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. FV11201369
The Honorable Michael A. Smith, Judge

SUPPLEMENTAL BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising 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) 738-9063
Fax: (619) 645-2044
Email: Christen.Somerville@doj.ca.gov
Attorneys for Plaintiff and Respondent

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PERSONS CONVICTED OF VEHICLE CODE SECTION 10851 ARE NOT ENTITLED TO PROPOSITION 47 RELIEF

After briefing in this case was complete, this court issued decisions in four cases that support respondent's argument that persons convicted of Vehicle Code section 10851 are not eligible for resentencing under Proposition 47. Also, appellant filed a supplemental brief arguing that this court's decision in *People v. Romanowski* (2017) 2 Cal.5th 903, as well as a recently published appellate court decision, support his argument that he is entitled to Proposition 47 relief. (Supp. ABOM.)[1] *Romanowski* does not support appellant's argument, and the appellate court decision is not persuasive.

A. This Court Recently Issued Decisions in Four Cases That Support Respondent's Argument That Proposition 47 Does Not Apply to Convictions of Vehicle Code Section 10851

The first of this court's four recent decisions, *Harris v. Superior Court* (2016) 1 Cal.5th 984, supports respondent's argument that Proposition 47 relief is only available to persons convicted of specific crimes enumerated under Penal Code section 1170.18, which Proposition 47 added to the Penal Code, and that list does not include Vehicle Code section 10851. In *Harris*, this court held that the People are not entitled to have a plea agreement set aside if the defendant seeks to have his or her sentence recalled under Proposition 47. (*Id.* at p. 993.) This court reasoned that "[t]he electorate exercised [its] authority in enacting Proposition 47. It adopted a public policy respecting the appropriate term of incarceration for persons convicted of *certain* crimes, including grand theft from the person." (*Id.* at p. 992, italics added.) Indeed, the electorate enumerated only certain

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[1] Appellant's supplemental brief is hereinafter referred to as "Supp. ABOM."

crimes that were eligible for reduction under Proposition 47, and Vehicle Code section 10851 is not one of those crimes. (BOM 9-13.)[2]

Similarly, this court's decision in *People v. Gonzales* (2017) 2 Cal.5th 858 supports respondent's argument that appellant is ineligible for Proposition 47 relief because the plain language of Penal Code section 1170.18 limits relief to specifically enumerated offenses, and Vehicle Code section 10851 is not one of those offenses. In *Gonzales*, this court held that entering a bank to cash forged and stolen checks constituted the new crime of "shoplifting" added by Proposition 47, and that crime was eligible for resentencing under Proposition 47. (*People v. Gonzales*, *supra*, 2 Cal.5th at p. 862.) In relevant part, this court reasoned that "shoplifting" applied to any type of property and was not limited to the theft of merchandise, because the plain language of the shoplifting statute did not expressly refer to merchandise. (*Id.* at p. 874.) Likewise, the drafters of Proposition 47 and Penal Code section 1170.18 would have expressly reduced Vehicle Code section 10851 if they intended to do so. (BOM 23-25.) Just as this court declined to read language into the shoplifting statute where that language did not plainly exist, it should decline to read Vehicle Code section 10851 into the specific list of eligible offenses enumerated in Penal Code section 1170.18. (BOM 9-13.)

Gonzales also supports respondent's equal protection argument. As this court recognized in *Gonzales*, "the culpability levels of the various theft offenses are policy decisions for the electorate to make." (*People v. Gonzales*, *supra*, 2 Cal.5th at p. 874.) The electorate's decision "may be debated but it is not absurd." (*Ibid.*) Permitting felony convictions of taking or driving a stolen vehicle valued at $950 or less under Vehicle Code

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[2] Respondent's answer brief on the merits is hereinafter referred to as "BOM."

section 10851 but requiring theft of an automobile valued at $950 or less to be designated as a misdemeanor under sections 487 and 490.2 passes rational basis scrutiny 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. (BOM 32-37.)

Next, this court's decision in *People v. Romanowski* (2017) 2 Cal.5th 903 supports respondent's argument that the plain language of Penal Code section 490.2, which was added to the Penal Code by Proposition 47, does not apply to Vehicle Code section 10851 because Penal Code section 490.2 amends provisions defining grand theft, and Vehicle Code section 10851 does not define grand theft. In *Romanowski*, this court held that convictions of theft of access card account information qualified for reduction under Proposition 47, because theft of access card account information was a theft crime, and Penal Code section 490.2 reduced punishment for theft of property under $950. (*People v. Romanowski*, *supra*, 2 Cal.5th at p. 906.) This court recognized that "[t]he text and structure of Proposition 47 convey that section 490.2's clear purpose was to reduce punishment for crimes of 'obtaining any property by theft' that were previously punished as 'grand theft' when the stolen property was worth less than $950." (*Id.* at p. 909.) In so holding, this court relied extensively on the plain language of Penal Code section 490.2. (*Ibid.*) *Romanowki*'s reasoning supports respondent's position that the plain language of Penal Code section 490.2 does not apply to Vehicle Code section 10851. (BOM 9-13.) Vehicle Code section 10851 explicitly does not define a grand theft crime, as required under Penal Code section 490.2, thus it is not affected or circumscribed by section 490.2. Indeed, because Vehicle Code section 10851 can be violated by mere driving or a taking without the intent to steal, theft (let alone "grand theft") is not required. (BOM 14-19.)

Finally, this court's decision in *People v. Valencia* (2017) 3 Cal.5th 347 supports respondent's argument that Proposition 47 does not apply to Vehicle Code section 10851 because that crime was not mentioned in the voter materials. In *Valencia*, this court held that the definition of dangerousness under Proposition 47 did not apply to the definition of dangerousness under Proposition 36, the Three Strikes Reform Act. (*People v. Valencia*, *supra*, 3 Cal.5th at p. 347.) This court recognized that the "primary focus [of Proposition 47] was reducing the punishment for a *specifically designated category* of low-level felonies from felony to misdemeanor sentences. The measure did not purport to alter the sentences for felonies *other than those that the measure reduced* to misdemeanors." (*Id.* at p. 354, italics added.) This court examined the Proposition 47 voter materials, and it repeatedly emphasized that these materials informed the voters that only "certain" felonies would be reduced to misdemeanors under the Proposition 47, the Safe Neighborhoods and Schools Act. (*Id.* at pp. 357-359.) It noted that nothing in the voter materials mentioned that Proposition 47 would alter the Three Strikes Reform Act. (*Id.* at p. 347.) Likewise, nothing in the voter materials informed the voters that Vehicle Code section 10851 would be affected by Proposition 47. (BOM 25-27.)

B. The Cases Cited in Appellant's Supplemental Brief Do Not Support His Argument That He Is Entitled to Proposition 47 Relief

Appellant argues that this court's recent decision in *Romanowski* supports his argument that persons convicted of Vehicle Code section 10851 are eligible for Proposition 47 relief. (Supp. ABOM 8-11.) *Romanowski* held that Penal Code section 490.2, which defines petty theft and amends grand theft statutes, applies to convictions of the crime of theft of access card account information. (*Romanowski*, *supra*, at p. 912.) *Romanowski* reasoned that the crime of theft of access card account

information constitutes a theft crime affected by section 490.2 because the crime's statute requires all the elements of theft listed under section 484 (which defines theft), and section 490.2 reduced punishment for theft crimes that require the elements set out in section 484. (*Ibid.*) Furthermore, section 490.2 amended statutes that define "grand theft," and the theft of access card account information statute expressly states that a person who violates subdivisions (a), (c), or (d) of that statute is "guilty of grand theft," while a person who violates subdivision (c) is "guilty of petty theft." (Pen. Code, § 484e.) Appellant claims that Penal Code section 490.2 similarly applies to Vehicle Code section 10851 because a person *could* violate Vehicle Code section 10851 by committing petty vehicle theft. (Supp. ABOM 8-11.)

However, unlike the crime of theft of access card account information at issue in *Romanowski*, Vehicle Code section 10851 does not require the elements of theft defined in section 484; indeed, Vehicle Code section 10851 expressly states that the People need not prove the elements of taking or the intent to permanently deprive to convict under that statute. (BOM 15-19.) Also, unlike the crime of theft of access card account information, Vehicle Code section 10851 does not define grand or petty theft; in fact, the text of Vehicle Code section 10851 does not once characterize a violation of that statute as theft, though it conspicuously refers to violations of subdivision (d) of Penal Code section 487 as "felony grand theft." This noticeable difference suggests that the Legislature purposefully did not refer to violations of Vehicle Code section 10851 as theft. (E.g. *In re Ethan C.* (2012) 54 Cal.4th 610, 638.) Finally, appellant's reliance on the chapter heading under which Vehicle Code section 10851 is contained ("Theft and Injury of Vehicles") does not support his argument that the statute constitutes a theft crime as contemplated by section 490.2. (Supp. ABOM 10.) This court has repeatedly noted that "'[t]itle or chapter

headings are unofficial and do not alter the explicit scope, meaning, or intent of a statute.' [Citation.]" (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1119, as modified (July 27, 2005).) The explicit scope of Vehicle Code section 10851 is evident by its language, which does not require the elements of theft be met to convict under the statute. Accordingly, *Romanowski* does not support appellant's claim that section 490.2 applies to Vehicle Code section 10851.

Appellant also relies on a recent appellate court decision, *People v. Van Orden* (2017) 9 Cal.App.5th 1277, in arguing that persons who violate Vehicle Code section 10851 by committing petty theft of a vehicle—as opposed to violating the statute by simply driving a stolen vehicle or taking the car without intent to permanently deprive—are uniquely entitled to have their felony convictions reduced under sections 1170.18 and 490.2. (Supp. ABOM 5-8.) Based on the appellate court's reasoning, appellant claims that Penal Code section 490.2 requires the court to apply various tests to determine whether the facts of a Proposition 47 petitioner's particular Vehicle Code section 10851 conviction satisfies the elements of petty theft and is thus eligible for reduction. (Supp. ABOM 5-8.) He also relies on this opinion to propose a wholly new argument: that even if Proposition 47 did not amend Vehicle Code section 10851, a section 10851 conviction qualifies for Proposition 47 relief where a court determines that the petitioner violated Vehicle Code section 10851 by committing the elements of petty vehicle theft (as opposed to violating the statute in another way), because section 490.2 mandates that any act of petty theft *must* be charged as petty theft and may not be charged as a felony under a different statute. (Supp. ABOM 5-8.) These arguments are unpersuasive for the following reasons.

First, as discussed at length in respondent's brief on the merits (BOM 15-19), examining each Vehicle Code section 10851 conviction to

determine whether the particular petitioner's conduct constitutes petty theft is unwarranted because Penal Code section 490.2 did not affect any Vehicle Code section 10851 convictions, regardless of the particular facts underlying each conviction. Penal Code section 490.2 did not directly or indirectly amend Vehicle Code section 10851. Section 490.2 defined petty theft and amended statutes that define grand theft—but Vehicle Code section 10851 does not define grand theft nor does it require the People prove the elements of theft to convict under the statute. (BOM 15-19.) Thus, section 490.2 did not amend Vehicle Code section 10851, and appellant would not have necessarily been guilty of a misdemeanor if Proposition 47 was in effect at the time of his conviction because Vehicle Code section 10851 remains unchanged and allows for felony convictions.

Second, regarding appellant's wholly new argument derived from the appellate court opinion, Penal Code section 490.2 does *not* demand that any act of petty theft must be charged as petty theft and may not be charged as a felony under a different statute; thus Penal Code section 490.2 does not mandate that a Proposition 47 petitioner is entitled to have his or her felony conviction under Vehicle Code section 10851 reduced to a misdemeanor where it is shown that the petitioner de facto committed the elements of petty theft in committing the offense. This conclusion is evident after construing Proposition 47 "as a whole." (See *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901). In ratifying Proposition 47, the voters added section 459.5, the crime of shoplifting, which expressly states that all acts of shoplifting must be charged as shoplifting, and that no person charged with shoplifting can also be charged with burglary or theft of the same property. In contrast, section 490.2 includes no such language demanding that any act of petty theft must be charged as petty theft and may not be charged as a felony under a different statute. "When language is included in one portion of a statute, its omission from a different portion addressing

a similar subject suggests that the omission was purposeful. [Citations.]" (*In re Ethan C., supra*, 54 Cal.4th at p. 638.) Moreover, such a rule would lead to absurd results. For example, under appellant's interpretation of section 490.2, a person convicted of a violent robbery may have his conviction reduced to misdemeanor petty theft under Proposition 47 if he stole property valued under $950 during the robbery.

In making his arguments, appellant essentially asks this court to require the lower courts to engage in a factual analysis on a case-by-case basis to determine whether or not a Proposition 47 petitioner convicted of Vehicle Code section 10851 committed theft, despite the fact that the statute does not require those elements be proven and therefore it is unlikely those elements were fully litigated or decided. Additionally, appellant essentially asks this court to amend Vehicle Code section 10851 to specifically define four independent types of crimes (including two specific theft crimes), to require the People prove a defendant charged with Vehicle Code section 10851 committed some act other than petty vehicle theft to justify the charge under that statute instead of Penal Code section 490.2, and to require litigation to determine whether the amount of time between the taking of the stolen vehicle and the subsequent driving of the vehicle constituted a "substantial break" warranting a charge of Vehicle Code section 10851 instead of theft (Supp. ABOM 6-8). Surely the drafters would have mentioned these significant changes in law and procedure somewhere in the statutes codified by Proposition 47 or in the ballot materials if that it what they intended. It is unrealistic to expect that the voters anticipated such a drastic effect on the Vehicle Code absent any mention of it in the ballot materials or statutory language. (*People v. Valencia, supra*, 3 Cal.5th at p. 347.) Moreover, the plain language of these statutes is clear and unambiguous, and this court should not insert additional language to afford appellant relief.

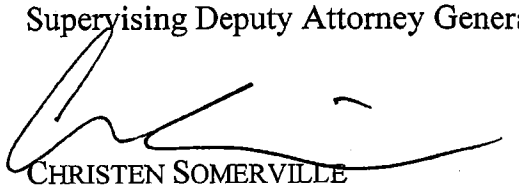
CONCLUSION

Accordingly, for the reasons here and in the prior briefs, respondent urges this court to affirm the decision of the Court of Appeal.

Dated: August 21, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising 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 **SUPPLEMENTAL BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains **2,558** words.

Dated: August 21, 2017

XAVIER BECERRA
Attorney General of California

CHRISTEN SOMERVILLE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **People v. Page**
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 with postage thereon fully prepaid that same day in the ordinary course of business.

On August 21, 2017, I served the attached **SUPPLEMENTAL BRIEF ON THE MERITS** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Jeffrey S. Kross
Attorney at Law
P.O. Box 2252
Sebastopol, CA 95473-2252
E-mail Address: kross142882@gmail.com
Attyorney for Defendant
ADI kross142882@gmail.com

The Honorable Michael A. Smith
Assigned Judge
San Bernardino County Superior Court
San Bernardino Justice Center
247 W. Third Street
Department S21
San Bernardino, CA 92415

Michael A. Ramos - District Attorney
San Bernardino County
303 West 3rd Street, 5th Floor
San Bernardino, CA 92415-0042
E-mail Address: da@da.sbcounty.gov

Court of Appeal of the State of California
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

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 August 21, 2017, at San Diego, California.

D. Wallace
Declarant

D. Wallace
Signature

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