT WOULD NOT HAVE BEEN PERMITTED TO INSTRUCT THE JURY ON THEFT AS A LESSER INCLUDED OFFENSE UNDER THE ACCUSATORY PLEADING TEST.

A. Introduction

This Court has also asked whether—even if a theft charge would have been prohibited under section 459.5, subdivision (b)—the prosecutor could nonetheless have moved to amend the information so as to make theft a lesser included offense of shoplifting under the accusatory pleading test, and, therefore, whether the jury could have been instructed on theft.

This Court should find that tactic would have been prohibited—both because it would violate section 459.5, subdivision (b), and because it would constitute an unwarranted and problematic expansion of the accusatory pleading test.

B. Legal Principles

In the absence of his consent, a defendant may not be convicted of a crime that is neither charged nor necessarily included in a charged offense. (See *Cole v. Arkansas* (1948) 333 U.S. 196, 201; *People v. Birks* (1998) 19 Cal. 4th 108, 128 ["Unless the defendant agrees, the prosecution cannot obtain a conviction for any uncharged, nonincluded offense."].) This rule derives from the principle that, "[d]ue process of law requires that an accused be advised of the charges against him in order that he may have

a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*Ex parte Hess* (1955) 45 Cal.2d 171, 175.)

There are two tests for discerning whether a lesser offense is included in a greater. "Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227–1228.) And, as relevant here, "[u]nder the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense, the latter is necessarily included in the former." (*Ibid.*)

C. Shoplifting and Theft are Distinct Crimes.

The questions presented here must be understood in the context of the relationship between the two crimes at issue. As this Court has stated, shoplifting is effectively a sub-category of burglary. (*People v. Martinez*, *supra,* 4 Cal.5th at p. 651.) The elements of shoplifting are,

(1) The defendant entered a commercial establishment;

(2) When the defendant entered a commercial establishment, it was open during regular business hours, and;

(3) When he entered the commercial establishment, he intended to commit theft.

(§459.5, subd. (a); *People v. Gonzales*, *supra,* 2 Cal.5th at p. 874; CALCRIM No. 1703.)

Shoplifting does not "require any taking, merely an entry with the required intent." (*People v. Gonzales, supra,* 2 Cal.5th at p. 872; see also CALCRIM No. 1703 ["The defendant does not need to have actually committed theft as long as (he/she) entered with the intent to do so."].) Thus, as with burglary more generally, shoplifting is complete when an entry is made with the required intent. (See *People v. Lamica* (1969) 274 Cal.App.2d 640, 644 ["the crime of burglary is complete when an entry with the essential intent is made, regardless whether the felony planned is committed or not (citation)."]; *People v. Bard* (1968) 70 Cal.2d 3, 5.) "What occurs later . . . is irrelevant to the original crime." (*People v. Bard, supra,* 70 Cal.2d at p. 5.)

Theft, on the other hand, does require a taking. The elements of theft by larceny (the form of theft relevant in this case) are,

(1) The defendant took possession of property owned by someone else;

(2) The defendant took the property without the owner's consent;

(3) When the defendant took the property he intended to deprive the owner of it permanently, and;

(4) The defendant moved the property, even a small distance, and kept it for any period of time, however brief.

(CALCRIM No. 1800; §484.)

Comparing the elements of shoplifting and theft reveals that the two are wholly separate crimes. The *actus reus* is distinct (entry versus taking and movement) and the *mens rea* is distinct (intent to commit theft versus intent to deprive). Practically speaking, they also occur at a different location within a commercial establishment and at different points in time. Thus, though the act of shoplifting may often be done in furtherance of the theft, they have no common elements.

D. As the Information was Written, Petty Theft with a Prior Was Not a Lesser Included Offense of Shoplifting Under the Accusatory Pleading Test.

As to the shoplifting count, the information in this case alleged the following:

> On or about February 12, 2015, in the County of Tulare, the crime of SHOPLIFTING, in violation of Penal Code 459.5, a FELONY, was committed by ANTHONY LOPEZ, who did unlawfully, with intent to commit theft, enter a commercial establishment during regular business hours, to wit, WALMART, where the property taken *or* intended to be taken was valued at less than $950.00

(CT 70 [emphasis added].)

This language does not allege that appellant in fact unlawfully took any property—the minimum that would be required to allege theft. (§ 952; *People v. Tatem* (1976) 62 Cal.App.3d 655, 658.) Instead, it merely states that appellant either took *or* intended to take property. The use of the word

"or" makes the language insufficient to allege that a taking actually occurred. (Cf. *People v. Smith* (2013) 57 Cal.4th 232, 242-243.)

Nor does the information include any of the other elements of theft by larceny. Thus, petty theft with a prior was not a lesser included offense of shoplifting as the information was actually drafted in this case. (*People v. Reed, supra,* 38 Cal.4th at pp. 1227–1228 [test is satisfied only when "the facts actually alleged in the accusatory pleading include all of the elements of the lesser offense . . . ."].)

E. The Prosecutor Would Not Have Been Permitted to Amend the Information in Order to Make Theft a Lesser Included Offense of Shoplifting Under the Accusatory Pleading Test.

The remaining question is whether the prosecutor could have amended the information in order to make theft a lesser included offense of shoplifting. This scenario presumably would have proceeded as follows: after the prosecution attempted to add a theft count to the information, the defense would have objected. The court would have sustained that objection, under section 459.5, subdivision (b), and the information would have only included shoplifting as an explicitly listed charge. Nonetheless, the prosecutor would have moved to amend the language of the shoplifting allegation to include the elements of theft, for the sole purpose of having the jury instructed on theft as a lesser included offense.

This strategy would have been improper. First and foremost, this conduct would violate section 459.5, subdivision (b) because even if the information no longer explicitly listed theft as a separate count, the prosecutor would, practically speaking, still be charging theft. Second, the strategy would constitute an improper application of the accusatory pleading test.

1. The Action Would be Prohibited by Section 459.5, Subdivision (b).

As explained, section 459.5, subdivision (b) prohibits any person charged with shoplifting from also being "charged" with theft or burglary of the same property. Appellant anticipates the Attorney General may advocate for a narrow construction of the word "charged" in section 459.5, subdivision (b)—one that only prohibits the prosecutor from explicitly listing theft as a separate count in the complaint or information. Thus, one could argue, if theft is merely inserted into the case as a lesser included offense, it is not technically "charged," and no violation of section 459.5 occurs. This argument has some superficial appeal given that lesser included offenses are often referred to as "uncharged" offenses. (See, e.g., *People v. Eid* (2014) 59 Cal.4th 650, 660; *People v. Reed, supra,* 38 Cal.4th at p. 1227.)

But, this interpretation fails under further analysis. First, there is effectively no difference between charging theft explicitly and employing the accusatory pleading test in order to get an instruction on theft. If the prosecutor here had amended the accusatory pleading *for the purpose* of making theft a lesser included offense—in a clever attempt to subvert the explicit charging limitation—the prosecutor would have been including a *de facto* charge of theft. In other words, the prosecutor's actions would be the functional equivalent of charging theft.

This is especially true given the lack of overlapping elements in shoplifting and theft. As such, the amendments would be done to add facts wholly superfluous to the charged crime of shoplifting—meaning they could serve no purpose other than to obtain a theft instruction. Permitting that strategy would allow the prosecution to do implicitly what it was prohibited from doing explicitly. Thus, section 459.5, subdivision (b) should be interpreted to mean an alternative theft offense cannot be explicitly and separately charged, nor implicitly charged by virtue of the accusatory pleading test. (See *People v. Clark* (1966) 241 Cal.App.2d 775, 780 ["Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers—one that is practical rather than technical . . . ."].)

Numerous principles support this interpretation. First, as this Court has recognized, "uncodified sections of Proposition 47 informed voters that the act 'shall be broadly construed to accomplish its purposes,' and that its provisions 'shall be liberally construed to effectuate its purposes.'" (*People v. Buycks* (2018) 5 Cal.5th 857, 877–878 [citing Voter Guide, text of Prop. 47, §§ 15, 18, p. 74].) Interpreting the statute to prohibit only a separately listed charge of theft constitutes an overly technical and narrow construction, rather than a broad one anticipated by the voters.

Moreover, courts may not interpret ballot initiatives in a way that "ignore[s] the purpose" or "thwart[s] the intent of the voters." (*People v. Prather*, *supra*, 50 Cal.3d at p. 437.) Effectively restoring the prosecutorial discretion that the voters plainly intended to take away—by sanctioning an end-run around the charging limitation—would directly thwart their intent.

Similarly, it is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (*Duncan v. Walker (2001)* 533 U.S. 167, 174; accord *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 330; *People v. Cruz* (1996) 13 Cal.4th 764, 782.) Allowing a prosecutor to subvert the charging limitation of section 459.5, subdivision (b) with a clever pleading strategy renders that limitation largely superfluous and insignificant. It would have

essentially no effect: it would merely require the prosecutor to jump through a technical hoop to return to the *status quo* of unrestricted discretion. Applying section 459.5, subdivision (b) in this way would promote gamesmanship and render the statutory language largely meaningless. Such an interpretation should be rejected. Instead, this Court should find that section 459.5, subdivision (b) prohibits a separately listed charge of theft, and a *de facto* theft charge accomplished via the accusatory pleading test.

2. The Accusatory Pleading Test Should Not Be Applied in This Manner.

Section 459.5, subdivision (b) resolves this question. However, the novel and expansive use of the accusatory pleading test imagined here should also be rejected as a fraught misapplication of the doctrine itself. Appellant is unaware of any case sanctioning this particular use of the accusatory pleading test. Specifically, intentionally including extraneous allegations in the description of one offense, for the sole purpose of making a wholly separate offense—which shares no common elements—a lesser included offense. There is ample reason to reject this use of the accusatory pleading test.

First, the lesser included offense doctrine more broadly appears inapplicable. The reason for the lesser included offense doctrine is to

protect the jury's "'truth-ascertainment function.'" (*People v. Breverman* (1998) 19 Cal.4th 142, 155.) Specifically, "[i]nstructing the jury on lesser included offenses avoids presenting the jury with 'an *unwarranted all-or-nothing choice*, thereby protect[ing] both the defendant and the prosecution against a verdict contrary to the evidence." (*People v. Eid, supra,* 59 Cal.4th at p. 657 [internal quotations and citations omitted; emphasis added].) But, in this context, the voters made clear that they *wanted* the jury presented with an all-or-nothing choice: shoplifting and shoplifting alone. Thus, the purpose underlying the doctrine of lesser included offenses suggests it should not be applied at all in this context.

Even if the lesser included offense doctrine more broadly were relevant, this Court should nonetheless find that the accusatory pleading test itself is inapplicable. The accusatory pleading test is used to determine whether a given defendant received notice of an uncharged crime. (*People v. Reed, supra,* 38 Cal.4th at p. 1231.) It does not apply in other contexts, such as determining whether a defendant may be convicted of both the greater and lesser crime. (*Ibid.*) In that situation, the statutory elements test applies. (*Ibid.*) Thus, the accusatory pleading test serves the limited purpose of ensuring a defendant is given proper notice. There is no justification for permitting prosecutors to use it as a tool to avoid a statutory charging limitation—a purpose it indisputably was not designed to serve.

Moreover, the broader implications of allowing the accusatory pleading test to be used in this way should give this Court pause. With a carefully crafted accusatory pleading, nearly any crime—or any number of crimes—could become a lesser included of any other. For example, the information in this case could have been drafted to include the additional, underlined allegations:

> On or about February 12, 2015, in the County of Tulare, the crime of SHOPLIFTING, in violation of Penal Code 459.5, a FELONY, was committed by ANTHONY LOPEZ, a felon, who did unlawfully, while knowingly possessing a usable amount of methamphetamine and a concealed firearm, with intent to commit theft, enter a commercial establishment during regular business hours, to wit, WALMART, where the property taken or intended to be taken was valued at less than $950.00, and then did take and carry away that property.

Theft would now be a lesser included offense of shoplifting—but so would being a felon in possession of a firearm (§ 12022), carrying a concealed firearm (§ 12025), and possession of methamphetamine (Health & Saf. Code § 11377).

This type of expansive use of the accusatory pleading test would be confusing and erode the notice given to a defendant—the very interest the doctrine is meant to serve. "Due process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." (*Ex parte Hess, supra*, 45 Cal.2d at p.

175.) Allowing the prosecutor to covertly charge any number of legally unrelated offenses via the accusatory pleading test interferes with a "reasonable opportunity" to prepare a defense. It requires the defendant to first search for every possible criminal violation contained in the alleged facts—even ones wholly separate from the charged crime(s). If he fails to correctly identify all of the possible charges, he will be unprepared to properly defend the case.

Such a rule would also impose an unnecessary burden on trial courts, who have a *sua sponte* duty to instruct on all lesser included offenses supported by the evidence. (*People v. Breverman, supra,* 19 Cal.4th at p. 154.) The court too would have to exhaustively search the accusatory pleading for all possible lesser included offenses that arise by virtue of extraneous facts. Thus, allowing the accusatory pleading test to be used in this way comes at a constitutional cost—and a cost to the efficient administration of justice—with no apparent benefit beyond allowing a prosecutor to evade an express charging limitation.

Naturally, the accusatory pleading test recognizes that a defendant can, at least in some instances, be given adequate notice of a lesser included offense even without a separately listed charge or reference to a specific statutory provision. And in many situations this would likely be uncontroversial. When there is little difference between the charged and

uncharged crime, the defendant's ability to defend his case is not significantly hampered—and his defense on the lesser will be largely the same as the defense on the greater. (See, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 25 [where Vehicle Code section 10851 was charged as "driv[ing] and tak[ing]" a vehicle, joyriding was a lesser included offense under the accusatory pleading test.].) But, where the crimes are legally unrelated, so too are the defenses—as they are with shoplifting and theft. Thus, a defendant cannot be given proper notice where the prosecutor merely lists facts completely extraneous to the charged offense, without informing the defendant what the penal consequences of those facts might be.

This Court has recognized this point in the context of sentencing enhancements. In *People v. Mancebo* (2002) 27 Cal.4th 735, 739, the trial court imposed a One Strike sentence, pursuant to section 667.61, based in part on an unpled multiple victim circumstance (section 667.61, subd. (e)(5)). There was no question that the case involved multiple victims—the defendant had been charged and convicted of crimes against two separate victims. (*Id.* at p. 741.) Nonetheless, this Court found the scenario "violate[d] [the defendant's] right to adequate notice of the factual and *statutory bases of enhancement allegations brought against him.*" (*Id.* at p. 746 [emphasis added].) Thus, *Mancebo* recognized that factual allegations

unmoored from their statutory significance are not necessarily sufficient to provide notice.

Elsewhere, this Court has recognized another constitutional problem that can result from atypical applications of the accusatory pleading test. In *People v. Schueren* (1973) 10 Cal.3d 553, 559, the defendant was convicted of "lesser offense" which was a lesser by virtue of the accusatory pleading test. However, that offense had a maximum penalty of life in prison (which the trial court imposed), while the "greater" offense had a maximum of 14 years. (*Id.* at p. 556.) The Court found this violated the state constitutional ban on cruel or unusual punishment, noting, "by successfully defending against the crime charged but not against an included offense, [the defendant] is now faced with the possibility of life in prison. Under the circumstances we believe that a prison term exceeding 14 years is, literally, an 'unusual' punishment . . . ." (*Id.* at p. 560.) Thus, *Schueren* serves as another example of the constitutional implications of an accusatory pleading test that strays too far from its ordinary application.

At the very least, the constitutional implications of this issue demonstrate that this Court should resolve the matter on other grounds. (See *People v. Navarro* (2007) 40 Cal.4th 668, 675; *Lyng v. Northwest Indian Cemetery Protective Assn.* (1988) 485 U.S. 439, 445 ["A fundamental and longstanding principle of judicial restraint requires that

courts avoid reaching constitutional questions in advance of the necessity of deciding them."].) Section 459.5, subdivision (b) itself resolves the issue.

F. Even if the Court Finds That the Accusatory Pleading Test Could be Utilized to Seek an Instruction and Conviction on Theft, Prejudice is Still Established in This Case.

Even if this Court finds that a prosecutor could use the accusatory pleading test as a means of getting around section 459.5, subdivision (b), prejudice is nonetheless established in this case. Had defense counsel objected to the theft charge, appellant could only have been convicted of theft if three things happened next: (1) the prosecutor actually moved to amend the information, (2) the trial court permitted the amendment and, (3) after the jury deadlocked on shoplifting, the prosecutor moved to withdraw that count. There is a reasonable probability that at least one of these three events would not have occurred.

First, it is unclear whether the prosecutor would have thought to subvert the limitations of section 459.5, subdivision (b) with a novel use of the accusatory pleading test envisioned—and therefore seek to amend the information on the basis. There is no law that discusses or explicitly sanctions this tactic. Thus, there is a reasonable probability the prosecutor either would not have developed this tactic, or would have decided against using it.

Second, even if the prosecutor did decide to amend the information, it is far from clear that the court would have permitted such an amendment. Under section 1009, after the entry of a plea, "[t]he court may order or permit an amendment of an . . . information . . . for any *defect or insufficiency*." (§ 1009 [emphasis added].) But there was no defect or insufficiency in the pleading as to shoplifting—the only permissible charge under section 459.5, subdivision (b). Thus, the prosecutor would have to have argued that the information was defective because, without amendment, the court could not instruct the jury on theft. The decision regarding whether or not to grant leave to amend an information rests within the sound discretion of the trial court. (*People v. Flowers* (1971) 14 Cal.App.3d 1017, 1020.) It is doubtful that a court would exercise that discretion in order to allow the prosecutor to obtain a lesser included offense instruction on a count it had just dismissed as improper under section 459.5, subdivision (b). Or, at the very least—there is a reasonable probability that the court would not have done so—which is sufficient to prove prejudice under *Strickland.* (*Strickland, supra,* 466 U.S. at p. 687.)

Finally, even if court did allow the amendment—meaning the jury would have received a lesser included offense instruction on theft—it would also have been instructed that it could only consider theft if it acquitted on the greater offense of shoplifting. (*People v. Kurtzman* (1988)

46 Cal.3d 322, 330.) Here, of course, the jury deadlocked on the shoplifting count. At that point, the prosecutor would have been faced with a choice: move for a mistrial and retry appellant for shoplifting or, forgo a chance to convict on shoplifting and ask the court to dismiss the shoplifting charge in the interest of justice under section 1385, meaning the jury could then reach a verdict on theft. (*People v. Anderson* (2009) 47 Cal.4th 92, 114.) If the prosecutor chose the first option prejudice would be established because a hung jury is a more favorable outcome for purposes of *Strickland* prejudice. (*Cone v. Bell* (2009) 556 U.S. 449, 452.) As to the second choice, given the prosecutor's interest in obtaining a conviction on shoplifting from the outset, there is a reasonable probability the prosecutor would have declined that option. While the prosecutor did ultimately dismiss the shoplifting count after appellant's trial (1 RT 244), that was only after the jury had returned a guilty verdict on theft. The prosecution's thought process might well have been different had it not been guaranteed a conviction on theft.

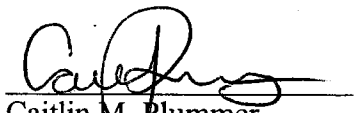
For all these reasons, regardless of whether the prosecutor could have, in theory, obtained a lesser included offense instruction on theft, appellant is nonetheless entitled to relief on the grounds of ineffective assistance of counsel.

CONCLUSION

Appellant respectfully requests that this Court reverse the judgment of the lower courts, and vacate his conviction for petty theft with a prior.

DATED: February 11, 2019

Respectfully submitted,



Caitlin M. Plummer
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.360(b)(1), I certify that this brief contains 11,216 words, based on the word-count feature of my word-processing program.

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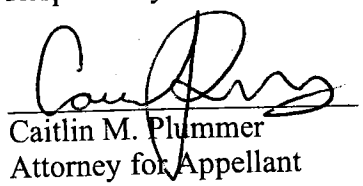

Caitlin M. Plummer
Attorney for Appellant

Re: *People v. Lopez*, No. S250829

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 February 11, 2019, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **Appellant's Opening Brief on the Merits** 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.

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
SacAWTTrueFiling@doj.ca.gov
Attorney for Respondent
State of California
____ Served Electronically
_x_ Served by Mail

Central California Appellate Program
2150 River Plaza Dr., Ste. 300
Sacramento, CA 95833
eservice@capcentral.org
____ Served Electronically
_x_ Served by Mail

Anthony Lopez
2010 East Olive Way
Dinuba CA, 93618
____ Served Electronically
_x_ Served by Mail

Tulare County Superior Court
Clerk's Office
221 S. Mooney Blvd., Rm. 124
Visalia, CA 93291
____ Served Electronically
_x_ Served by Mail

Tulare County District Attorney
221 S. Mooney Blvd., Rm 224
Visalia, CA 93291
____ Served Electronically
__x__ Served by Mail

Clerk of the Court
Fifth District Court of Appeal
2424 Ventura Street
Fresno, California, 93721
via Truefiling

____ Served Electronically
__x__ Served by Mail

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 11, 2019, at Grass Valley, California.

Caitlin M. Plummer
Attorney for Appellant