In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TIMOTHY WAYNE PAGE,

Defendant and Appellant.

Case No. S230793

Fourth Appellate District, Division Two, Case No. E062760
San Bernardino County Superior Court, Case No. FVI1201369
The Honorable Michael A. Smith, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
MICHAEL PULOS
Deputy Attorney General
CHRISTEN SOMERVILLE
Deputy Attorney General
State Bar No. 299690
600 West Broadway, Suite 1800
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2403
Fax: (619) 645-2044
Email:
Christen.Somerville@doj.ca.gov
Attorneys for Plaintiff and Respondent

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INTRODUCTION

Appellant Timothy Wayne Page led police on a dangerous car chase while driving a stolen car. He pleaded guilty to multiple criminal charges, including the unlawful taking or driving of a vehicle, a felony, under Vehicle Code section 10851. Two years later, the voters passed Proposition 47, the Safe Neighborhoods and School Act (the Act), which makes certain enumerated drug and theft offenses misdemeanors and allows persons who are currently serving sentences for convictions that would have been misdemeanors under the Act to petition for relief.

After Proposition 47 went into effect, appellant filed a petition for recall of sentence in the superior court, but that court found appellant ineligible for relief and denied the petition. The Court of Appeal affirmed, holding the Act does not apply to Vehicle Code section 10851. Appellant now claims the Act applies to his conviction under Vehicle Code section 10851 because it is a theft crime and falls under the language of Penal Code section 490.2, petty theft, which the Act added to the Penal Code.[1] Appellant further argues that denying him relief violates his constitutional right to equal protection because he is similarly situated to persons convicted of automobile theft under section 487, subdivision (d)(1), who are eligible for relief under section 490.2 if the stolen automobile was valued at $950 or less.

Appellant's claim fails because he was statutorily barred from resentencing relief as the plain language of section 1170.18, which was added by the Act, limits relief to specifically enumerated offenses, and Vehicle Code section 10851 is not included in that list. Likewise, the plain language of section 490.2 does not apply to Vehicle Code section 10851 because section 490.2 amends provisions defining grand theft, and Vehicle

[1] All unspecified statutory references are to the Penal Code.

Code section 10851 does not define grand theft. In fact, that Vehicle Code provision does not require the defendant commit theft at all, and it may be violated by "driving" a stolen vehicle or a temporary taking. Appellant may not supplant the intent of the voters by circumventing the plain language of these provisions. The Act's plain language is dispositive because following the plain language does not lead to an absurd result as driving a stolen vehicle under Vehicle Code section 10851 is not necessarily a less serious offense than stealing a vehicle under section 487. Also, the Act's plain language is dispositive because there is no evidence of legislative intent to impliedly extend Proposition 47 relief to persons convicted of Vehicle Code section 10851. This result does not violate appellant's constitutional right to equal protection because appellant failed to demonstrate persons convicted under Vehicle Code section 10851 are similarly situated to persons convicted under section 487, subdivision (d)(1), to whom the Act applies. Finally, the Act passes rational basis scrutiny.

STATEMENT OF THE CASE AND FACTS

On May 30, 2012, the San Bernardino District Attorney filed a felony complaint charging appellant with the unlawful taking or driving of a vehicle, a Toyota Camry (Veh. Code, § 10851, subd. (a)), evading an officer with willful disregard for the safety of others while the officer's vehicle exhibited lighted red lamps and sounded its siren (Veh. Code, § 2800.2, subd. (a)), and resisting an executive officer by force or violence (§ 69). The complaint further alleged that appellant had two prior strike convictions for robbery (§ 211; §§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)); four prior convictions for which he served prison terms (§ 667.5, subd. (b)), which included two convictions for robbery (§ 211), one burglary (§ 459), and one grand theft (§ 487, subd. (a)); and he was previously convicted of a crime with an "aggravated white collar crime

enhancement" for embezzling more than one hundred thousand dollars (§ 186.11). (CT 1-4.)

Appellant pleaded guilty to all three counts. He also admitted one prior strike conviction and two prior convictions for which he served prison terms. (CT 5-7; RT 14-15.) The court dismissed appellant's remaining strike conviction upon the People's motion. (RT 16.) In exchange for appellant's guilty plea, the superior court sentenced appellant to prison for ten years and eight months. (CT 5; RT 23-24.) Specifically, appellant received six years for the Vehicle Code section 10851 count (the aggravated term of three years, doubled by the admission of the strike prior), 16 months for the evading arrest count (eight months doubled by the admission of the strike prior), and 16 months for the resisting an officer count (one third the midterm of two years, doubled by the admission of the strike prior), and two years for the admission of the two prior prison terms. (RT 23-24.)

On November 4, 2014, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act," and it became effective the next day. (Cal. Const., art. II, § 10 (a) ["An initiative statute or referendum approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise"]; *People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328 (*Diaz*).) The declared purposes of Proposition 47 included the following: reducing felonies for certain "nonserious, nonviolent crimes like petty theft and drug possession" to misdemeanors; "authoriz[ing] consideration of resentencing for anyone who is currently serving a sentence" for the listed offenses; "ensur[ing] that people convicted of murder, rape, and child molestation will not benefit;" and "requir[ing] a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety."

(2014 Cal. Legis. Serv. Prop. 47 (Proposition 47) (WEST), § 3; *Diaz*, *supra*, 238 Cal.App.4th at p. 1328.)

To achieve those purposes, Proposition 47 first reduced certain specified nonserious, nonviolent felonies to misdemeanors. (*Diaz*, *supra*, 238 Cal.App.4th at p. 1325.) These specified offenses included, for example, simple drug possession, shoplifting, and receipt of stolen property valued at $950 or less. (§ 1170.18, subd. (a).) As relevant here, petty theft under section 490.2 is explicitly listed in Penal Code section 1170.18 as one of "those sections [that] have been amended or added" by Proposition 47. (*Ibid.*) Newly added section 490.2 states: "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor[.]" (§ 490.2, subd. (a).)

Proposition 47 next provided a process by which those already convicted of these specified offenses can petition to have those convictions reduced to misdemeanors. Specifically, "[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section . . . had this act been in effect at the time of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing . . . ." (§ 1170.18, subd. (a).) This procedure requires that the trial court determine whether the prior conviction would necessarily be a misdemeanor. If so, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) The term "unreasonable risk of danger to public safety" means "an unreasonable risk that the petitioner will

commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." (§ 1170.18, subd. (c).) Thus, the court must find the petitioner poses an unreasonable risk of committing a limited list of offenses such as murder, molestation of a child, a sexually violent offense, or an offense punishable by life in prison or death. (§ 667, subd. (e)(2)(C)(iv).)[2]

On November 19, 2014, two weeks after the passage of the Act, appellant petitioned to have his felony conviction for the unlawful taking or driving of a vehicle reduced to a misdemeanor conviction. (CT 35-36.) His petition simply stated that he moved the court to modify his sentence under "New Law—Prop 47." (CT 35.) He alleged no facts to support his claim. The superior court found appellant ineligible for relief and denied the petition. (CT 34.)

Appellant appealed the superior court's denial of his petition. (CT 40, 43.) He argued that (1) the superior court erred by denying his petition for

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[2] Section 667, subdivision (e)(2)(C)(iv) lists eight felonies or classes of felonies: "(I) A 'sexually violent offense' as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code. [¶] (II) Oral copulation with a child who is under 14 years of age, and who is more than 10 years younger than he or she as defined by Section 288a, sodomy with another person who is under 14 years of age and more than 10 years younger than he or she as defined by Section 286, or sexual penetration with another person who is under 14 years of age, and who is more than 10 years younger than he or she, as defined by Section 289. [¶] (III) A lewd or lascivious act involving a child under 14 years of age, in violation of Section 288. [¶] (IV) Any homicide offense, including any attempted homicide offense, defined in Sections 187 to 191.5, inclusive. [¶] (V) Solicitation to commit murder as defined in Section 653f. [¶] (VI) Assault with a machine gun on a peace officer or firefighter, as defined in paragraph (3) of subdivision (d) of Section 245. [¶] (VII) Possession of a weapon of mass destruction, as defined in paragraph (1) of subdivision (a) of Section 11418. [¶] (VIII) Any serious and/or violent felony offense punishable in California by life imprisonment or death."

resentencing under section 1170.18 because the Act applies to violations of Vehicle Code section 10851; and (2) since the Act applies to violations of section 487, subdivision (d)(1), the equal protection clause requires that the Act apply to appellant's conviction under Vehicle Code section 10851 because he is similarly situated to persons convicted under section 487, subdivision (d)(1), and there is no rational basis to discriminate between both groups. The People responded, arguing that the superior court properly found appellant ineligible for relief because (1) the Act's plain language does not contain any reference to Vehicle Code section 10851; (2) there is no evidence of voter intent to amend Vehicle Code section 10851 by implication; and (3) appellant's sentence does not violate his constitutional right to equal protection because he failed to prove that his conviction places him in a class of persons similarly situated to those who receive relief under the Act, and the Act passes rational basis scrutiny.

The Fourth District California Court of Appeal, Division Two, affirmed the superior court's denial in full. It held that the Act does not apply to convictions of Vehicle Code section 10851 because the Act's plain language did not address such offense. It also held that the plain language of section 1170.18 does not permit a person convicted of Vehicle Code section 10851 to prove eligibility for relief under section 490.2. It reasoned that section 490.2's reference to section 487 did not indirectly amend Vehicle Code section 10851 because section 490.2 amends the definition of grand theft, and Vehicle Code section 10851 does not proscribe theft of either the grand or petty variety. Finally, the court held that equal protection principles do not require appellant's conviction under Vehicle Code section 10851 be treated the same as a conviction for grand theft auto under section 487, subdivision (d)(1), because appellant failed to show he was similarly situated to persons convicted under section 487. (E062760.)

Appellant petitioned for review, raising two issues: 1) whether the Act applies to Vehicle Code section 10851 through it's enactment of Penal Code section 490.2; and 2) whether the Act violates appellant's right to equal protection by extending relief to persons convicted under Penal Code section 487, subdivision (d)(1), but not to persons convicted under Vehicle Code section 10851. (ABOM 6-7.) This Court granted the petition without limiting the issues.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DENIED APPELLANT'S PETITION FOR RECALL OF SENTENCE AND HELD APPELLANT INELIGIBLE FOR RELIEF BECAUSE PROPOSITION 47 DOES NOT APPLY TO CONVICTIONS UNDER VEHICLE CODE SECTION 10851

Appellant claims the Act applies to violations of Vehicle Code section 10851, though he concedes that the plain language of section 1170.18, the Act's primary statute, does not refer to Vehicle Code section 10851. (ABOM 14.) Since the Act applies to automobile theft violations of Penal Code section 487 through the introductory clause of section 490.2, he claims the drafters impliedly intended the Act apply to Vehicle Code section 10851, which he asserts is a lesser-included, and thus less serious, offense of section 487, subdivision (d)(1). (ABOM 14.) However, appellant may not frustrate the intent of the voters by circumventing the statute's plain language, which is clear and unambiguous: Vehicle Code section 10851 is not included in the list of statutes subject to relief. The plain language prevails because following the Act's plain language does not lead to an absurd result as driving a stolen vehicle may be a more dangerous offense than stealing a vehicle. Also, the plain language prevails because there is no evidence of the electorate's intent to impliedly amend Vehicle Code section 10851 under the Act. As a wobbler, trial courts already had the ability to reduce Vehicle Code section 10851 violations to

misdemeanors; the electorate did not indicate that further reduction was necessary.

A. General Principles of Statutory Construction

The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) First, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901 (*Robert L.*).) "When statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it." (*People v. Hendrix* (1997) 16 Cal.4th 508, 512 [internal quotations and citations omitted].)

Second, the statutory language is construed in the context of the statute as a whole and within the framework of the overall statutory scheme to effectuate the voters' intent. (*Ibid.*) Statutory interpretation canons are employed to determine the meaning of the statute's plain language. For example, the statutory interpretation canon *expressio unius est exclusio alterius* ("expressio unius") means that inclusion of one thing in a statute indicates exclusion of another thing not expressed in the statute. (E.g. *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.) This canon has force only when the items expressed in a statute are members of an "associated group or series," which justifies the conclusion that items not mentioned were excluded by deliberate choice, not inadvertence. (E.g. *Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168.) Where a statute lists specific exemptions, courts may not infer additional exemptions unless there is a *clear* legislative intent that such additional exemptions are intended. (*Wildlife Alive v. Chickering* (1976) 17 Cal.3d 190, 195, superseded by statute in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.)

Third, where the language is ambiguous, the court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L.*, *supra*, 30 Cal.4th at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187–188 [ballot pamphlet information is a valuable aid in construing the intent of voters].) Any ambiguities in an initiative statute are "not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent [electorate] intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782, internal citation and quotation omitted.) Ultimately, the court's duty is to interpret and apply the language of the initiative "so as to effectuate the electorate's intent." (*Robert L.*, *supra*, 30 Cal.4th at p. 900.)

B. The Plain Language of Sections 1170.18 and 490.2 Clearly and Unambiguously Omits Any Reference to Vehicle Code Section 10851

Sections 1170.18 and 490.2 omit any reference to Vehicle Code section 10851, and courts may not add something to a statute to conform it to an assumed intent that does not appear from the statute's clear and unambiguous language.

1. The Act states proposition 47 relief may be granted for the "offenses listed" in section 1170.18 and Vehicle Code section 10851 is not one of those offenses

The Act, in an un-codified section declaring the "Purpose and Intent," states in part: "In enacting this act, it is the purpose and intent of the people of the State of California to: ... [¶] (4) Authorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses *listed herein* that are now misdemeanors." (2014 Cal. Legis. Serv. Prop. 47 (Proposition 47) (WEST), § 3, emphasis added.) Vehicle Code section 10851 is a "wobbler" offense, which can be charged as either a felony or a misdemeanor. The Act did not change this. It added or

amended only the following sections to make them subject to misdemeanor punishment: sections 11350, 11357, or 11377 of the Health and Safety Code, and section 459.5, 473, 476a, 490.2, 496, and 666 of the Penal Code. (§ 1170.18.) Vehicle Code section 10851 is not included in this list. The Act's express inclusion of only particular enumerated offenses implies the drafters intended to exclude non-enumerated offenses, like Vehicle Code section 10851.

Under the well-established statutory interpretation canon *expressio unius est exclusio alterius*, the Act's inclusion of only particular offenses demonstrates legislative intent to omit Vehicle Code section 10851. As discussed above, this statutory interpretation canon means that inclusion of one thing in a statute indicates the drafters intended to exclude another thing not expressed in the statute. (E.g. *Gikas v. Zolin*, *supra*, 6 Cal.4th at p. 852.) This canon has force only when the items expressed in a statute are members of an "associated group or series," which justifies the conclusion that items not mentioned were excluded by deliberate choice, not inadvertence. (E.g. *Barnhart v. Peabody Coal Co.*, *supra*, 537 U.S. at p. 168.) Where a statute lists specific exemptions, courts may not infer additional exemptions unless there is a *clear* legislative intent that such additional exemptions are intended. (*Wildlife Alive v. Chickering*, *supra*, 17 Cal.3d at p. 195.)

For example, in *People v. Guzman* (2005) 35 Cal.4th 577 (*Guzman*), this Court held that Guzman, who committed nonviolent drug possession offenses (NDPOs) while on probation for offenses that were not NDPOs, was not entitled to mandatory probation under the Substance Abuse and Crime Prevention Act of 2000 (Proposition 36). This Court held that the plain language of Proposition 36 expressly addressed only 1) probationers who were already on probation for NDPO at the effective date of the Act or 2) those who receive probation under the Act for an NDPO. (*Id.* at p. 588.)

This Court stated that under the *expressio unius* canon, "the Act's express inclusion only of probationers who are on probation for NDPO's implies the drafters' intent to exclude probationers who, like defendant, are on probation for non-NDPO's." (*Ibid.*)

Here, as in *Guzman*, Penal Code section 1170.18 lists specific enumerated crimes, and that list does not include Vehicle Code section 10851. The electorate's intent to limit application of the Act to the listed offenses is clear—the plain language of the statute states that a petitioner may request resentencing in accordance with particular listed code sections that have been "added or amended" by the Act. (§ 1170.18.) The logical inference is that any section not added or amended by the Act is not included or affected by the Act. Also, the statute's plain language uses the conjunction "or" between the listed offenses, and "or" is a word of limitation, not expansion. (Cf. *People v. Horner* (1970) 9 Cal.App.3d 23 [statutory word "including" followed by examples is a word of enlargement, not limitation].) There is no logical reason for mentioning only certain statutes if the electorate intended to include others. The statute's plain language illustrates the drafters' intent to limit the applicable offenses to those listed in the text.

2. The plain language of section 490.2 omits any reference to Vehicle Code section 10851

Vehicle Code section 10851 is also not included within the language of section 490.2, which the Act added to the Penal Code. Section 490.2 states:

> Notwithstanding Section 487 *or any other provision of law defining grand theft*, obtaining property by *theft* where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . .

(§ 490.2, subd. (a), emphasis added.) Section 490.2 neither redefines nor establishes a substantive theft offense. "Theft" is defined in Penal Code section 484, subdivision (a).[3] (See *People v. Davis* (1998) 19 Cal.4th 301, 304–305.) Rather than define a new offense, section 490.2 refers to Penal Code section 487 and "any other provision of law *defining grand theft*." (§ 490.2, subd. (a), emphasis added.) But Vehicle Code section 10851, the unlawful driving or taking of a vehicle, is not a provision of law defining grand theft. Vehicle Code section 10851 provides that:

> Any person who *drives* or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, *whether with or without intent to steal the vehicle*, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty . . . .

(Veh. Code, § 10851, subd. (a), emphasis added.) It also proscribes, in part, that unlawfully driving or taking an ambulance or a distinctively marked vehicle of a law enforcement agency or fire department is a felony. (Veh. Code, § 10851, subd. (b).) Vehicle Code section 10851 does not characterize a violation of its provisions as a theft, petty theft, or grand theft (cf., e.g., § 487 ["Grand theft is theft committed in any of the following cases"]). As Vehicle Code section 10851 explicitly does not define a grand theft crime, as required under section 490.2, it is not affected or

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[3] Penal Code section 484, subdivision (a), provides: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him or her, or who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property, or who causes or procures others to report falsely of his or her wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money, or property or obtains the labor or service of another, is guilty of theft."

circumscribed by section 490.2. Indeed, because the statute can be violated by driving or a taking without the intent to steal, theft (let alone "grand theft") is not required. Accordingly, the plain language of section 490.2 does not apply to Vehicle Code section 10851.

3. The statutes' plain language is clear and unambiguous

The plain language of these statutes is clear, thus this Court should not insert additional language to afford appellant relief. As this Court has stated, "'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes. This rule has been codified in California as [Code of Civil Procedure] section 1858, which provides that a court must not insert what has been omitted from a statute." (*People v. Guzman, supra,* 35 Cal.4th at p. 587 (citations omitted).) Courts have no power to add something to a statute to conform it to an assumed intent that does not appear from the statute's language. (*Wells Fargo Bank v. Superior Court* (1991) 53 Cal.3d 1082, 1099.) As Justice Traynor stated: "[W]ords ... stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded." (*Ibid.*, quoting *People v. Knowles* (1950) 35 Cal.2d 175, 182 [internal quotations omitted].) The court should not partially rewrite a statute unless it is "compelled by necessity and supported by firm evidence of the drafters' true intent." (*People v. Guzman, supra*, 35 Cal.4th at p. 587.)

Furthermore, unless a statute's plain language is ambiguous, the court should not examine legislative history to determine the drafters' intent. (*Robert L., supra*, 30 Cal.4th at p. 900.) Here, there is no ambiguity; the Act does not include Vehicle Code section 10851. In any event, the ballot

materials for Proposition 47 do not help appellant.[4] Though appellant seeks to provide "firm evidence" supporting his view in the ballot materials (ABOM 11), this Court has repeatedly explained, "the statements of purpose and intent" in such an "'uncodified section ... properly may be utilized as an aid in construing' the Act, but they 'do not confer power, determine rights, or enlarge the scope of [the] measure.'" (*People v. Guzman*, *supra*, 35 Cal.4th at p. 588, quoting *People v. Canty* (2004) 32 Cal.4th 1266, 1280.) Appellant attempts to invoke vague statements in the ballot materials to enlarge the scope of the Act, which is exactly what this Court has stated he cannot do.

In sum, the plain language of the Act, and Penal Code sections 1170.18 and 490.2 do not affect Vehicle Code section 10851 violations. The plain language of the Act demonstrates legislative intent to exclude relief to persons convicted of Vehicle Code section 10851, and appellant cannot frustrate the intent of the voters by circumventing such plain language. Appellant is therefore ineligible for resentencing.

C. The Addition of Section 490.2 Does Not Show the Electorate's Intent to Indirectly Amend Vehicle Code Section 10851 Because Section 10851 Prohibits a Wide Range of Conduct and Does Not Necessarily Include Theft

Despite the fact that the Act's plain language demonstrates legislative intent to omit Vehicle Code section 10851, and though appellant does not suggest that there is anything ambiguous about which offenses are included under the Act's language, appellant claims there is clear evidence of legislative intent to include Vehicle Code section 10851 under the Act.

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[4] As the Act's plain language is clear and unambiguous, there is no reason for this Court to examine legislative history to determine the electorate's intent. Thus, respondent respectfully opposes appellant's request to take judicial notice of the Proposition 47 ballot materials.

Appellant argues that the Act impliedly extends to Vehicle Code section 10851 because the Act added Penal Code section 490.2, which states that theft of property valued at $950 or less is petty theft, a misdemeanor offense. (ABOM 12.) He argues that since the Act applies to auto theft under section 487 through the introductory clause of Penal Code section 490.2, the Act must also apply to Vehicle Code section 10851, a lesser-included offense of Penal Code section 487, subdivision (d)(1). Appellant is mistaken. First, appellant fails to show the drafters impliedly intended to include Vehicle Code section 10851 by enacting section 490.2 because that offense involves theft, but Vehicle Code section 10851 includes non-theft conduct. Second, Vehicle Code section 10851 is not a *lesser*-included offense of section 487, subdivision (d)(1), but even if it were, that does not mean that Vehicle Code section 10851 is a necessarily less serious offense. Precluding relief to violations of driving a stolen vehicle under Vehicle Code section 10851 while extending relief to violations of automobile theft under section 487 does not lead to absurd consequences because driving a stolen vehicle may be a more dangerous offense than stealing a vehicle. Third, the drafters would have expressly included Vehicle Code section 10851 if they had intended the Act apply to that offense. Finally, the legislative history is devoid of any intent to amend Vehicle Code section 10851. Accordingly, the plain language prevails.

1. Vehicle Code section 10851 includes non-theft conduct

Penal Code section 490.2 does not impliedly amend Vehicle Code section 10851 as Vehicle Code section 10851 may be violated without committing theft, and section 10851 does not "define" a grand or petty theft.

To commit theft, a person must take possession of property owned by someone else, without the owner's consent, with the intent to permanently

deprive the owner of the property. (*People v. Shannon* (1998) 66 Cal.App.4th 649, 654.) "Taking" is not a synonym for stealing; it is a legal term of art describing one element of theft by larceny. (*People v. Gomez* (2008) 43 Cal.4th 249, 255.) Taking has two aspects: (1) achieving possession of the property, and (2) carrying the property away. (*Ibid.*) Thus, if a defendant takes property with the intent to deprive the owner of possession *temporarily*, he has not committed theft. (*People v. Garza* (2005) 35 Cal.4th 866, 871.)

Every theft offense is either grand theft or petty theft—and the punishment options depend on the degree of the crime. (§ 486.) A defendant commits grand theft "[w]hen the money, labor, or real or personal property taken" exceeds $950. (§ 487, subd. (a).) Before the passage of Proposition 47, however, theft of some property became grand theft at a lower value threshold; for example, a defendant had to steal only $250 worth of "domestic fowls, avocados, olives, citrus," or other produce to be guilty of grand theft. (§ 487, subd. (b)(1); see § 487, subd. (b)(2) [$250 worth of aquacultural products from a commercial or research operation].) Also, theft of other types of property was deemed grand theft regardless of value. Importantly, theft of an automobile in violation of section 487, subdivision (d)(1), was deemed grand theft regardless of how much the automobile was worth. Also, every theft of a "hog, sow, boar, gilt, barrow, or pig" was designated grand theft (§ 487a), as was theft of "gold dust, amalgam, or quicksilver" from "any mining claim, tunnel, sluice, undercurrent, riffle box, or sulfurate machine" (§ 487d). (See *People v. Whitmer* (2014) 230 Cal.App.4th 906, 918 ["It is well established that the Legislature's intent regarding this provision was to designate theft of the enumerated items as grand theft regardless of their value."].)

Any theft not defined as grand theft is petty theft, a misdemeanor (§ 488)—and section 490.2 redefines petty theft. As discussed above, section

490.2 reduces the possible punishment for defendants convicted of "obtaining property by theft" worth $950 or less. Thus, under section 490.2, theft of an automobile valued at $950 or less is petty theft and only punishable as a misdemeanor. (§ 490.2.)

Unlike section 490.2, Vehicle Code section 10851 specifically states that "intent to steal" is not a necessary element of the offense. (Veh. Code, § 10851, subd. (a).) In fact, a person may violate Vehicle Code section 10851 in three ways, two of which do not constitute theft. First, a person violates section 10851 by unlawfully *driving* another person's vehicle—a non-theft offense. (*People v. Garza*, *supra*, 35 Cal.4th at p. 871.) Second, a defendant violates section 10851 by taking another person's vehicle with the intent to *temporarily* deprive the owner of possession—a non-theft offense. (*Ibid.*) Third, a defendant may violate the statute by taking another person's vehicle with the intent to *permanently* deprive the owner of possession—a theft offense. (*Ibid.*)

Indeed, even if the People prove the defendant stole the vehicle, he may be convicted of *both* theft under the Penal Code and Vehicle Code section 10851 for driving the vehicle after the theft was complete. (*Ibid.* ["unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete . . . Therefore, a conviction under Vehicle Code section 10851(a) for posttheft driving is not a theft conviction . . . ."].) In *Garza*, this Court held that a person convicted of Vehicle Code section 10851 could also be convicted of receiving that same stolen vehicle. (*Ibid.*) It reasoned that section 10851 "proscribes a wide range of conduct" and that the acts of driving a vehicle and taking a vehicle are separate and distinct. (*Id.* at p. 876.) Thus, a defendant was not precluded from being charged with both receipt of the stolen vehicle and post-theft unlawful driving under section 10851. (*Ibid.*) The electorate was presumably aware of *Garza* and did not include section 10851 since that

section applies to conduct separate and distinct from theft. (See *In re Lance W.* (1985) 37 Cal.3d 873, 890, fn. 11 [electorate is presumably aware of existing laws and judicial construction thereof].)

In contrast to Vehicle Code section 10851, section 490.2 applies only to property obtained by theft. Section 490.2 states in part: "obtaining any property *by theft* where the value of the [. . .] property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft[.]" (§ 490.2, subd. (a), emphasis added.) It does not state that it applies to "theft-*related*" offenses, let alone driving offenses. Nowhere in Penal Code section 490.2 is there any language suggesting it applies to violations related to the unauthorized use or driving of a vehicle or violations where the prosecution need not prove the intent to steal. Expanding the plain language of sections 1170.18 and 490.2 to apply to theft-*related* offenses not only contradicts the plain language of those sections, it improperly and considerably expands the scope of the Act to offenses not considered by the voters. (See *People v. Guzman*, *supra*, 35 Cal.4th at p. 588.)

Finally, as argued above, section 490.2 amended statutes "defining grand theft," yet Vehicle Code section 10851 does not define grand theft. Appellant attempts to read the word "grand" out of section 490.2 and read the statute to apply to theft-*related* offenses like Vehicle Code section 10851. Yet, the Court of Appeal in this case correctly stated that section 490.2 "does no more than amend the definition of grand theft" and "Vehicle Code section 10851 does not proscribe theft of either the grand or petty variety[.]" (*People v. Page* (2015) E062760, slip op. at p. 6 (*Page*).) The text of Vehicle Code section 10851 does not define the taking of a vehicle as grand theft within the catchall language of section 490.2; rather, it simply proscribes actions, regardless whether there was an intent to steal.

Since Vehicle Code section 10851 and theft under Penal Code sections 484 and 487 are distinct and separate crimes, amending Penal

Code section 487 does not show legislative intent to indirectly amend Vehicle Code section 10851. Further, since section 490.2 amends the definition of grand theft and Vehicle Code section 10851 does not define grand theft, appellant has not shown clear legislative intent to impliedly include section 10851 under the Act.

Accordingly, appellant cannot petition for relief under section 490.2 even if he could show that his particular criminal conduct falls within the language of section 490.2. The Court of Appeal in this case correctly noted that section 1170.18 provides a relief mechanism for a person "who would have been guilty of a misdemeanor" if Proposition 47 had been in effect at the time of the offense; however, Proposition 47 left intact the language of Vehicle Code section 10851, a wobbler offense. (*Page*, *supra*, slip op. at p. 4.) Thus, appellant cannot demonstrate that he *necessarily* would have been guilty of a misdemeanor, as required under section 1170.18, if the Act had been in effect at the time of his offense since Vehicle Code section 10851 still allows for felony convictions of appellant's conduct. (*Ibid.*)

2. The Act's plain language is dispositive because following the plain language does not lead to an absurd result

Appellant further argues that it would be absurd to convict someone who unlawfully takes or drives a vehicle valued at $950 or less of a felony offense. He maintains that Vehicle Code section 10851 is a lesser included offense of automobile theft under Penal Code section 487, thus the voters "logically" must have intended to grant relief to persons convicted of Vehicle Code section 10851 since that is a less serious offense than Penal Code section 487. (ABOM 14-15.) Appellant mistakenly assumes that Vehicle Code section 10851 is a less serious offense than grand theft auto. Rather, following the Act's plain language and denying resentencing relief to persons convicted of Vehicle Code section 10851 does not lead to an

absurd result because Vehicle Code section 10851 targets a wide range of criminal conduct, not just theft, and Vehicle Code section 10851 is not necessarily a less serious offense than Penal Code section 487, subdivision (d)(1).

Appellant is incorrect that section 10851 is a *lesser* included offense of automobile theft under section 487 thus section 490.2 must apply to Vehicle Code section 10851. (ABOM 13.)[5] Appellant mistakenly assumes that Vehicle Code section 10851 targets less serious conduct because a defendant who violates section 487, subdivision (d)(1), necessarily violates Vehicle Code section 10851. Rather, Vehicle Code section 10851 is either an equal offense to grand theft auto, or it is an entirely separate, non-theft offense depending upon how it is violated. An offense is necessarily included in another offense if all the elements of the lesser offense are included in the elements of the greater offense, so that the greater offense cannot be committed without also necessarily committing the lesser offense. (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034.) Before the passing of the Act, if a defendant committed grand theft auto under section

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[5] Appellant relies on *People v. Vera* (1997) 15 Cal.4th 269, 273 (*Vera*) and *People v. Marshall* (1957) 48 Cal.2d 394, 400 (*Marshall*) to support his claim that Vehicle Code section 10851 is a necessarily included offense of grand theft auto. (ABOM 13-14.) However, neither of these cases addressed whether Vehicle Code section 10851 is a less *serious* offense. The *Vera* court simply stated in its procedural history section that the defendant was charged with grand theft auto and convicted of the lesser-included offense of Vehicle Code section 10851 (*Vera*, *supra*, 15 Cal.4th at p. 273), and the *Marshall* court simply stated that the intent to permanently deprive ownership of a vehicle includes the intent to temporarily deprive ownership of a vehicle (*Marshall, supra,* 48 Cal.2d at p. 400). But Vehicle Code section 10851 proscribes a wide range of conduct—not just temporary takings—thus these cases do not show that Vehicle Code section 10851 is a necessarily less serious offense than auto theft under the Penal Code.

487, subdivision (d)(1), he necessarily committed a violation of Vehicle Code section 10851 under the vehicle theft theory of liability. However, such a violation of Vehicle Code section 10851 was not a *lesser* offense because violations of section 487, subdivision (d)(1) and Vehicle Code section 10851 were both wobbler offenses that proscribed the same punishment prior to the Act. (Compare Veh. Code, § 10851, subd. (a), with § 489.)

Additionally, as discussed *ante*, Vehicle Code section 10851 may be violated in three ways and only one constitutes vehicle theft. (*People v. Garza*, *supra*, 35 Cal.4th at p. 871.) In addition to theft, the section prohibits both the unlawful driving and the unlawful taking of a vehicle, and even a taking may be accomplished without the intent to permanently deprive the owner of the vehicle. (*Ibid.*) Accordingly, it is not absurd that drafters intended to leave the language of Vehicle Code section 10851 intact since section 10851 is a unique offense that does not necessarily constitute theft.

Moreover, driving a stolen vehicle under Vehicle Code section 10851 is not necessarily a less serious offense than section 487, subdivision (d)(1). Driving a stolen vehicle may be a very dangerous activity, and it is not absurd that the voters intended to prevent this public hazard by not including Vehicle Code section 10851 among the list of statutes subject to the Act. For example, as the facts of this case demonstrate, persons who drive stolen vehicles typically do so openly and on public roads. When discovered by law enforcement, it is not uncommon that they subsequently flee the scene, placing everyone on the public streets in danger. (Also, e.g., *People v. Howard* (2005) 34 Cal.4th 1129, 1132 [defendant drove erratically at high speed on the wrong side of the road to evade police who tagged defendant for driving a stolen car]; *People v. Renteria* (2008) 165 Cal.App.4th 1108, 1112 [same].) In other cases, persons may drive a stolen

vehicle to facilitate greater crimes or use the vehicle to commit gang violence. (E.g. *People v. Vang* (2001) 87 Cal.App.4th 554, 558 [defendants drove a stolen car to commit a drive-by shooting and murder to benefit their gang].) Driving a stolen vehicle may quickly escalate into a dangerous situation in which a defendant uses the vehicle as a deadly weapon. For example, in *People v. Howard*, the police noticed the defendant driving a vehicle without and license plate and signaled the defendant to pull over onto the side of the road. (*People v. Howard*, *supra*, 34 Cal.4th at p. 1132.) The defendant, who was driving a stolen car, led police on high-speed chase. (*Ibid.*) He ultimately sped through a stop sign and collided with another vehicle, killing the driver. (*Ibid.*) By contrast, stealing a vehicle may not be inherently dangerous because a person may simply steal a vehicle by means other than driving it away: for example, it "might either be towed, or loaded on a truck." (*People v. Cuevas* (1936) 18 Cal.App.2d 151, 153 [holding a defendant may be convicted of both theft of an automobile and unlawfully driving an automobile if the driving occurs after the theft is complete].)

Additionally, Vehicle Code section 10851 protects against specific dangers that the theft statutes fail to address. Section 487, subdivision (d)(1), only refers to a very limited crime: "theft" of "automobiles." Conversely, Vehicle Code section 10851, subdivision (b), provides enhanced penalties when a defendant takes or drives an "ambulance" or "distinctly marked vehicle of a law enforcement agency or fire department" knowing that the vehicle "is on an emergency call." (Veh. Code, § 10851, subd. (b).) This specific, dangerous behavior of taking or driving a stolen, on-call ambulance, law enforcement vehicle, or fire truck outlined in Vehicle Code section 10851 is clearly a dangerous criminal endeavor that is harmful to the public. Appellant does not recognize nor explain how section 490.2 would affect these provisions.

In sum, it is not absurd that the drafters of the Act omitted Vehicle Code section 10851, which specifically targets this dangerous conduct.

3. The drafters would have expressly reduced Vehicle Code section 10851 if they intended to do so

If the Proposition 47 drafters had intended to reduce Vehicle Code section 10851 violations to misdemeanors, then they would have explicitly written the revisions to express that. (See *People v. Licas* (2007) 41 Cal.4th 362, 367 (*Licas*) [Legislature is presumably aware of closely related statutes and not mentioning them indicates intent to omit them]; see also *People v. Shabazz* (2006) 38 Cal.4th 55, 65, fn. 8 [rejecting argument that voters were unlikely to have considered doctrine of transferred intent in enacting Proposition 21 because voters are presumed to know the law].) In *Licas*, this Court addressed whether assault with a firearm is a lesser included offense of shooting at another person from a vehicle. (*Id.* at p. 364.) This Court answered no, and it cited the statutory language of the applicable Penal Code sections. (*Id.* at pp. 367-368.) Specifically, this Court determined that unlike the statutory definition of assault found in section 240, the language of section 12034, subdivision (c),[6] does not require that one who shoots at someone from inside a vehicle must have a present ability to cause that person violent physical injury. (*Id.* at p. 367.) From this, this Court held that the Legislature was presumably aware of the present-ability requirement in the closely related assault statute when it

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[6] On January 1, 2012, section 12034 was repealed by Stats. 2010, ch. 711 (S.B. 1080), § 4. Prior to this, section 12034, subdivision (c), stated:

> (c) Any person who willfully and maliciously discharges a firearm from a motor vehicle at another person other than an occupant of a motor vehicle is guilty of a felony punishable by imprisonment in state prison for three, five, or seven years.

added subdivision (c), but the Legislature intended to omit such section as a element of the shooting offense. (*Ibid.*)

Here, the Act contains no change, revision, or amendment to the Vehicle Code, let alone Vehicle Code section 10851. Instead, the only arguably relevant change is the addition of section 490.2. Unlike section 490.2, Vehicle Code section 10851, as discussed *ante*, does not require the prosecution to prove the intent to steal the vehicle. Accordingly, like the analysis in *Licas*, when the drafters of Proposition 47 revised the Penal Code, they were presumably aware of Vehicle Code section 10851 and deliberately omitted it.

Indeed, in re-writing section 666, subdivision (a), the Act specifically left in a reference to Vehicle Code section 10851.[7] If the Proposition 47 drafters had intended to reduce Vehicle Code section 10851 violations to misdemeanors, then they would have explicitly written the revisions to express that. For example, section 490.2 could have included a reference to Vehicle Code section 10851 or "any crime prohibiting the unauthorized use of property or a vehicle," alongside the current language specifying crimes involving "obtaining any property by theft." Instead, the Vehicle Code's provision regarding the required intent element in a Vehicle Code section

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[7] Section 666, subdivision (a), as amended now provides:

> Notwithstanding Section 490, any person described in subdivision (b) who, having been convicted of ... *auto theft under Section 10851 of the Vehicle Code* ..., and having served a term of imprisonment therefor in any penal institution or having been imprisoned therein as a condition of probation for that offense, and who is subsequently convicted of petty theft, is punishable by imprisonment in the county jail not exceeding one year, or in the state prison. (Emphasis added.)

10851 violation is omitted from sections 490.2, and, accordingly, like *Licas*, is evidence of a different intent by the initiative.

Therefore, the Vehicle Code is unaffected by the Act and, accordingly, Vehicle Code section 10851 is not reduced in classification from a wobbler to a misdemeanor.

4. The legislative history is devoid of any intent to include Vehicle Code section 10851

The Legislative Analyst's Office (hereinafter "LAO") analyzed the effects of Proposition 47. In that analysis, the LAO provided a summary of Proposition 47, examined the fiscal impact of the initiative, and discussed the initiative's impact on several crimes. In this discussion, the LAO stated:

> This measure reduces certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors. The measure limits these reduced penalties to offenders who have not committed certain severe crimes listed in the measure – including murder and certain sex and gun crimes. Specifically, the measure reduces the penalties for the following crimes: ...

(Ballot Pamp., Gen. Elec. (Nov. 4, 2014) p. 35.)

The LAO goes on to list the crimes affected by Proposition 47. These crimes include: grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) p. 35.) Nowhere in the LAO analysis is there a single mention of the unauthorized driving or taking of a vehicle. In the list of crimes affected by proposition, the grand theft section does use the theft of a car as an example of a wobbler crime affected by the initiative. (*Ibid.*) However, as discussed above, the theft of a vehicle is separate and distinct from the unauthorized driving of a vehicle under Vehicle Code section 10851. (*People v. Garza*, *supra*, 35 Cal.4th at p. 876.) Moreover, given that Vehicle Code section 10851 is a separate entity from "grand theft" as it

does not defined theft as grand or petty, it would be absurd if this one example allowed Proposition 47 full coverage over an otherwise omitted Vehicle Code violation.

Additionally, in the Official Title and Summary section of the Act, included in the Ballot Pamphlet, the language specifically states that Proposition 47 would require a "misdemeanor sentence instead of felony for certain drug possession offenses" and for petty theft, receiving stolen property, and forging or writing bad checks when the amount involved is less than or equal to $950. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, p. 70.) It did not mention Vehicle Code section 10851.

Finally, the ballot arguments for and against the proposition do not discuss or mention Vehicle Code section 10851. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) pp. 38-39.) The argument against Proposition 47 alerts the voters to the consequences of Proposition 47 that are not readily apparent from the text of the Act. For example, the argument warns voters that the Act undermines laws against sex-crimes because possession of a date-rape drug would be considered a misdemeanor no matter how many times the defendant was convicted of that offense. (*Id.* at p. 39.) The argument against Proposition 47 presumably would also have warned voters that non-enumerated crimes would be affected, yet it does not once mention Vehicle Code section 10851. (*Id.* pp. 38-39.) In the arguments in favor of Proposition 47, the drafters state that the initiative

> Stops wasting prison space on petty crimes and focuses law enforcement resources on violent and serious crime by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors.

(*Ibid.*) Again, there is no mention of Vehicle Code section 10851. The ballot initiative was therefore devoid of any intent to include Vehicle Code section 10851.

In sum, the voters were not informed that Proposition 47 would impact Vehicle Code section 10851. When the voters approved Proposition 47, they did not approve legislation that would impact Vehicle Code section 10851. Instead, voters were presented with an initiative designed to impact specifically enumerated crimes. To hold now that Proposition 47 covers Vehicle Code section 10851 would defy the voters' intent, and it would create dangerous precedent for the scope of future criminal initiatives. "[The court] may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*People v. Park, supra,* 56 Cal.4th at p. 796, internal citations omitted; accord, *People v. Johnson* (2015) 61 Cal.4th 674, 682.) Accordingly, given the LAO analysis and ballot arguments, the only reasonable interpretation of Proposition 47 is that it does not impact Vehicle Code section 10851, either expressly or impliedly. As there is no evidence of an intent for the Act to affect unauthorized driving of a vehicle or other Vehicle Code violations, this Court should not rewrite the statutes to include them. (See *Guzman, supra,* 35 Cal.4th at p. 587.)

D. Even Assuming a Person Convicted of Vehicle Code section 10851 May Petition for Relief Under the Act, Appellant Has Failed to Demonstrate That He Qualifies for Resentencing Under Penal Code Section 490.2

Even if this Court were to conclude that the Act impliedly applies to violations of Vehicle Code section 10851 convictions through its enactment of section 490.2, the superior court properly denied appellant's petition under section 1170.18 because he failed to show that he qualified for resentencing.

Penal Code section 1170.18 states that a person currently serving a felony sentence for an offense that is now a misdemeanor may petition for recall of that sentence and request resentencing in accordance with the offense statutes as added or amended by Proposition 47, including section

490.2. (§ 1170.18, subd. (a).) "Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a)." (*Id.*, subd. (b).) A person who satisfies the criteria in subdivision (a) of section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Ibid.*)

Importantly, appellant failed to allege facts that established his eligibility for relief, and it is the petitioner's burden to establish this threshold element of relief by including facts in his petition that, if true, establish his eligibility. (See § 1170.18, subd. (b) [the trial court must determine if "petitioner satisfies the criteria" for resentencing under Proposition 47]; *People v. Sherow* (2015) 239 Cal.App.4th 875, 880 [the petitioner bears the burden of proof to establish facts upon which his or her eligibility is based]; *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 449, review denied (Jan. 13, 2016) [same]; *People v. Perkins* (2016) 244 Cal.App.4th 129, 137 [same].) As the petitioning party, appellant is required to make an initial showing that he met the requirements of Penal Code section 490.2, under which he was seeking relief, and that he necessarily "would have been guilty of a misdemeanor" under the Act. (§ 1170.18, subd. (a).) A petitioner commonly bears the initial burden of making some showing that she is eligible for the relief or action sought. (See § 851.8, subd. (b) [petitioner seeking a finding of factual innocence has the initial burden of showing there was no reasonable cause; if the petitioner makes this showing, the burden shifts to the respondent to show reasonable cause]; see also *In re Clark* (1993) 5 Cal.4th 750, 798, fn. 35 [petitioner bears the initial burden of alleging facts on which he relied to explain and justify delay or a successive petition]; see also *People v. Duvall* (1995) 9 Cal.4th 464, 474-475 [petitioner in a habeas corpus proceeding

bears the initial burden of establishing a prima facie case for relief]; *People v. Kim* (2009) 45 Cal.4th 1063, 1093 [petitioner of a writ of error corum nobis must make three required showings]; see also *Agosto v. Board of Trustees of Grossmont-Cuyamaca Community College Dist.* (2010) 189 Cal.App.4th 330, 335-336 [to obtain relief in a writ of mandate, petitioner must make initial showings].)

Here, there was no finding of fact that the value of the car taken was $950 or less, and appellant did not allege the value of the car in his petition for resentencing (CT 35-36) or in his appellate brief. There was also no finding of fact that appellant intended to deprive the owner of permanent possession of his or her vehicle, which is a necessary element of theft. (See *People v. Garza, supra,* 35 Cal.4th at p. 871.) Moreover, appellant could not prove that he "would have been guilty of a misdemeanor" under the Act as required under section 1170.18, subdivision (a), because appellant admitted that he drove the stolen vehicle (CT 1), and unlawful driving is a distinct and separate offense from vehicle theft. (*Garza, supra,* 35 Cal.4th at p. 871.) Accordingly, appellant did not and could not prove eligibility because he could not show that he would have been guilty of *only* misdemeanor petty theft under the Act.

In sum, appellant failed to make an initial showing that his conviction was for a qualifying offense under Penal Code section 490.2. Accordingly, even assuming the Act applies to persons convicted under Vehicle Code section 10851, appellant failed to prove he is eligible for relief.

II. APPELLANT'S SENTENCE DOES NOT VIOLATE HIS CONSTITUTIONAL RIGHT TO EQUAL PROTECTION BECAUSE HE CANNOT SHOW HE IS IN A CLASS OF PERSONS SIMILARLY SITUATED TO THOSE WHO RECEIVE RELIEF UNDER THE ACT, AND THE ACT PASSES RATIONAL BASIS SCRUTINY

Appellant argues that not extending Proposition 47 relief to persons convicted of driving or unlawful taking of a vehicle valued at $950 or less

under Vehicle Code section 10851 violates his right to equal protection under the United States and California Constitutions. (ABOM 16.) He argues that if persons convicted under Penal Code section 487 of theft of an automobile valued at $950 or less are eligible for relief under the Act, he too must be eligible for relief under the Act. (ABOM 16.) However, first, appellant failed to demonstrate that his conviction places him in a class of persons similarly situated to those who receive relief under the Act, since he did not prove that the vehicle he took or drove was worth $950 or less. Second, persons convicted under Vehicle Code section 10851 are not similarly situated to persons convicted under Penal Code section 487, subdivision (d)(1), because each crime requires different elements. Third, his claims fail because the Act passes rational basis scrutiny.

A. Appellant Failed to Prove He is in the Class of Persons he Argues Should Receive Relief Under The Act

Appellant claims that equal protection principles require the Act apply to persons convicted of Vehicle Code section 10851 who stole a vehicle valued at $950 or less. Yet appellant failed to prove that he falls within such class of persons. Appellant pleaded guilty to Vehicle Code section 10851, but his plea does not establish the value of the vehicle taken. As discussed *ante* in Argument I, subsection E, he does not argue, nor is there a finding of fact, that the vehicle was worth $950 or less. He also did not prove that he took a vehicle *without driving* that vehicle, or that he intended to *permanently* deprive the owner of the vehicle. Appellant cannot argue that his sentence violates his constitutional right to equal protection because he has not established that he is in the class of persons whom he argues received an unconstitutional sentence.

B. Persons Convicted under Vehicle Code Section 10851 Are Not Similarly Situated to Those Convicted under Penal Code Section 487, Subdivision (d)(1)

Even if appellant were in the class he claims is entitled to relief, his claim fails. Appellant argues that the Act applies to persons convicted under Vehicle Code section 10851 for theft or unlawful driving of a vehicle valued at $950 or less because persons convicted of such crime are similarly situated to persons convicted of theft of a vehicle valued at $950 or less under Penal Code section 487, who now receive relief via section 490.2. (ABOM 16-17.) However, appellant fails to show that the classes are similarly situated.

The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in a similar fashion. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 571; see U.S. Const. 14th Amend.; see Cal. Const., art. I, § 7.) To succeed on an equal protection claim, appellant must first demonstrate that "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Guzman, supra,* 35 Cal.4th at pp. 591-592.) "'This initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged.'" (*Id.* at p. 592.) Generally, offenders who commit different crimes are not similarly situated. (See *People v. Dillon* (1983) 34 Cal.3d 441, 446 [rejecting an equal protection challenge to the felony-murder rule by observing that premeditated first degree murder and felony murder are "not the 'same' crime[ ]...."].) However, there must be a rational reason for the legislative distinction between the two offenses. (*Rinaldi v. Yeager* (1966) 384 U.S. 305, 309.)

Appellant cannot show that persons convicted of Vehicle Code section 10851 are similarly situated to persons convicted of Penal Code

section 487, subdivision (d)(1). The Act's purpose is to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession" and "[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 3 & 4, p. 70.) As discussed above, Vehicle Code section 10851 is a different crime than Penal Code sections 490.2 and 487. Specifically, section 487 requires a defendant *steal* an automobile, while Vehicle Code section 10851 only requires the defendant *drive* a vehicle. (See *People v. Garza, supra,* 35 Cal.4th at p. 871.)

Thus, appellant's claim fails because persons convicted under each statute are not similarly situated, and appellant has not established that he is in the class of persons he argues should receive relief under the Act.

C. The Act Passes Rational Basis Scrutiny

Even if appellant proved he is in a class of persons similarly situated to persons receiving relief under the Act, such discrimination is rational because it allows for prosecutorial discretion to charge and judicial discretion to sentence certain persons with felony theft or driving a vehicle based on the particular facts of the case.

When evaluating an equal protection claim, the court first determines whether "the state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 836, internal quotations omitted.) If two groups are similarly situated but treated differently, the court next determines whether such disparate treatment is justified by applying the applicable level of scrutiny. (*Ibid.*) The court applies different levels of scrutiny to different types of classifications: classifications based on invidious characteristics such as race or national origin and classifications affecting fundamental rights are strictly scrutinized; classifications based on sex and illegitimacy

are granted intermediate scrutiny; and at a minimum, a statutory classification must be rationally related to a legitimate governmental purpose. (*Ibid.*)

When a statutory classification that does not apply to suspect classes or infringe upon fundamental constitutional rights, "equal protection of the law is denied only where there is no rational relationship between the disparity of treatment and some legitimate governmental purpose." (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.) Prisoners are not a suspect class. The status of incarceration is neither an immutable characteristic (*Frontiero v. Richardson* (1973) 411 U.S. 677, 686) nor an invidious basis of classification (*Plyler v. Doe* (1982) 457 U.S. 202, 216). Further, a defendant "does not have a fundamental interest in a specific term of imprisonment." (*People v. Wilkinson, supra,* 33 Cal.4th at p. 838 [finding rational basis review applicable to identical criminal statutes prescribing different levels of punishment].) The Legislature is afforded wide latitude in defining and setting the consequences of criminal offenses. (*Johnson v. Department of Justice*, *supra*, 60 Cal.4th at p. 887.) Strict scrutiny of identical criminal statutes that provide different levels of punishment is "incompatible with the broad discretion the Legislature traditionally has been understood to exercise in defining crimes and specifying punishment." (*People v. Wilkinson*, *supra*, 33 Cal.4th at p. 838.) Thus, contrary to appellant's claim that strict scrutiny applies (ABOM 18-20), rational basis review applies here.

When a court applies rational basis scrutiny, it may speculate as to the justification for the legislative choice. (*Johnson v. Department of Justice*, *supra*, 60 Cal.4th at p. 881, quoting *Heller v. Doe by Doe* (1993) 509 U.S. 312, 320.) The rational basis standard "does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated." (*Ibid.*)

The party that claims differential treatment fails rational basis review must "negative every conceivable basis" that might support the distinction. (*Ibid.*) The court may not evaluate the "wisdom, fairness, or logic" of the distinction if a conceivable basis exists for such distinction. (*Ibid.*) " 'A classification is not arbitrary or irrational simply because there is an "imperfect fit between means and ends"' (*ibid.*, quoting *Heller*, *supra*, 509 U.S. at p. 321, 113 S.Ct. 2637), or 'because it may be "to some extent both underinclusive and overinclusive."' [Citation.]" (*Id.* at p. 887.)

This Court has stated that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson*, *supra*, 33 Cal.4th at p. 838, citing *U. S. v. Batchelder* (1979) 442 U.S. 114, 125.) It does not violate a defendant's right to equal protection to charge the defendant with a felony violation under a certain statute even though violation of a separate but identical statute prescribes a lesser punishment. (*Ibid.*) There is no equal protection violation unless the prosecution deliberately singled out the defendant based on some invidious criterion, such as race, religion, or other arbitrary classification. (*Ibid*; *U.S. v. Batchelder*, *supra*, 442 U.S. at p. 125; *Manduley v. Superior Court, supra,* 27 Cal.4th at p. 568.) To prove such an equal protection violation, the defendant much show that the prosecution deliberately singled out the defendant based on some invidious criterion, and that "the prosecution would not have been pursued except for the discriminatory purpose of the prosecuting authorities." (*Manduley v. Superior Court*, *supra*, 27 Cal.4th at p. 568.)

Appellant makes no argument that omitting Vehicle Code section 10851 from the Act allows for invidious discrimination; rather he claims that the distinction between a conviction under Vehicle Code section 10851

and a conviction under Penal Code section 487 is arbitrary and thus fails rational basis scrutiny. (ABOM 20-21.) Yet, appellant fails to "negative every conceivable basis" that might support such disparate treatment. (*Johnson v. Department of Justice*, *supra*, 60 Cal.4th at p. 881.) Permitting felony convictions of taking or driving a stolen vehicle valued at $950 or less under Vehicle Code section 10851 but requiring theft of an automobile valued at $950 or less be designated as a misdemeanor under section 487 and 490.2 is rational because it allows for prosecutorial charging discretion and judicial sentencing discretion to impose greater punishment for thefts of vehicles when the particular facts of the case warrant such punishment.

In *People v. Wilkinson*, this Court held that a statutory scheme that allowed for (i) misdemeanor prosecutions of batteries "with injury" committed on custodial officers and (ii) felony prosecutions for batteries "without injury" passed rational basis scrutiny. (*People v. Wilkinson, supra,* 33 Cal.4th at p. 839.) This Court reasoned that the Legislature's failure to repeal Penal Code section 243.1 was to allow for felony prosecutions of more serious cases, even if no injury was inflicted. (*Ibid.*) It stated that the only difference between the two sections at issue was that the "lesser" offense was a wobbler, so "a trial court has discretion at sentencing either to impose misdemeanor punishment or grant probation and later, upon the defendant's successful completion of probation, declare the offense to be a misdemeanor." (*Id.* at p. 840.) This Court concluded that there was a rational basis for these statutes because the Legislature could have reasonably concluded that a prosecutor may determine that a particular offense warrants felony prosecution based on the facts of that case. (*Ibid.*)

Here, like in *Wilkinson*, the drafters conceivably did not amend Vehicle Code section 10851 under the Act to allow for prosecutorial discretion in charging particular defendants, as well as to provide for

judicial discretion in sentencing particular defendants. The electorate's decision to leave Vehicle Code section 10851 intact allows for felony prosecutions of more serious cases, even if the elements of both crimes are similar. Prosecutorial discretion allows the People to charge a particular defendant with a particular statute based on the defendant's background, the nuances of the crime, the severity of the crime, and other factors. (*People v. Wilkinson, supra,* 33 Cal.4th at p. 839.) Furthermore, the choice to keep Vehicle Code section 10851 as a wobbler is rational because it leaves discretion with the trial court at sentencing to either to impose misdemeanor punishment or grant probation and later declare the offense to be a misdemeanor. (§ 17, subds. (b)(1), (3).) Also, the trial court still has discretion at the preliminary hearing to determine that a wobbler offense is a misdemeanor. (§ 17, subd. (b)(5).)

Such discretion is consistent with the purpose behind the Act because it allows for future felony prosecution and sentencing of certain individuals that may present a danger to society. It is conceivable that the drafters, in an attempt to keep neighborhoods safe and ensure public safety, intended to leave some charging discretion to the prosecution and sentencing discretion to the trial courts so that they may look holistically at the facts underlying each offense and determine the most appropriate charge to bring against each particular offender. In this case, the superior court exercised its discretion in not reducing appellant's convictions to a misdemeanor on its own motion, which was a rational decision because appellant led the police on a car chase and compromised the safety of police officers and other persons. (CT 1-4.) A vehicle may be used as a dangerous weapon, especially when a person uses that vehicle to evade arrest. (E.g. *People v. Howard, supra*, 234 Cal.4th at p. 1132.) Withholding resentencing relief under the Act to persons already convicted of Vehicle Code section 10851 is rational because a trial court already considered that defendant's

dangerousness, culpability, and evaluated the seriousness of that defendant's actions. Accordingly, it was rational to omit changes to Vehicle Code section 10851. Thus, appellant's equal protection argument fails because he cannot prove he is within the class of persons that he claims receive unequal treatment under the Act, and the Act passes rational basis scrutiny.

In sum, appellant was convicted of a different crime than those the electorate, through the initiative process and enactment of Penal Code section 1170.18, has deemed eligible for resentencing. Appellant fails to prove he is similarly situated to a persons who receive relief under the Act, and he fails to show that the Act does not pass rational basis scrutiny. Accordingly, respondent requests this Court affirm the Court of Appeal's judgment in full.

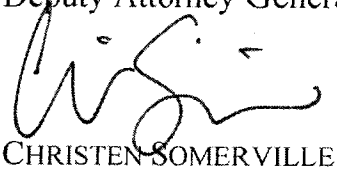
CONCLUSION

Based on the arguments above, respondent respectfully requests this Court affirm the Court of Appeal's judgment in full.

Dated: May 18, 2016

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Deputy Solicitor General
MICHAEL PULOS
Deputy Attorney General



CHRISTEN SOMERVILLE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 11,668 words.

Dated: May 18, 2016

KAMALA D. HARRIS
Attorney General of California

CHRISTEN SOMERVILLE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Timothy Wayne Page** Case No.: **S230793**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 18, 2016, I served the attached **Respondent's Answer Brief on the Merits,** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Jeffrey S. Kross
Attorney at Law
P.O. Box 2252
Sebastopol, CA 95473-2252
Attorney for Appellant

Kevin J. Lane
Clerk of the Court
Court of Appeal of the State of California
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

The Honorable Michael A. Ramos
District Attorney
San Bernardino County
District Attorney's Office
303 West 3rd Street, 5th Floor
San Bernardino, CA 92415-0042

The Honorable Michael A. Smith
c/o Christina M. Volkers
Court Executive Officer
San Bernardino Justice Center
247 West Third Street
San Bernardino, CA 92415-0063

and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on **May 18, 2016**, to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Jeffrey S. Kross, Appellant's attorney's electronic service address by 5:00 p.m. on the close of business day at jeffsjkross@earthlink.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 18, 2016, at San Diego, California.

L. Hernández
Declarant

L. Hernandez
Signature

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