In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **HENRY ARSENIO LARA II,** Defendant and Appellant.	Case No. S243975

Fourth Appellate District, Division Two, Case No. E065029
Riverside County Superior Court, Case No. INF1302723
The Honorable Samuel Diaz, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

ISSUE PRESENTED

Does Penal Code section 490.2, added by Proposition 47, effective November 5, 2014, apply directly (i.e., without a petition under Penal Code section 1170.18) in trial and sentencing proceedings held after Proposition 47's effective date, where the charged offense was allegedly committed before Proposition 47's effective date?

INTRODUCTION

Penal Code section 490.2 applies directly in trial and sentencing proceedings held after Proposition 47's effective date, where the charged offense was committed before Proposition 47's effective date.

However, Penal Code section 490.2 has no application to this case. Penal Code section 490.2 applies only to theft crimes. As this Court has held, driving (as opposed to taking) a vehicle under Vehicle Code section 10851 is not a theft crime. Appellant drove a car six or seven days after it was stolen, and he was convicted and punished only for driving, not taking, the vehicle under section 10851.

Accordingly, this Court should affirm the judgment.

STATEMENT OF THE CASE AND FACTS

A Honda Civic was stolen from in front of a house in Indio, California, on August 8 or 9, 2013. (RT 73, 102-105.) On August 14, a police officer spotted the unoccupied Civic parked in a nearby mobile home park known to law enforcement as a "dumping ground" for stolen cars. (RT 64-66, 74, 95.) The car was missing its special rims or hubcaps, one of its windows was broken, and its ignition was damaged. (RT 68-69, 71-73.) At trial, the officer testified it is common for car thieves to steal a car, remove the parts they want, and then dump the car. (RT 69.)

The car was kept under intermittent surveillance. (RT 66.) The next day, August 15, 2013, appellant was seen driving the car across the street

from the mobile home park. (RT 66-67.) An officer in a marked patrol car got into the lane behind appellant. (RT 84, 87.) Although the officer did not activate his siren or overhead lights, appellant pulled over to the side of the road and stopped. (RT 84-85.) When the officer told appellant to get out of the car, appellant did so by climbing out of the driver-side window because the door was not operable. (RT 86.)

Appellant was the only occupant of the car. (RT 85-86.) The ignition had been manipulated such that the car could be started with an implement other than the actual car key. (RT 62-63, 68, 90-93.) On the driver-side floorboard were two keys not belonging to the Honda Civic, both of which started the car when inserted into the damaged ignition. (RT 91-94.) Appellant lived a few blocks from the home from which the car was stolen, and a few blocks from the mobile home park. (RT 94-95.) The car's owner did not know appellant and did not give him permission to drive her car. (RT 104, 106.)

On November 4, 2014, the voters enacted Proposition 47, which went into effect the following day. (*People v. Morales* (2016) 63 Cal.4th 399, 404; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108 (*Lynall*).) Proposition 47 redefined several drug and theft felonies as misdemeanors. (*People v. Dehoyos* (2018) 4 Cal.5th 594, 597-598 (*Dehoyos*).) Among these redefined crimes is theft of property worth $950 or less, which, under new Penal Code section 490.2, is now a misdemeanor, unless the defendant has one or more prior convictions for certain serious and violent crimes or sex offenses. (*Id.*, citing Pen. Code, §§ 667, subd. (e)(2)(C)(iv)(I)-(VIII).)

Appellant was charged by information on January 5, 2015, with "willfully and unlawfully driv[ing] and tak[ing]" a car without the owner's consent and with intent to deprive the owner of title to and possession of the car (Veh. Code, §10851, subd. (a); count 1) on or about August 15, 2013; and receiving the stolen car (Pen. Code, § 496d, subd. (a); count 2)

on the same date. (1 CT 69-70.) The information also alleged as enhancements that appellant previously had been convicted of "felony theft and unlawful receiving . . . involving a vehicle" (Pen. Code, § 666.5, subd. (a); Veh. Code, § 10851, subd. (a)), and the serious and violent felony crime ("strike") (Pen.Code, §§ 667, subds. (b)-(i) and 1170.12, subds. (a)-(d)) of robbery (Pen. Code, § 211); and that appellant had four prior prison term convictions (Pen. Code, § 667.5, subd. (b)). (1 CT 70-71.)

Respecting count 1, the jury was instructed as follows:

> The defendant is charged in Count 1 with unlawfully driving a vehicle in violation of Vehicle Code section 10851.
>
> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant drove someone else's vehicle without the owner's consent;
>
> AND
>
> 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time.

(1 CT 181; RT 140.)

The prosecutor argued to jury:

> So let's go through Count 1 first. . . . This requires that I prove to you that the defendant drove a vehicle without the owner's consent, and that's real easy. . . . [¶][The owner] didn't give[] him or anybody else permission to have it. So when he's driving that car, he was driving it without [the owner's] consent.
>
> The second element, is that when he drove that vehicle, he had the intent to deprive the owner . . . of possession of the vehicle for any period of time.
>
> . . . .
>
> [W]e know it's not his. He doesn't know [the owner]. He's driving it around. Keeping it at this du[m]ping ground for stolen cars. He knew it was stolen. He knew that he was depriving the owner, whoever that person was, of possession of the vehicle.

(RT 143-145.)

She also argued,

> The question in this case is not who stole the car originally. The question is not who took it to the mobile home park. Did the defendant take it? Maybe. Maybe he did. Right?
>
> He's driving it a few days after it's stolen . . . . He's keeping it at this dumping ground for stolen cars, which is only a few blocks away from his house. His house is only a few blocks away from [the owner's] house. Did he take it? Maybe. We don't know. But that's okay that we don't know because that's not the question here . . . .
>
> The question[s] that you have to answer are was he driving it without the owner's consent, and when he was driving it did he know—did he have the intent to deprive [the owner] of the car? Did he know it was stolen? The answer to both of those questions—to all of those questions is yes, beyond any reasonable doubt.

(RT 149.)

The jury found appellant guilty as charged in count 1. (1 CT 193-194.)[1] The verdict form read:

> We, the jury in the above-entitled action, find the defendant, HENRY ARSENIO LARA, II, GUILTY of a violation of section 10851, subdivision (a) of the Vehicle Code, DRIVING A VEHICLE WITHOUT PERMISSION, as charged under count 1 of the information.

(1 CT 193; RT 180.)

Trial on the prior-conviction allegations was by court, and the court found all of the allegations true. (1 CT 196; RT 51, 187.) Appellant was sentenced to 10 years in prison. (1 CT 255-271, 288; 1 CT 308.)

On appeal, appellant contended his felony conviction on count 1 must be reduced to a misdemeanor because Vehicle Code section 10851 is a theft

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[1] Appellant was found not guilty of count 2. (1 CT 194.)

crime; Penal Code section 490.2 made all theft crimes misdemeanor petty theft unless the value of the stolen property exceeded $950; and the court did not instruct the jury to find the value of the Honda Civic in this case. A majority of the Court of Appeal rejected appellant's contention, holding that a violation of Vehicle Code section 10851 is not theft because, whereas theft requires a felonious taking, Vehicle Code section 10851 can be committed "merely by driving, without any taking." (Slip opn. at p. 5.) Therefore, the court held, "Proposition 47 does not apply to unlawful taking or driving of a vehicle [under Vehicle Code section 10851]." (Slip opn. at p. 7.)

In her concurring opinion, Justice Slough maintained that Proposition 47 applies to Vehicle Code section 10851 when a defendant steals a vehicle, but not when a defendant merely unlawfully drives the vehicle. (Conc. opn. of Slough, J., at p. 1.) She concurred in the result, however, "[b]ecause the record establishes the district attorney prosecuted the case as an unlawful driving offense[.]" (*Ibid.*)

This Court granted appellant's petition for review, but deferred further action in the matter pending the outcome of *People v. Page* (S230793), or further order of the Court. The Court issued its opinion in *Page* on November 30, 2017. (*People v. Page* (2017) 3 Cal.5th 1175.) In *Page*, the Court held, like the dissent below, that Proposition 47, and specifically Penal Code section 490.2, applies to "the theft form of the Vehicle Code section 10851 offense," but not the driving form. (*Id.* at p. 1183.)

After deciding *Page*, this Court ordered the parties in this case to submit briefs addressing the question of whether section 490.2 applies automatically to trial and sentencing proceedings held after the effective date of Proposition 47, for crimes allegedly committed before the proposition's effective date.

ARGUMENT

I. PENAL CODE SECTION 490.2 APPLIES DIRECTLY IN TRIAL AND SENTENCING PROCEEDINGS HELD AFTER PROPOSITION 47'S EFFECTIVE DATE WHERE THE CHARGED CRIMES WERE COMMITTED BEFORE THE PROPOSITION'S EFFECTIVE DATE

A statute that lessens punishment for criminal conduct applies to trial and sentencing proceedings held after the statute's operative date for crimes committed before the statute's operative date. Effective November 5, 2014, Penal Code section 490.2 lessens the punishment for most theft crimes where the value of the property is $950 or less. Therefore, Penal Code section 490.2 applies directly (i.e., without need to petition under section 1170.18) to defendants who committed theft crimes before the effective date of Proposition 47, but who are tried or sentenced after the effective date of the proposition.

Where a change in the law benefits defendants by redefining the elements of an offense in their favor, the new law applies automatically to defendants tried or sentenced after the change goes into effect. (See *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*), citing, inter alia, *In re Estrada* (1965) 63 Cal.2d 740, 746 (*Estrada*); *People v. Rossi* (1976) 18 Cal.3d 295, 299 ["a statute mitigating punishment applie[s] to acts committed before its effective date as long as no final judgment ha[s] been rendered"].) This is so even if the defendant committed the criminal conduct before the effective date of the change. (*Tapia*, at pp. 286-287, 300-301; *Rossi*, at pp. 298-302.)

In *Tapia*, the defendant committed his crimes before the effective date of Proposition 115, the Crime Victims Justice Reform Act, and his trial was pending when the initiative took effect. This Court had to resolve the question of whether provisions of Proposition 115 applied to prosecutions of crimes committed before the proposition's effective date. (*Tapia*, at

p. 286.) The Court answered the question in the affirmative for the provisions that made criminal conduct less culpable, such as those adding the element of intent to kill to crimes that previously required no such intent. (*Tapia*, *supra*, 53 Cal.3d at pp. 300-301.)

The *Tapia* court stated, "'[W]hen the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act' and '"sufficient to meet the legitimate ends of the criminal law."'" (*Id.* at p. 301, quoting *Estrada*, *supra*, 62 Cal.2d at p. 745, and *People v. Oliver* (1956) 1 N.Y.2d 152.) The Court pointed out that it had "applied the same reasoning to statutes which redefine, to the benefit of defendants, conduct subject to criminal sanctions." (*Tapia*, at p. 301, citing *People v. Rossi* (1976) 18 Cal.3d 295 (*Rossi*).) "These authorities," the Court held, "compel the conclusion that . . . [provisions benefiting criminal defendants] may be applied to pending cases." (*Tapia*, at p. 301.)

Similarly, in *People v. Wright* (2006) 40 Cal.4th 81, 85-86 (*Wright*), the Compassionate Use Act of 1996 (the CUA) provided no affirmative defense to transporting marijuana when defendant committed the crime in 2001. (*Id.*, at p. 84, citing Health & Saf. Code, § 11362.5.) Before defendant's case was final, however, the Legislature enacted the Medical Marijuana Program (the MMP) (Health & Saf. Code, § 11362.7 et seq.), which provided an affirmative defense to that crime. (*Wright*, at p. 85, citing Health & Saf. Code, § 11362.765.) This Court held that the MMP applied to cases pending at the time of its passage, even for crimes committed before the effective date of that act. (*Wright*, at pp. 94-95.) Citing *Rossi* and *Estrada*, the Court said, "'This authority makes clear that [the MMP] may be applied retroactively to provide, if its terms and the

applicable facts permit, a defense to appellant.'" (*Wright*, at p. 95, quoting *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1545.)

Here, Proposition 47, by means of Penal Code section 490.2, redefined grand theft to exclude the theft of any property valued at $950 or less. Under *Tapia* and *Wright*, this ameliorative change applies automatically to trial and sentencing proceedings held after Proposition 47's effective date, even where the charged offense was committed before the proposition's effective date.

That conclusion is consistent with this Court's recent decision in *Dehoyos*. The question in *Dehoyos* was whether Proposition 47's ameliorative provisions applied directly to persons *already serving sentences* for their crimes. (*Dehoyos*, *supra*, 4 Cal.5th at pp. 597, 600.) Because Proposition 47 provided a specific avenue for relief in those circumstances—petitioning for recall of the sentence under section 1170.18, subdivision (a)—this Court determined that the Legislature intended that to be the only avenue for relief for those defendants. (*Id.* at pp. 597, 603.) Proposition 47 makes no such provision for defendants who, before the effective date of Proposition 47, committed a crime subsequently reduced to a misdemeanor by the proposition, and who are tried or sentenced after the proposition's effective date. Therefore, section 490.2 applies automatically to such defendants; they need not petition for relief under section 1170.18.

II. PENAL CODE SECTION 490.2 HAS NO APPLICATION TO THIS CASE BECAUSE SECTION 490.2 APPLIES ONLY TO THEFT CRIMES, AND THE RECORD IN THIS CASE CONCLUSIVELY ESTABLISHES APPELLANT WAS NOT CONVICTED OF THEFT

The answer to the question in the preceding section has no bearing on the outcome of this case because Penal Code section 490.2 does not apply here. Section 490.2 applies only to theft offenses. Whereas car theft under Vehicle Code section 10851 is a theft offense; unlawful driving under that

section is not. Appellant was convicted only of unlawful driving under section 10851.

Penal Code section 490.2 provides, "Notwithstanding [Penal Code] 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 . . . ." (Pen. Code, § 490.2, subd. (a).) "Theft . . . requires a taking with intent to steal the property—that is, the intent to permanently deprive the owner of its possession." (*Page*, *supra*, 3 Cal. 5th at p. 1182.) But "Vehicle Code section 10851 punishes not only taking a vehicle, but also driving it without the owner's consent, 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.*'" (*Id.* at p. 1182, quoting Veh. Code, § 10851, subd. (a), italics in original.)

In *People v. Garza* (2005) 35 Cal.4th 866, 871 (*Garza*), this Court held, "'Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft . . . . On the other hand, unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete.'" (*Page*, *supra*, 3 Cal.5th at p. 1183, quoting *Garza*, at p. 871.) "The same is true when a defendant acted with intent only to deprive the owner temporarily of possession. Regardless of whether the defendant drove or took the vehicle, he did not commit auto theft if he lacked the intent to steal." (*Page*, at p. 1183.)

In *Page*, the Court held that Penal Code section 490.2 applies to the theft form, but not the unlawful driving form, of Vehicle Code section 10851. (*Page*, *supra*, 3 Cal.5th at p. 1183.) Thus, where the 10851 conviction is based on post-theft driving (i.e., "driving a vehicle without the owner's consent after the vehicle has been stolen") *or* on a taking without

the intent to permanently deprive the owner of possession, section 490.2 does not apply. (*Id.* at p. 1188.)

Here, the record conclusively establishes appellant was convicted of and punished for post-theft driving, and not vehicle theft.[2] (See conc. opn. of Slough, J., at p. 1.) Although the information initially charged appellant with "willfully and unlawfully driv[ing] *and* tak[ing]" a car (1 CT 69-70, italics added), the People effectively abandoned the taking allegation and proceeded at trial on only a post-theft driving theory. (See *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1532-1533 ["When a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way[,]" but "[s]uch allegations do not require the prosecutor to prove that the defendant committed the crime

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[2] Citing *People v. Gallardo* (2017) 4 Cal.5th 120 (*Gallardo*), appellant asserts that this court cannot look at the evidence presented to the jury to elucidate the jury's verdict. (OBM 31-36.) *Gallardo* does not support appellant's assertion. In *Gallardo*, this Court held that a sentencing court could not impose a prior-conviction enhancement "based on its independent conclusions about what facts or conduct 'realistically' supported the [prior] conviction," but must limit its inquiry to "identify[ing] those facts it is 'sure the jury . . . found' in rendering the guilty verdict." (*Gallardo*, *supra*, 4 Cal.5th at pp. 135-136.) Even assuming *Gallardo* applies in the present context, the issue here involves a determination of the latter, not the former. Moreover, *Gallardo* permits an examination of "the record of conviction," which includes at a minimum the charging document and jury instructions, to determine the "facts . . . necessarily found by [the] jury." (*Id.* at pp. 124, 129, 137-138.) The record of conviction would also include the verdict form. (See *People v. Trujillo* (2006) 40 Cal.4th 165, 177 [record of conviction is composed of those documents that reliably reflect facts of offense of which defendant was convicted].) The instructions and verdict form in this case conclusively establish that appellant was convicted of unlawful driving, and he was not found to have acted with the intent to permanently deprive the vehicle's owner of the car. Therefore, even were this Court (and the Court of Appeal) limited to only the record of conviction, that record still shows appellant was convicted only of unlawfully driving a vehicle, and not vehicle theft.

in more than one way."]; *People v. Knowlden* (1985) 171 Cal.App.3d 1052, 1058 [when a prosecutor does not provide evidence or argument on a particular offense, it may be considered "impliedly abandoned," such that instructions on that offense would make little sense].)

Indeed, the evidence adduced at trial showed only a post-theft driving by appellant: The car was stolen on August 8 or 9, 2013. Five or six days later, it was spotted, damaged and missing its parts, in a place where car thieves frequently dump cars after stealing and looting them. The next day—six or seven days after the theft—appellant was seen driving the car.

In accordance with this evidence, the jury was instructed only on unlawful driving:

> The defendant is charged in Count 1 with unlawfully *driving* a vehicle in violation of Vehicle Code section 10851.
>
> To prove that the defendant.is guilty of this crime, the People must prove that:
>
> 1. The defendant *drove* someone else's vehicle without the owner's consent;
>
> AND
>
> When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle *for any period of time*.

(1 CT 181, italics added; RT 140.)

Furthermore, the prosecutor's argument to the jury was also limited to post-theft driving:

> So let's go through Count 1 first. . . . This requires that I prove to you that the defendant *drove* a vehicle without the owner's consent, and that's real easy. . . . [¶][The owner] didn't given him or anybody else permission to have it. So when he's *driving* that car, he was *driving* it without [the owner's] consent.
>
> The second element, is that when he *drove* that vehicle, he had the intent to deprive the owner . . . of possession of the vehicle *for any period of time*.

. . . .

[W]e know it's not his. He doesn't know [the owner]. He's *driving* it around. Keeping it at this du[m]ping ground for stolen cars. He knew it was stolen. He knew that he was depriving the owner, whoever that person was, of possession of the vehicle.

(RT 143-145, italics added.)

In fact, the prosecutor expressly told the jury not to worry about resolving the question of who stole the car, but to just focus on whether appellant unlawfully drove it after it was stolen:

The question in this case is not who stole the car originally. The question is not who took it to the mobile home park. Did the defendant take it? Maybe. Maybe he did. Right?

He's driving it a few days after it's stolen . . . . He's keeping it at this dumping ground for stolen cars, which is only a few blocks away from his house. His house is only a few blocks away from [the owner's] house. *Did he take it? Maybe. We don't know. But that's okay that we don't know because that's not the question here.* . . .

The question[s] that you have to answer are was he *driving* it without the owner's consent, and when he was *driving* it did he know—did he have the intent to deprive [the owner] of the car? Did he know it was stolen? The answer to both of those questions—to all of those questions is yes, beyond any reasonable doubt.

(RT 149, italics added.)

Finally, when the jury found appellant guilty as charged in count 1, the verdict form read:

We, the jury in the above-entitled action, find the defendant, HENRY ARSENIO LARA, II, GUILTY of a violation of section 10851, subdivision (a) of the Vehicle Code, DRIVING A VEHICLE WITHOUT PERMISSION, as charged under count 1 of the information.

(1 CT 193; RT 180.)

The record thus conclusively establishes that appellant was convicted of post-theft driving, and that the jury did not find he intended to permanently deprive the car's owner of her property, as would have been required for a theft conviction. Accordingly, Penal Code section 490.2 does not apply to this case, and its automatic application to trial and sentencing proceedings held after Proposition 47's effective date is of no import here.

Appellant points out that theft of a vehicle may be accomplished by driving the car away. (OBM 37-38.) Quite so; that is the usual case. Citing *Page* and *Garza*, however, he then asserts that driving a vehicle without permission is always a theft unless it occurs after the taking. (OBM 37.) Therefore, he contends, the jury's verdict "leaves open possibility they found petitioner stole the vehicle." (OBM 37.)

There are two problems with appellant's argument. First, it misconstrues *Page* and *Garza*; those cases hold that a taking by driving without the intent to permanently deprive the owner is not a theft, nor is a driving that occurs some time after the taking, even if in the latter scenario the intent is to permanently deprive. (*Page*, *supra*, 3 Cal.5th at pp. 1182-1183; *Garza*, *supra*, 35 Cal.4th at pp. 871, 876-878.)

Second, the verdict here leaves no possibility but that the jury convicted appellant of unlawful driving. Again, the evidence showed only a post-theft driving, the prosecutor argued only a post-theft driving, the instructions were limited to unlawful driving and did not require the jury to find the intent to permanently deprive, and the jury found only an unlawful driving and did not find an intent to permanently deprive. Therefore, the jury's verdict leaves no room for doubt that it convicted appellant of post-theft driving, and not theft, of the vehicle. To the extent appellant suggests the jury may have harbored the belief that appellant also stole the car, in addition to driving it long after the theft was complete, that is irrelevant;

what matters is what the jury actually convicted appellant of, and as set forth above, the record is clear the jury convicted appellant of post-theft driving.

III. BECAUSE THE JURY CONVICTED APPELLANT OF UNLAWFUL DRIVING, NOT VEHICLE THEFT, THIS COURT NEED NOT RESOLVE THE SPLIT OF AUTHORITY REGARDING THE PROPER REMEDY IN THOSE CASES IN WHICH THE JURY MAY HAVE CONVICTED THE DEFENDANT OF THE THEFT FORM OF VEHICLE CODE SECTION 10851 WITHOUT DETERMINING THE VALUE OF THE STOLEN CAR

In his opening brief on the merits, appellant asserts remand is not permitted for the error he urges occurred in this case—namely, that the jury was not made to declare upon which of the two forms of Vehicle Code section10851 (unlawful driving or vehicle theft) it based its verdict, and, had it been the theft form, to further decide the value of the stolen property. (OBM 17-40.) Irrespective of the potential merits of appellant's assertion regarding the availability of remand in the abstract, it is irrelevant here because no error of the type appellant urges occurred. As discussed above, the verdict in this case was based on unlawful driving, and there was therefore no error of the type appellant urges. In any event, any error would be instructional in nature and harmless, or, alternatively, subject to remand.

A. Any Error Would Be Instructional and Harmless

While harmlessness analysis and remedy are not at issue in this case because there is no error, any putative error would be instructional; that is, the problem would be that the prosecution proceeded on a theft theory (or both a theft and a driving theory), and the court failed to properly instruct with the elements of theft as modified by Penal Code section 490.2. Such instructional error is subject to harmless error analysis. (See *People v. Merritt* (2017) 2 Cal.5th 819, 824-831; *People v. Chiu* (2014) 59 Cal.4th,

155, 167.) Here, the error would be harmless beyond a reasonable doubt because the evidence showed a post-theft driving, not a theft; the People only argued a driving, not a theft; and the jury expressly found appellant committed unlawful driving, and not vehicle theft. (See *Garza*, *supra*, 35 Cal.4th at p. 872 ["when . . . the evidence is such that it is not reasonably probable that a properly instructed jury would have found that the defendant took the vehicle but did not engage in any posttheft driving, a reviewing court may construe the Vehicle Code section 10851(a) conviction as a conviction for posttheft driving"].)

B. Even Were There Prejudicial Error, the Proper Remedy Would Be Remand

The proper remedy for any prejudicial error would be to remand the matter to the trial court to permit the People to accept reduction of the conviction to a misdemeanor, or to retry the case. (See *In re J.R.* (2018) 22 Cal.App.5th 805, 822 (*J.R.*); *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 856-858, 863; but see *In re D.N.* (2018) 19 Cal.App.5th 898, 902-904 (*D.N.*).) The constitutional protection against double jeopardy generally prohibits retrial for the same offense when a conviction is reversed for insufficient evidence (*People v. Goolsby* (2016) 244 Cal.App.4th 1220, 1225), but not "after a reversal premised on error of law" (*People v. Shirley* (1982) 31 Cal.3d 18, 71, superseded by statute on other grounds, as explained in *People v. Alexander* (2010) 49 Cal.4th 846, 879). Where "evidence is not introduced at trial because the law at that time would have rendered it irrelevant, . . . remand to prove that element is proper and the reviewing court does not treat the issue as one of sufficiency of the evidence." (*People v. Figueroa* (1993) 20 Cal.App.4th 65, 72 (*Figueroa*).)

The rule stated in *Figueroa* has been applied where "a statutory amendment adds an additional element to an offense" and that amendment applies retroactively to the defendant because his or her judgment is not yet

final. (*People v. Eagle* (2016) 246 Cal.App.4th 275, 280 (*Eagle*).) Federal courts have similarly held that double jeopardy protections do not bar retrial where an intervening judicial decision clarifies that the law requires "'evidence that was not theretofore generally understood to be essential to prove the crime . . . .'" (See, e.g., *U.S. v. Wacker* (10th Cir. 1995) 72 F.3d 1453, 1465 [double jeopardy did not bar retrial where government presented its proof based on the then-governing rule in the circuit and, while the case was on appeal, the Supreme Court clarified that additional evidence was necessary to support a conviction].)

Here, Proposition 47 was not in effect at the time of appellant's offense. And while it had taken effect by the time of his trial, the issue of whether Proposition 47 applied to theft convictions under Vehicle Code section 10851 was far from settled.[3] When this Court resolved the issue in *Page*, the effect was to require, in section 10851 cases, a specific factual finding previously irrelevant, namely, that the stolen vehicle was worth more than $950, or that the defendant was convicted of joyriding or post-theft driving. (*Gutierrez, supra*, 20 Cal.App.5th at p. 855.) Thus, were

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[3] See e.g., *People v. Page* (2015) 241 Cal.App.4th 714, 719, superseded by grant of review [Penal Code section 490.2 "simply inapplicable" to section 10851]; *People v. Solis* (2016) 245 Cal.App.4th 1099, 1104, review granted June 8, 2016, S234150, transferred to the Court of Appeal for reconsideration in light of *Page, supra*, 3 Cal.5th 1175 Mar. 21, 2018 [Proposition 47 does not apply to Vehicle Code section 10851 "under any legal theory"]; *People v. Haywood* (2015) 243 Cal.App.4th 515, 522, review granted Mar. 16, 2016, S232250, transferred to the Court of Appeal for reconsideration in light of *Page, supra*, 3 Cal.5th 1175 Mar. 21, 2018 [section 490.2 does not apply to unlawful taking or driving a vehicle]; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted March 16, 2016, S232344, dismissed and remanded in light of *Page, supra*, 3 Cal.5th 1175, February 28, 2018 [defendant convicted under Section 10851 may be eligible for Proposition 47 resentencing if he can show the offense qualifies as petty theft under Penal Code section 490.2].

there prejudicial error in this case, the appropriate remedy would be to remand the matter to the trial court to allow the People the opportunity to obtain a jury finding that appellant was convicted of post-theft driving, or that the vehicle was worth more than $950, or to accept a reduction of the adjudication of the violation of Vehicle Code section 10851 to a misdemeanor. (*J.R.*, *supra*, 22 Cal.App.5th at pp. 822-823; but see *D.N.*, *supra*, 19 Cal.App.5th 898.) Again, however, this court need not reach that issue in this case because here there was no error.

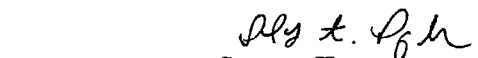
CONCLUSION

Accordingly, respondent requests that this Court affirm the judgment.

Dated: July 18, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
JULIE L. GARLAND
Senior Assistant Attorney General
MICHAEL PULOS
Supervising Deputy Attorney General



STACY TYLER
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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 5,557 words.

Dated: July 18, 2018

XAVIER BECERRA
Attorney General of California

STACY TYLER
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Henry Arsenio Lara II**

Case No.: **S243975**

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On July 18, 2018, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope 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:

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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 July 18, 2018, at San Diego, California.

N. Rodriguez
Declarant

N. Rodriguez
Signature

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