IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

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

APPELLANT'S REPLY BRIEF ON THE MERITS

Caitlin M. Plummer
State Bar Number 309053
2852 Willamette St., #164
Eugene, OR 97405
Telephone: (541) 505-7895
cplummer.lplaw@gmail.com

Attorney for Appellant
By appointment of the
California Supreme Court

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ARGUMENT

I. RESPONDENT NOW AGREES THAT ERROR OCCURRED IN THIS CASE BECAUSE SECTION 459.5, SUBDIVISION (B) PROHIBITS DUAL CHARGING OF SHOPLIFTING AND THEFT.

The second sentence of Penal Code section 459.5, subdivision (b)[1] states, "No person who is charged with shoplifting may also be charged

[1] Subsequent statutory references are to the Penal Code.

with burglary or theft of the same property." (§ 459.5, subd. (b).) In the Court of Appeal, the People argued that section 459.5, subdivision (b) should be interpreted only to prohibit dual convictions. (See *People v. Lopez* (2018) 26 Cal.App.5th 382, 389.) However, the People now agree that section 459.5 "prohibits a prosecutor from charging a defendant with both shoplifting and theft of the same property, even in the alternative," and that the prosecutor "should not have charged appellant in two separate counts." (RBOM at 18.)[2]

These concessions mean the parties now agree that the answer to this Court's first question—whether section 459.5, subdivision (b) permits a prosecutor to charge a defendant with shoplifting and theft of the same property—is "no."

II. APPELLANT'S CLAIM WAS NOT FORFEITED.

Though the People agree there was error, they argue appellant forfeited his claim by failing to object or demur to the amended information. (RBOM at 30.) They cite the general principle that failure to object to an amendment to the information forfeits any error. (RBOM at 30-31 [citing *People v. Collins* (1963) 22 Cal.App.3d 310, 313, *People v.*

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[2] "RBOM" refers to respondent's Answer Brief on the Merits. "ABOM" refers to Appellant's Opening Brief on the Merits.

Spencer (1972) 22 Cal.App.3d 786, 799; § 1012.) However, courts have declined to apply this rule when the defendant stands convicted of a charge that is improper as a matter of law. (ABOM 31-34.)

Appellant cited two such examples. (ABOM at 31-32.) The People attempt to distinguish both cases. First, the People argue *People v. Henry* (2018) 28 Cal.App.5th 786 is distinguishable on its facts. In *Henry*, the Court of Appeal reviewed a *Williamson*[3] error despite the lack of objection, noting that the "issue [was] one of law based on undisputed facts . . ." (*Id.* at p. 791, fn. 3.) The court ultimately held that the defendant was improperly charged under a general statute, rather than a more specific one that governed the same conduct. (*Id.* at p. 491.) The People argue *Henry* is inapposite because there the facts showed "unequivocally" that the defendant had violated the specific statute, whereas here, there was a dispute concerning whether appellant committed shoplifting. (RBOM at 33.)

But the relevant question for forfeiture purposes is not whether, on the whole, the case presented some factual dispute. The question is whether resolution of the specific legal claim at issue requires reference to undisputed facts. (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.) Here, the

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[3] *In re Williamson* (1954) 43 Cal.2d 651

facts relevant to appellant's legal claim are undisputed. The People initially charged appellant with shoplifting. At the outset of the preliminary hearing, the People announced they intended to also charge appellant with theft. (CT 32.) As the People now acknowledge, it was error to permit both charges. (RBOM at 18.) And, as argued fully below, the prosecutor's initial decision to charge shoplifting meant she was required to pursue that charge alone. (See *infra*, Argument IV.) Thus, while there was a factual dispute at trial as to whether appellant committed shoplifting, that dispute is not relevant to the legal question presented in this appeal.

Thus, just as in *Henry*, there are no factual disputes that must be resolved in order to determine whether error was committed. Nor are there any factual disputes that must be resolved to apply the appropriate remedy. When the People proceed on an improper charge, and the defendant is later convicted of that charge, the remedy is reversal of the improper charge. (See *People v. Murphy* (2011) 52 Cal.4th 81, 94-95 [finding that *Williamson* error requires reversal of the improperly charged count].)

Appellant cited *People v. Shabtay* (2006) 138 Cal.App.4th 1184 as a second example of a court declining to apply forfeiture to a claim stemming from an improper charging decision. There, the defendant argued he had been improperly charged with—and therefore improperly convicted of—

multiple counts under a single statute. (*Id.* at p. 1187.) Though he had not objected on these grounds, the court held, "failure to demur does not justify a multiple-conviction that is improper as a matter of law." (*Id.* at p. 1192.) The People "agree[] entirely" with this holding, but argue it is inapplicable here because appellant was not *convicted* of both shoplifting and theft. (RBOM at 34.) If he had been, the People state they would "readily concede" that the error was not forfeited. (RBOM at 34.) But, there is no reason why, if the "failure to demur does not justify a multiple-conviction that is improper as a matter of law" (*Id.* at p. 1192), it nonetheless justifies a single conviction that is improper as a matter of law. In either case, the defendant is convicted of an improperly charged offense.[4]

In support of their own argument, the People cite *People v. Goldman* (2014) 225 Cal.App.4th 950. *Goldman* involved an application of section 288.5, subdivision (c), which provides that when a prosecutor charges a defendant with continuous sexual abuse of a child under section 288.5, the prosecutor may not also charge discrete sexual offenses against the same victim during the same time period unless the discrete sexual offenses are

[4] The only difference is that when the defendant is convicted of only a single charge, reversal means he will not stand convicted of any offense. But this consequence does not have significance to the forfeiture question. Moreover, notably, the People could have chosen to pursue the shoplifting charge at a retrial, but declined to do so. (1 RT 244.)

charged in the alternative. The charging document in *Goldman* violated this rule, and the defendant was ultimately convicted of continuous sexual abuse and the discrete act. (*Id.* at p. 955.) Nonetheless, the court held that because section 288.5 constituted a "legal bar to prosecution," under section 1012, it was forfeited by the defendant's failure to demur. (*Id.* at p. 956.)

Respondent's reliance on *Goldman* is misplaced because, respectfully, *Goldman* was wrongly decided. Specifically, *Goldman* misapplied this Court's decision in *People v. Johnson* (2014) 28 Cal.4th 240. In *Johnson*, this Court held the *charging* limitation in section 288.5 necessarily implies that a defendant may not suffer multiple *convictions* for both continuous sexual assault and a discrete act within the same time period. (*Id.* at p. 248.) Any other interpretation, the Court found, would render section 288.5 meaningless. (*Id.* at p. 247.)

In *Goldman*, the defendant suffered multiple convictions—which was unquestionably error under *Johnson*.[5] As the Court of Appeal held in *Shabtay*, a claim of improper multiple convictions is *not* waived by failure

[5] The *Goldman* court dispensed with *Johnson* by noting that *Johnson* had not addressed the issue of whether such a claim is forfeited by failure to demur, and therefore was not authority for that point. (*Goldman, supra,* 225 Cal.App.4th at pp. 956-957.)

to demur. (*Shabtay, supra,* 138 Cal.App.4th at p. 1192.) The People "agree[] entirely" with this holding. (RBOM at 34.) Yet *Goldman* found precisely the opposite. As such, the People's reliance on *Goldman* is misplaced because, even under the People's view of the law, *Goldman*'s analysis was mistaken.

Incidentally, this Court's analysis in *Johnson* is also helpful in that it clarifies that a charging limitation necessarily carries with it a conviction limitation. (*Johnson, supra,* 28 Cal.4th at p. 247-248.) Given that section 459.5, subdivision (b) prohibits a prosecutor from charging a defendant with theft after it has already charged him with shoplifting, it also necessarily prohibits a theft *conviction* under those circumstances. The People assert that claims of improperly *charged* offenses are waived by failure to demur (RBOM at 34 [citing *Goldman, supra,* 225 Cal.App.4th at 956), while seemingly agreeing that claims of improper *conviction* are not (RBOM at 34). But *Johnson* makes clear that, in this context, this is a distinction without a difference. The charging limitation in section 459.5, subdivision (b) necessarily implies a conviction limitation. Thus, a violation of section 459.5, subdivision (b) is not subject to forfeiture.

Finally, the People argue appellant's claim that his theft conviction resulted in an unauthorized sentence is unavailing because appellant's theft

conviction "was not itself unauthorized." (RBOM at 34.) For the reasons explained, the People are incorrect. Because section 459.5, subdivision (b) prohibits any person charged with shoplifting from also being charged with theft—and appellant was a person charged with shoplifting—his theft conviction was improper. In other words, appellant's claim is not simply that there was a "pleading defect," as the People suggest. (RBOM at 34.) His claim is that, given the charging limit in section 459.5, subdivision (b), his theft conviction is improper as a matter of law. So too is his sentence for that charge. (Cf. *People v. Iniguez* (2002) 96 Cal.App.4th 75, 81.) Accordingly, forfeiture is inapplicable. (*People v. Scott* (1994) 9 Cal.4th 331, 354.)

III. IF THE CLAIM IS FORFEITED, TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

The People make no argument that defense counsel's failure to object was objectively reasonable. Nor do they offer any strategic reason for the failure to do so. Thus, to the extent the claim is forfeited, resolving appellant's alternative claim of ineffective assistance of counsel turns on whether appellant was prejudiced by counsel's error.

The People argue appellant cannot demonstrate prejudice because, had counsel objected, the prosecutor had two available strategies that would

have led to the same result (a theft conviction). And, the People argue, the prosecution would have adopted one of those strategies. For the sake of clarity, appellant addresses each of these topics below in separate headings.

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

A. Introduction

The first sentence of section 459.5, subdivision (b) states, *"Any act of shoplifting* as defined in subdivision (a) *shall* be charged as shoplifting." (Emphasis added.) The People argue this language is "ambiguous as applied" because it provides no guidance regarding how to determine if an act constitutes shoplifting at the charging stage. (RBOM at 14, 25.) The People ask this Court to solve that ambiguity by finding that, although a prosecutor may not charge both theft and shoplifting, she retains complete authority to choose between the two—at least whenever the evidence is "ambiguous." (RBOM at 29.) They argue this authority includes the discretion to amend the charge as well. (RBOM at 29.) As it relates to this case, they argue the prosecutor would have been free to replace the shoplifting charge with theft had defense counsel objected to the dual charging of those offenses. (RBOM at 26.) The People urge that this

outcome flows from the "well established discretion entrusted to prosecutors to exercise charging discretion within ethical bounds." (RBOM at 14.)

The People's argument ignores a basic reality of this case: the People *were* permitted to exercise their prosecutorial discretion, and they decided to charge shoplifting. Even if the People are correct that prosecutors should be free to select the appropriate charge, this rule would not support their position in this case. The prosecutor selected shoplifting—initially *only* shoplifting. If the relevant statutory language means anything—which it must—it must mean that when a prosecutor decides to charge conduct as shoplifting, the conduct will be considered shoplifting for purposes of section 459.5, subdivision (b).

The People seek to downplay the importance of the prosecutor's initial decision by arguing that testimony at the preliminary hearing made the evidence of shoplifting "ambiguous," to an extent that the prosecutor then decided to add a theft charge. (RBOM at 25-26.) But this argument is factually and legally flawed. Factually, the People's decision to add a theft charge was unrelated to the preliminary hearing evidence. The prosecutor announced her desire to add that charge *before* any evidence was presented. (CT 26.) Second, even if the People's factual assertion were correct, it

would not have legal significance. Whatever happened at the preliminary hearing, the prosecutor continued to pursue the shoplifting charge. That decision triggered section 459.5, subdivision (b), such that she was obligated to pursue that charge alone. And there were no circumstances that would have justified a change of course.

Thus, though the People anticipate problems arising from scenarios where the evidence is truly ambiguous, but a prosecutor is nonetheless forced to charge shoplifting, this is not that case. Here, the People decided to charge appellant with shoplifting entirely of their own volition. The People also seem to fear that appellant's interpretation of section 459.5, subdivision (b) will cause significant disruption to the long-standing tradition of prosecutorial discretion. The People are mistaken. Appellant's position is much narrower. He only argues that, when the People do exercise their traditional discretion, their choices should be given legal significance in this context.

B. At a Minimum, Section 459.5, Subdivision (b) Must Mean that When the Prosecutor Elects to Charge Conduct As Shoplifting, She May Not Subsequently Replace that Charge with Theft.

The People are correct that while the statute requires acts of shoplifting to be charged as shoplifting, it does not specify how one

determines whether a given act was indeed shoplifting at the point of charging. Regardless, that question was answered in this case when the People decided appellant's conduct was shoplifting. In this context, the proper application of section 459.5, subdivision (b) is plain: the People were required to abide by that determination. The prosecutor would not have been free to substitute a theft charge.

There is nothing oppressive or unjust about requiring the People to abide by their own determination that an act constitutes shoplifting for purposes of charging. Indeed, such a rule would have no effect on the prosecutor's initial discretion to choose the charge. It would only limit her ability to renounce that decision later. Such a rule is also a rational and commonsense way to apply section 459.5, subdivision (b): there can be no better evidence of whether an act constitutes shoplifting for purposes of charging than the prosecutor's own charging decision.

Indeed, the People agree that "*when the evidence demonstrates at the time of charging* that the defendant's conduct constituted an 'act of shoplifting,' section 459.5 mandates the prosecutor to charge shoplifting rather than burglary or theft." (RBOM at 24-25 [emphasis added].) Here, at the time of charging, the People determined the evidence demonstrated

shoplifting. Thus, even under the People's own analysis, the case should have been prosecuted solely under that theory.

It is only with the benefit of hindsight—specifically the jury's inability to reach a verdict on shoplifting—that the People now suggest the evidence in this case was ambiguous from early on. (See, e.g., RBOM at 14 ["Given the ambiguity about when appellant formed the intent to steal . . . ."], 19.) But, "the People are ordinarily bound by their stipulations, concessions or representations regardless of whether counsel was the Attorney General or the district attorney." (*People v. Mendez* (1991) 234 Cal.App.3d 1773, 178; see also *Saville v. Sierra College* (2006) 133 Cal.App.4th 857, 872 a party is "not permitted to change [its] position and adopt a new and different theory on appeal"].) The jury's failure to convict appellant of shoplifting does not justify the People's reversal.

Section 459.5, subdivision (b)'s statement that an act of shoplifting "shall be charged as shoplifting" must be given some effect. *(Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 [rules of statutory construction "preclude a construction which renders a part of a statute meaningless or inoperative"].) To resolve this case, the Court need not give it any effect beyond requiring prosecutors to charge conduct they themselves have determined is shoplifting, as shoplifting.

C. The Prosecutor's Decision to Add a Theft Charge in this Case Cannot be Explained by a Change or Development in the Evidence.

The People repeat throughout their brief that the prosecutor's decision to add a theft charge in this case was a reaction to an ambiguity that arose in the evidence at the preliminary hearing. Specifically, the People characterize the scenario as follows:

> The prosecutor initially charged shoplifting alone. But, *when the preliminary hearing evidence indicated that appellant might have formed an intent to steal after entering the store*, making the crime theft and not shoplifting, she amended the charges to allege both crimes, without objection.

(RBOM at 13, emphasis added.) The People similarly assert that, "*After the evidence was presented*, the prosecutor informed the court that she intended to amend the complaint to include an additional charge of petty theft . . . ." (RBOM at 15 [citing CT 32, 42, emphasis added].)

The People use this scenario to argue they should not be bound "to an initial charging decision, particularly where evidence adduced at the preliminary hearing tends to show that appellant had committed a different but related offense." (RBOM at 39.) As appellant understands it, the People essentially argue that because the preliminary hearing evidence was ambiguous enough that the prosecutor determined a theft charge was

prudent, the People should not be bound to their initial decision to charge shoplifting.

This argument contains several flaws. First, it is not consistent with the record. It is clear that the prosecutor's decision to add a theft charge was not related to any evidence adduced at the preliminary hearing—because she announced that intention *before* any evidence was received. At the start of the proceeding, before any witnesses were called, she stated, "we would like to indicate to the Court that we'll be looking for a bindover for PC 666 as well." (CT 32.) Thus, the People's suggestion that the prosecutor's decision to add the theft charge was a reaction to the evidence at the preliminary hearing is directly contradicted by the record.

Second, there is no reason to believe that the prosecutor learned something new or surprising at the preliminary hearing. The People argue the evidentiary picture changed when Officer Georges testified about the contents of appellant's statement. (RBOM at 25-26.) But it is exceedingly difficult to imagine that the prosecutor was unfamiliar with the contents of appellant's statement at the time she charged the offense. Undoubtedly, she had the police report available—which certainly would have summarized appellant's alleged confession. If she had lingering questions or doubts about the shoplifting charge before she filed the complaint, she presumably

would have investigated further rather than filing the charge without being assured she could prove it. (*People v. Catlin* (2001) 26 Cal.4th 81, 109 ["Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt."].)

Finally, even if the decision to add a theft charge was spurred by some changed in the evidence at the preliminary hearing, this would not aid the People's argument. Regardless of what happened at the preliminary hearing, *the prosecutor still pursued a shoplifting charge as well.* Given the prosecutor's steadfast belief that appellant's conduct constituted shoplifting, section 459.5, subdivision (b) required her to pursue that charge alone.

The People argue that if a prosecutor is required to adhere to a charge of shoplifting, "regardless of what evidence may subsequently be adduced," she will be left a "'Hobson's choice' between pursuing the shoplifting charge or nothing at all." (RBOM at 39-40.) But this is not an inevitable consequence of appellant's argument. There may very well be a scenario where new evidence justifies an amendment to the charges. But, again, this is not that case. The People consistently pursued the shoplifting charge at every juncture of these proceedings. If section 459.5, subdivision

(b) means anything at all, it must mean that decision had a preclusive effect.

D. The People's Arguments are Inconsistent with Well-Established Rules of Statutory Construction.

The People's decision to charge appellant with shoplifting should be the determinative factor in deciding this particular case. Nonetheless, as explained below, there are broader reasons to reject the People's arguments.

1. The First Sentence of Section 459.5, Subdivision (b) Must not Be Rendered Meaningless.

The People argue that—at least whenever the evidence is "ambiguous"—the prosecutor's discretion to chose and amend the charge is only limited by the general legal and ethical rules that pre-date section 459.5, subdivision (b). (RBOM at 26, 28-29.) This amounts to an argument that the first sentence of section 459.5, subdivision (b)—which requires certain conduct be charged only as shoplifting—adds nothing to existing law in any case where the evidence of shoplifting is "ambiguous."

The People's proposal effectively nullifies the first sentence of subdivision (b) in every case. The People do not explain whose role it is to decide whether evidence is "ambiguous," or by what standard. But, given their emphasis on prosecutorial discretion, presumably the People would argue this is a question for the prosecutor. Moreover, there is arguable

ambiguity in every case—in that it is always possible a jury will fail to convict a defendant of shoplifting.[6] Thus, under the People's argument, the first sentence section of 459.5, subdivision (b) will place no additional limits prosecutorial discretion. This argument renders the first sentence of subdivision (b) meaningless and must be rejected for that reason. *(Manufacturers Life Ins., supra,* 10 Cal.4th at p. 274.) If the voters meant to maintain the status quo, there would have been no purpose in including this statutory language.

Though the People agree that section 459.5, subdivision (b) prohibits dual charging of shoplifting and theft (RBOM at 23), this prohibition is contained entirely within the second sentence. The first sentence—which is unrelated to the notion of dual charging—must be given its own, independent effect. The People's proposed interpretation of that language fails to do so.

2. The People's Argument Conflicts with the Voters' Intent.

In interpreting section 459.5, subdivision (b), the intent of the voters is "the paramount consideration." (*In re Lance W.* (1985) 37 Cal.3d 873,

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[6] In this sense, the People's argument implicates the same problems as the Court of Appeal's determination that a prosecutor can charge both theft and shoplifting whenever the evidence is "in question." (See ABOM at 28-29.)

889.) Citing the Voter Information Guide, the People argue that the purpose of section 459.5 was to "prevent prosecutors from charging burglary, with its commensurate wobbler punishment," where the relevant conduct met the definition of shoplifting. (RBOM at 27.) The Voter Information Guide states, in relevant part, "Under this measure, shoplifting property worth $950 or less would always be a misdemeanor and cannot be charged as burglary." (Official Voter Information Guide, Analysis by Legislative Analyst, p. 35.) The People argue that allowing the prosecutor to exercise her "traditional charging discretion" to charge either shoplifting or theft fulfills the voters' intent because "the defendant avoids being charged with burglary." (RBOM at 27.)

The People's view of the voters' intent is incomplete. While the People are correct that the voter information guide focuses on the fact that an act of shoplifting could no longer be charged as burglary—and that this was one goal of the legislation—this does not represent the full scope or intent of the statute. Indeed, this Court has cautioned against assuming that a brief analysis from the Legislative Analyst "accurately reflect[s] the full intent of the drafters or the understanding of the electorate." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 331; see also *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 308–309 [Finding that a brief

analysis from the Legislative Analyst "cannot plausibly be viewed as implicitly limiting the scope of the statute in the manner advocated by defendants."].)

Instead, understanding the full scope and intent of the statute requires reference to the plain language itself, which is generally the "most reliable indicator of intent." (*People v. Lawrence* (2000) 24 Cal.4th 219, 230.) This is particularly true because it is presumed the voters read and "duly considered" the entire text of the initiative, not just the ballot materials. (See *Wright v. Jordan* (1923) 192 Cal. 704, 713.)

Reference to the text itself reveals that the voters intended section 459.5, subdivision (b) to do more than prevent an act of shoplifting from being charged as burglary. The voters *also* intended to prevent prosecutors from charging an act of shoplifting as theft. This is plain from the language requiring that an of shoplifting "shall be charged as shoplifting," and that no person charged with shoplifting may be charged with either "burglary *or* theft." (§ 459.5, subd. (b) [emphasis added].) In other words, the voters intended to prioritize prosecution of shoplifting over both burglary *and* theft. The two offenses are treated identically in the text of the statute.

The People's assertion that their interpretation "fulfills Proposition 47's stated purpose of prohibiting prosecutor's from charging shoplifting as

burglary" (RBOM at 23), ignores the co-equal purpose of preventing prosecutors from charging shoplifting as theft. (*People v. Prather* (1990) 50 Cal.3d 428, 437 [a ballot initiative should not be interpreted in a way that would "thwart the intent of the voters and framers"].)

Moreover, the People's interpretation of section 459.5, subdivision (b) disregards the clear intent of Proposition 47 to alter traditional charging discretion in this context. The intent to limit discretion is apparent from the language of the statute itself—which requires that certain conduct only be charged as shoplifting. But it also demonstrated by the larger context of Proposition 47.

One of the primary components of Proposition 47 was changing a variety of wobbler offenses to misdemeanors. (Official Voter Information Guide, Analysis by Legislative Analyst, p. 35 ["This measure reduces certain nonserious and nonviolent property and drug offenses from wobblers or felonies to misdemeanors."].) Had the voters been satisfied with prosecutorial decisions regarding when to charge wobblers as felonies or misdemeanors, there would have been no need to do this. Meanwhile, opponents of Proposition 47 warned that, "California has plenty of laws and programs that allow judges and prosecutors to keep first-time, low-level offenders out of jail if it is appropriate. *Prop. 47 would strip judges and*

prosecutors of that discretion." (Official Voter Information Guide, Argument Against Proposition 47, p. 39, emphasis added.) The voters passed Proposition 47 in spite of this warning.

This context demonstrates that the voters who adopted Proposition 47 wanted to alter "traditional charging discretion" in the context of nonviolent petty crimes. They also wanted to prioritize prosecution of shoplifting over theft. An interpretation of the first sentence of section 459.5, subdivision (b) that does neither must be rejected.

E. Where the Prosecutor Has Exercised Her Discretion to Charge Shoplifting, Prohibiting a Subsequent Theft Charge Does Not Create an Absurd Result.

The People argue it would be absurd to require a prosecutor to charge shoplifting when the evidence of that charge is uncertain or ambiguous. (RBOM at 25.) But this concern is not implicated by this case. Certainly, if the prosecutor holds a good faith belief that she cannot prove shoplifting beyond a reasonable doubt, she should not be forced to pursue that charge. But here, the People voluntarily chose to charge appellant's conduct as shoplifting—reflecting their belief that the charge could be proven at trial. There is nothing absurd about giving that decision legal significance.

The People also suggest it would be absurd to adopt an interpretation of section 459.5, subdivision (b) that may result in criminal conduct going unpunished. They argue, "nothing demonstrates or even suggests that the voters intended criminals to escape punishment entirely, regardless of how 'slight' that likelihood might be." (RBOM at 41.) Appellant understands the People to argue that in case where a jury might not find shoplifting proven beyond a reasonable doubt, prosecutors should be free to charge theft instead in order to avoid the possibility that the defendant will not be convicted of a crime. But, because it is never possible to predict a jury's verdict, this would permit a theft charge in every case, and thwarts the voter's clear intent to prioritize shoplifting charges over theft charges.

Though the People find the risk—even a small one—that a defendant will escape punishment for a nonviolent property crime unacceptable, the voters are not presumed to have identical priorities. Indeed, given the significant changes Proposition 47 made to the way petty crime had traditionally been prosecuted, it is apparent that the goals of prosecutors and the voters were not aligned in this context. In adopting section 459.5, subdivision (b), the voters wanted to prioritize shoplifting charges over theft. Even to the extent that decision creates a remote risk that a defendant will escape punishment, there is nothing inherently absurd

about this outcome. (See AOB 25-28.) The voters are allowed to balance priorities, even though the People would debate the wisdom of the chosen approach. (See *People v. Gonzales* (2017) 2 Cal.5th 858, 874.)

The People also envision a third absurd result. They argue that in a case charged as theft, "a defendant could effectively dismiss a theft charge by testifying that he had formed his intent to steal prior to entering a commercial establishment and relying on the language in section 459.5 . . . [could] argue that the prosecutor was required to have charged him with shoplifting . . . ." (RBOM at 40-41.) Appellant agrees this would be an improper use of the statutory language—but it is not what occurred in this case and it can easily be avoided with a rule that prevents this tactic.

F. Even in a More Difficult Case, Giving Section 459.5, Subdivision (b) Effect Does not Elevate the Trial Court to the Role of Fact Finder.

Because the prosecutor's decision to charge shoplifting in this case should be considered dispositive, this Court does not need to decide how courts will address cases in which a defendant argues that conduct charged as theft or burglary should be charged as shoplifting instead. Nonetheless, as appellant argued in his opening brief, a standard could be created to balance the competing interests. (ABOM at 25.)

The People express concern about prosecutors being forced to charge conduct as shoplifting, even when the evidence is in doubt. (RBOM at 25.) Appellant has never suggested such a rule. But, short of that, in a case where the parties have a legitimate dispute about how the conduct should be charged, appellant has merely argued trial courts can resolve the issue under an appropriate standard. This does not, as the People suggest, require the trial court to sit as a fact finder and determine at the charging stage whether the defendant is guilty of shoplifting. (RBOM at 28.) There are numerous standards short of that which the Court could deploy.

Moreover, after a prosecutor has filed charges, review of those charges has long been a part of the judiciary's role. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 517 ["When the jurisdiction of a court has been properly invoked by the filing of a criminal charge, the disposition of that charge becomes a judicial responsibility].) Thus, even to the extent the People are right that prosecutors should retain their initial discretion to pick the appropriate charges in the first instance, nothing insulates those charges from subsequent judicial review. Interpreting section 459.5, subdivision (b) to give the trial court some authority to review charges of theft, burglary, or shoplifting, is entirely consistent with

its long-standing role. Nonetheless, this Court need not determine the full scope of this review to resolve this case.

V. THE PROSECUTOR WOULD NOT HAVE BEEN PERMITTED TO AMEND THE PLEADING IN ORDER TO MAKE THEFT A LESSER INCLUDED OFFENSE OF SHOPLIFTING.

A. There is No Theft Form of Shoplifting

The People urge the Court to find that in addition to having the discretion to pick between shoplifting and theft, a prosecutor may use the accusatory pleading test as a means of making theft a lesser included offense of shoplifting. (RBOM at 26.) Respondent refers to this strategy as permitting the prosecutor to charge shoplifting under both a burglary and "theft theory." (RBOM at 26.)[7]

This phrasing suggests a relationship between the two crimes that does not exist. Shoplifting is a form of burglary, not a form of theft. (See *People v. Martinez* (2018) 4 Cal.5th 647, 651.) There is no theft form of shoplifting, just as there is no theft form of burglary—because neither shoplifting nor burglary requires an actual theft. Those crimes are committed the moment the defendant makes an unlawful entry with the

[7] The People agree that, as the charging document was drafted in this case, theft was not a lesser included offense of shoplifting under the accusatory pleading test. (RBOM at 42-43.)

requisite intent. (*People v. Gonzales*, *supra*, 2 Cal.5th at p. 872; *People v. Lamica* (1969) 274 Cal.App.2d 640, 644.)

That is not to say that a completed theft is irrelevant in a shoplifting or burglary case. It may provide circumstantial evidence of intent upon entry (*People v. Jones* (1962) 211 Cal.App.2d 63, 71), and the value of any goods actually taken is relevant in determining whether the entry constituted shoplifting (if the goods totaled $950 or less) or second-degree burglary (if the goods totaled more than $950). (§ 459.5, subd. (a).) Nonetheless, the offenses themselves retain a distinct legal character.

However, the People argue that the definition of shoplifting in section 459.5, subdivision (a) recognizes a theft form of shoplifting. Specifically, the People argue,

> [T]he language of section 459.5 itself contemplates the possibility that certain conduct that may appear to be shoplifting may in fact constitute merely theft. The statute refers to "property taken *or* intended to be taken." (§459.5, subd. (a), italics added). That is, a defendant may commit shoplifting by merely intending to take property or by actually taking property.

(RBOM at 44.) The People read too much into the relevant statutory language. The reference to "property taken" is specifically tied to the value of the goods. After defining the relevant act and mental state for shoplifting, subdivision (a) specifies that the act is only shoplifting "where

the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." This language does not suggest "a defendant may commit shoplifting by . . . actually taking property." (RBOM at 44.) As explained, shoplifting is committed at the moment of entry—before any theft occurs. (*Gonzales*, *supra*, 2 Cal.5th at p. 872.) The statutory language merely explains that if the defendant does indeed commit a theft after his unlawful entry, the value of whatever he took can be used to determine whether shoplifting or burglary is the appropriate charge. It does not suggest that shoplifting and theft are linked in the way the People argue.

B. The People's Argument Thwarts the Voters' Intent and Promotes an Improper Use of the Accusatory Pleading Test.

The People's proposed use of the accusatory pleading test serves as an end-run around the statutory language and intent, and allows a prosecutor to do covertly what she is prohibited from doing explicitly. (See ABOM at 46-49.) The People's response to this concern is that because a lesser included offense is not considered a "charged offense," there is no violation of section 459.5, subdivision (b). This argument is inconsistent with the fact that Proposition 47 must be "broadly" and "liberally construed." (See *People v. Buycks* (2018) 5 Cal.5th 857, 877–878 [citing

Voter Guide, text of Prop. 47, §§ 15, 18, p. 74].) It creates a hyper-technical loophole, and improperly renders the statutory prohibition on dual charging "superfluous, void, or insignificant." (*Duncan v. Walker* (2001) 533 U.S. 167, 174.)

Furthermore, as the People acknowledge, this Court has held that it is "illogical" to apply the accusatory pleading test in situations where "doing so merely defeats [a] legislative policy." (RBOM at 47 [citing *People v. Reed* (2006) 38 Cal.4th 1224, 1231.) But that is precisely what the People's argument does. Indeed, in the scenario envisioned, the *only* purpose of drafting the accusatory pleading to make theft a lesser included offense of shoplifting would be to defeat the statutory language of section 459.5, subdivision (b).

The People's argument is also problematic because allowing a prosecutor to use of the accusatory pleading test to make one offense a lesser included of another—even when those offenses share no common elements—raises substantial constitutional notice concerns. (ABOM at 51-55.) The People dismiss appellant's concerns by arguing that theft and shoplifting are "closely related." (RBOM at 47.) But, as explained, the offenses share no common elements. (ABOM at 42-44.) If such offenses can be made lesser included offenses of each other merely by language in

the accusatory pleading, that rule would extend far beyond the scope of this case.

Finally, the People propose this strategy as another means of avoiding the "absurd result" that a petty criminal might escape punishment. But the voters were quite clear that they wanted shoplifting prosecuted *exclusively* as shoplifting. The negligible risk that a petty criminal would escape punishment does not justify overriding the clear intent of the voters. (*Supra*, Argument IV(E).) The voters' intent should be given the "paramount consideration" (*In re Lance W., supra,* 37 Cal.3d at p. 889)—not subverted with a novel and constitutionally questionable pleading strategy.

VI. EVEN IF THE PROSECUTOR WAS ABLE TO CHARGE OR RECEIVE AN INSTRUCTION ON THEFT, THERE IS A REASONABLE PROBABILITY THAT SHE WOULD NOT HAVE DONE SO, OR THAT THE TRIAL COURT WOULD NOT HAVE PERMITTED IT.

The People argue that had defense counsel objected to dual charging of shoplifting and theft, there is no reasonable probability that the prosecutor would not have either charged appellant with theft, or amended the pleading to make theft a lesser included offense of shoplifting. (RBOM at 47-49.) Thus, they argue—assuming that those strategies were permitted

under section 459.5—appellant cannot demonstrate prejudice. (RBOM at 49.)

The People's position is premised on the notion that the prosecutor would not have "gambled" on a solitary shoplifting charge. (RBOM at 48.) This argument is necessarily made with the knowledge that the jury failed to convict appellant of shoplifting. But nothing in the record reflects that—at any time prior to trial—the prosecutor believed the shoplifting charge was a gamble. If she did, she would have been prohibited from pursuing the charge. (*Catlin, supra,* 26 Cal.4th at p. 109 ["A prosecutor abides by elementary standards of fair play and decency by refusing to seek indictments until he or she is completely satisfied the defendant should be prosecuted and the office of the prosecutor will be able to promptly establish guilt beyond a reasonable doubt"], internal quotation marks omitted.)[8] Thus, given the prosecutor's apparent confidence in the shoplifting charge, there is a reasonable probability the prosecutor would have stuck by her original decision to charge shoplifting.

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[8] This point is also responsive to the People's suggestion that the prosecutor used equivocal language in closing argument, demonstrating she was not "sold" on the shoplifting theory. (RBOM at 48.) This suggestion is incompatible with the decision to pursue the shoplifting charge to a conviction.

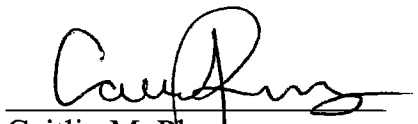
The People also argue that even if she did select shoplifting as the listed charge, the prosecutor would have amended the language of the information in order to make theft a lesser included offense. (RBOM at 29.) But, this argument is also made with the benefit of hindsight—and only after that possibility was raised by the Court in its supplemental order. The People did not raise this possibility in previous briefing, nor did the Court of Appeal. Nor is this novel use of the accusatory pleading test supported by any existing precedent. Thus, there is at least a reasonable probability that the prosecutor would not have generated this strategy or, given the absence of any case law supporting this novel use of that pleading strategy, she would have decided against using it. Similarly, in the absence of supporting precedent, there is a reasonable probability that the trial court would have prohibited it. Thus, even if this Court determines that the prosecutor would have been legally permitted to execute this strategy, there is a reasonable probability she would not have done so. Accordingly, even if the Court rejects appellant's other arguments, prejudice is nonetheless established.

CONCLUSION

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

DATED: August 1, 2019

Respectfully submitted,



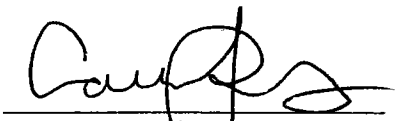
Caitlin M. Plummer
Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.360(b)(1), I certify that this brief contains 6,756 words, based on the word-count feature of my word-processing program.

DATED: August 1, 2019

Respectfully submitted,



Caitlin M. Plummer
Attorney for Appellant

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

ATTORNEY'S CERTIFICATE OF ELECTRONIC SERVICE AND SERVICE BY MAIL
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I, Caitlin M. Plummer, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is cplummer.lplaw@gmail.com and my business address is 2852 Willamette St., #164, Eugene, OR 97405. On August 1, 2019, I served the persons and/or entities listed below by the method checked. For those marked "Served Electronically," I transmitted a PDF version of **Appellant's Reply Brief on the Merits** by TrueFiling electronic service or by e-mail to the e-mail service address(es) provided below. For those marked "Served by Mail," I deposited in a mailbox regularly maintained by the United States Postal Service in Eugene, OR, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

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

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

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

Office of the Clerk
Tulare County Superior Court
221 S. Mooney Blvd., Rm. 303
Visalia CA 93291
____ Served Electronically
_x_ Served by Mail

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

Clerk of the Court
Fifth District Court of Appeal
2424 Ventura Street
Fresno, California, 93721
___ Served Electronically
_x_ Served by Mail

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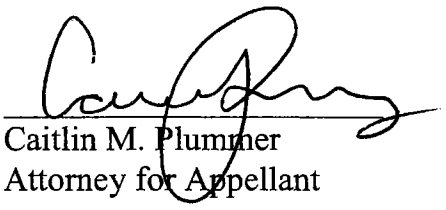

Caitlin M. Plummer
Attorney for Appellant