SUPREME COURT NO. S243975

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

vs.

HENRY ARSENIO LARA II,
Defendant and Petitioner.

Court of Appeal
No. E065029

Superior Court
No. INF1302723

APPEAL FROM THE SUPERIOR COURT OF
RIVERSIDE COUNTY

Judge Samuel Diaz Jr. Presiding

PETITIONER LARA'S OPENING BRIEF ON THE MERITS

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STATEMENT OF CASE

Petitioner Henry Lara was charged by felony information on January 5, 2015 with: count 1, driving and taking a vehicle with intent to deprive the owner (Veh. Code, § 10851, subd. (a)), with a prior felony conviction for felony theft and unlawful receiving (Pen. Code,[1] §666.5, subd. (a)); and count 2, receiving a stolen vehicle (§ 496d, subd. (a)), with a prior conviction for receiving stolen property (§ 666.5, subd. (a)). The

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

information further alleged one prior felony strike (§ 667, subds. (b)-(e)) and four prior prison terms (§ 667.5, subd. (b)). (1 CT pp. 69-71.)

A jury found appellant guilty of count one and acquitted on count two. (1 CT pp. 193-194.) The verdict on count one found petitioner guilty of "driving a vehicle without permission . . .." (1 CT p. 193.) In a bench trial the court found all of the alleged priors true. (1 CT p. 196.)

At sentencing on December 14, 2015 the court imposed an aggregate prison term of 10 years, consisting of the 3-year middle term for the Vehicle Code section 10851 violation, doubled to 6 years under the Strikes Law, plus four 1-year prior prison term enhancements. (1 CT p. 288.)

Petitioner appealed, arguing among other things that his offense was a misdemeanor theft within the meaning of recently enacted section 490.2, which petitioner argued applied to him because his conviction was not final on the effective date of Proposition 47. (Slip Opn. E065029, p. 2.) The Court of Appeal affirmed the conviction, with the majority concluding Proposition 47 did not apply to a violation of Vehicle Code section 10851, subdivision (a) and that such offense is not a "theft" within the meaning of section 490.2. (Slip Opn., pp. 3-7.) The court also rejected petitioner's claim Equal Protection mandated Proposition 47 be applied to violations of Vehicle Code section 10851. (Slip Opn. pp. 8-10.) Concurring in the

result, Justice Slough opined that a Vehicle Code section 10851 violation based on unlawfully taking a vehicle amounts to a theft under section 490.2; however, based on a review of the evidence the concurrence found petitioner was convicted not of taking, but of post-theft driving. Accordingly, the concurrence found petitioner's offense was not a theft within the meaning of section 490.2. (Slip Opn., concurrence, pp. 1-4.)

Petitioner petitioned for review, and this court granted review, but ordered briefing deferred pending its decision in *People v. Page* (2017) 3 Cal.5th 1175. Then on March 21, 2018 this court issued an order directing briefing of the following question: "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?"

STATEMENT OF FACTS

Jessica Rivera testified her 2000 Honda Civic went missing from where she had parked it in August of 2013. (RT pp. 102-103.) A police officer testified that approximately two days later he saw appellant driving Rivera's vehicle. (RT pp. 66-67.) The officer followed the vehicle, and

appellant pulled over. (RT pp. 84-85.) The car had a broken window, and the ignition had been manipulated to start with keys that did not match the car. (RT pp. 90-94.)

ARGUMENT

PENAL CODE SECTION 490.2, ENACTED BY PROPOSITION 47, IS DIRECTLY APPLICABLE TO PETITIONER PURSUANT TO THE RETROACTIVITY PRESUMPTION OF *IN RE ESTRADA* (1965) 63 Cal.2d 740 BECAUSE THE PROPOSITION'S PETITION PROCESS SET OUT IN PENAL CODE SECTION 1170.18 IS EXPRESSLY INAPPLICABLE TO PETITIONER.

A. Summary of argument

Proposition 47 ("The Safe Neighborhoods and Schools Act") became effective November 5, 2014. Proposition 47 includes section 490.2, designating any theft of $950 or less as a misdemeanor. And in *People v. Page* (2017) 3 Cal.5th 1175, this court held that a Vehicle Code section 10851, subdivision (a), conviction based on taking a vehicle of $950 or less is a misdemeanor "theft" within the meaning of section 490.2. *Page* further clarified that driving a vehicle to steal it amounts to theft under section 490.2, while driving a vehicle after the theft is complete is not theft under section 490.2.

Petitioner's case was based on an incident occurring in 2013. But it was not until 2015 that he was charged by information, convicted by a jury, and sentenced to a felony prison term for the offense.

Proposition 47's designation, in section 490.2, of any theft of $950 or less as a misdemeanor applies directly to petitioner. A statutory enactment ameliorating the punishment for a crime is presumptively applicable to any defendant whose case is not final on the effective date of the legislation. (*In re Estrada*, *supra*, 63 Cal.2d 740, 744-745.) A legislative "savings clause" may rebut this presumption by stating the change is not retroactive. Alternatively, the legislation may expressly provide for retroactive application, but impose limits on retroactivity. For example, this court has previously held that the petition provisions in both Proposition 36 and Proposition 47 preclude direct retroactive application of the ameliorative changes to persons who may petition under those provisions. As to those persons, retroactive application must be accomplished through the petition process prescribed in sections 1170.126 and 1170.18, respectively. And retroactive application for such petitioners is subject to the limits provided by those sections. (*People v. Conley* (2016) 63 Cal.4th 646 [Proposition 36]; *People v. Dehoyos* (2018) 4 Cal.5th 594 [Proposition 47].)

Petitioner, however, is not a person who may petition for Proposition 47 relief through the petition process. That is because section 1170.18 is express in permitting petitions by either a person who was serving their sentence for the affected conviction on November 5, 2014 (1170.18, subd. (a)) or who has already completed their sentence (1170.18, subd. (f)). Petitioner is neither–because he was sentenced after November 5, 2014 and has not completed his sentence.

Since petitioner is not a person subject to the limited retroactively provisions in the petition process set out in section 1170.18, he is entitled to the direct retroactive benefit of section 490.2. This result is compelled by the normal presumption of retroactivity absent a savings clause, by the unmistakable intent of the drafters and voters that Proposition 47 be retroactive and broadly construed, and by the fact it would violate Equal Protection to extend ameliorative relief to those convicted of the identical act before and after petitioner, but deny the same relief to him.

Petitioner's conviction must be reduced to a misdemeanor because the jury's verdict below establishes no more than a misdemeanor theft. While the verdict states petitioner drove a vehicle, it does not specify whether he drove to steal the vehicle, or instead drove after the theft was complete. Nor did the jury find the vehicle's value exceeded $950.

Consequently, the verdict does not establish the act was a non-theft, i.e., a felony.

No retrial is permitted on the question of whether petitioner committed a felony act of driving separate from the taking of the vehicle. The prosecution's failure to secure a more specific jury verdict forfeited a retrial, and a retrial would violate petitioner's right to be free from double jeopardy.

B. General rules governing retroactivity of statutes reducing criminal punishment

Where the Legislature or electorate[2] enacts legislation reducing the punishment for an offense, it may expressly state whether and to what extent the amendment is to be applied retroactively. (*People v. Conley* (2016) 63 Cal.4th 646, 656; *In re Estrada* (1965) 63 Cal.2d 740, 744.) Such a statute may include a "savings clause" precluding retroactive application. (*Conley*, *supra*, at p. 656; *Estrada supra*, at p. 747.) Where an ameliorative amendment lacks a savings clause, it is presumed the drafters intended the ameliorative change apply to any defendant whose case was not final on the effective date of the enactment. (*Conley*, at p. 656; *Estrada*, at pp. 744-745.) Explaining this presumption of legislative intent, this court

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[2] Principals of statutory construction are equally applicable whether a statute is enacted by the Legislature or by the electorate through the initiative process. (*People v. Morales* (2016) 63 Cal.4th 399, 409.)

in *Estrada* stated that when the Legislature determines a lesser punishment suffices for a criminal act, there is ordinarily no reason to continue imposing the more severe penalty, beyond simply " 'satisfy[ing] a desire for vengeance.' " (*Id.* at p. 745.) Further, this court reasoned, the drafters of an ameliorative statute "must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply," including defendants whose cases were not final on the statute's effective date. (*Ibid.*) "Final" for the purpose of the *Estrada* rule means at the expiration of the appeal period. (*Id.* at pp. 747-748; *People v. Robbins* (2018) 19 Cal. App. 5th 660, 678.)

Recently this court has addressed instances in which the drafters of an ameliorative statute created express retroactivity provisions including procedural and substantive limitations. This court found those express provisions may effectively trump the *Estrada* presumption as to defendants subject to the express provision. In such instances, a defendant's right to retroactive relief is limited by the terms of the express retroactivity provision–even where the defendant's conviction was non-final on the statute's effective date.

So, for example, in *People v. Conley*, *supra*, this court addressed whether third strike defendants who were sentenced before the effective

date of Proposition 36 (the Three Strikes Reform Act of 2012), but whose judgments were not yet final on that date, were entitled to direct retroactive treatment or were instead required to utilize the petition process set out in section 1170.126, the act's express retroactivity provision (*Conley*, *supra*, 63 Cal.4th at p. 652.) The question was consequential since section 1170.126 imposed procedural and substantive limits not applicable to a defendant entitled to direct ameliorative treatment–notably, a petitioning defendant was subject to denial of relief based on the trial court's discretionary finding resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.126, subds, (f), (g).) In *Conley* this court held that a defendant seeking reduction of a Three Strikes sentence–including a defendant whose sentence was not final on the Act's effective date–was required to use the petition process set out in section 1170.126. (*Id.* at p. 652.) This court explained that the defendant was a person described by the language of the act's retroactivity provision, i.e., a "person[] presently serving an indeterminate term of imprisonment pursuant to [the Three Strikes Law] . . .." (*Id.* at p. 655, citing section 1170.126, subd. (a).) Accordingly, this court held that the usual *Estrada* presumption was rebutted as to such defendants because the Three Strikes Reform Act was not silent on the subject of retroactivity, but instead created an express

retroactivity provision with limits reflecting the drafters' and voters' public safety concerns. (*Id.* at pp. 657-659.)

In *People v. Dehoyos* (2018) 4 Cal.5th 594, this court confronted an analogous question in construing Proposition 47: Whether defendants serving felony sentences on the measure's effective date, but whose judgments were on appeal and thus not yet final, are entitled to automatic resentencing under Proposition 47, or must they instead seek relief through the Proposition's resentencing procedure set out in section 1170.18. (*People v. Dehoyos*, 4 Cal. 5th at p. 597.) This court's analysis began with a review of Proposition 47, which reduced several formerly felony offenses to misdemeanors. (*Ibid.*) Like Proposition 36, Proposition 47 includes an express retroactivity provision prescribing a petition process for seeking retroactive relief. Specifically, under section 1170.18, subdivision (a), persons who on November 5, 2014 were serving a sentence for an affected offense may petition for reduction of the offense; and under section 1170.18, subdivision (f), persons who have completed serving their sentence for an affected offense may petition for re-designation of the offense. Section 1170.18 is inapplicable to persons previously convicted of certain enumerated serious offenses. (§ 1170.18, subd. (i).) An additional limit is that a defendant petitioning under subdivision (a) will be denied

relief where the trial court determines the new sentence would be an "unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Subdivision (c) of the statute, in turn, defines "unreasonable risk of danger to public safety" as an unreasonable risk the petitioner will commit a new "violent felony" within the meaning of section 667, subdivision (e)(2)(C)(iv). Largely following it analysis in *People v. Conley*, this court concluded in *Dehoyos* that Proposition 47's express provision of a petition process for retroactive relief, with evident concern regarding public safety, rebutted the *Estrada* presumption of direct and automatic retroactivity as to persons subject to the petition provisions. (*Dehoyos*, 4 Cal.5th at pp. 600-603.) The court found nothing in the language or history of Proposition 47 to indicate the language of section 1170.18, subdivision (a), "serving a sentence," was intended to apply only to those serving final sentences. (Dehoyos, 4 Cal.5th at pp. 603-604.) Accordingly, this court held any person serving a sentence for an affected offense on the effective date of Proposition 47 was required to seek relief through the petition process set out in section 1170.18, subdivision (a). (*Dehoyos*, 4 Cal.5th at pp. 600-603.)

C. Section 490.2 is directly applicable to defendants sentenced after the effective date of Proposition 47; the *Estrada* presumption applies to such defendants because they are excluded from the petition process set out in section 1170.18, subdivisions (a) and (f), which apply only to persons serving their sentence on the act's effective date or who have completed their sentence.

Section 1170.18 authorizes a petition for retroactive relief by two groups of defendants: Section 1170.18, subdivision (a), authorizes a petition by "[a] person who, on November 5, 2014, was serving a sentence for [an offense reduced by the act]." And section 1170.18, subdivision (f) authorizes a petition by ""[a] person who has completed his or her sentence for [an offense reduced by the act]."

The original version of section 1170.18, subdivision (a) authorized a petition by "[a] person ***currently*** serving a sentence for [a reduced offense]." (Italics added.) But effective January 1, 2017 the Legislature deleted the term "currently" and substituted the language specifying that the petitioner must have been serving his or her sentence on November 5, 2014. While petitioner has found no legislative history addressing this particular change, it appears the Legislature sought to eliminate ambiguity over whether "currently" referred to the date Proposition 47 became effective or instead to the date the petition is filed. In fact, at least one decision rendered prior to the above-mentioned amendment construed "currently" in the latter manner, i.e., to refer to the date of the petition: In *People v. Mutter*

(2016) 1 Cal.App.5th 429, a defendant who was sentenced in January 2015, two months after the effective date of Proposition 47, petitioned for relief under section 1170.18, subdivision (a). The trial court denied the petition on the ground the offense was not reducible. On appeal, the Court of Appeal requested briefing on an additional, procedural, question: whether the defendant's claim was properly addressed through the section 1170.18 petition process, or whether he was instead entitled to direct retroactive relief under *Estrada*. (*Id.* at pp. 436-437, citing *People v. Floyd* (2002) 31 Cal.4th 179, 184, which in turn cited *Estrada*, *supra*, 63 Cal.2d at p. 744.) Noting that the defendant was serving his sentence at the time of his petition, the court in *Mutter* concluded the defendant had properly proceeded through the petition process under section 1170.18, subdivision (a). (*Ibid.*)

But as previously noted, after *Mutter* the Legislature amended section 1170.18, subdivision (a), by substituting "on November 5, 2014" for "currently." The amendment was permitted by the provision in Proposition 47 permitting amendment by the Legislature.[3] This amendment clarified

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[3] Proposition 47 permits the Legislature to amend the measure in a manner consistent with the act: "SEC. 15. Amendment. This act shall be broadly construed to accomplish its purposes. The provisions of this measure may be amended by a two-thirds vote of the members of each house of the Legislature and signed by the Governor so long as the amendments are consistent with and further the intent of this act. The

that subdivision (a) applies only to persons serving their sentence on the Proposition's effective date. It necessarily follows that the group of persons consigned to the petition process under subdivision (a) excludes those sentenced ***after*** November 5, 2014.

From this it is evident that petitioner, who was not sentenced until after November 5, 2014, falls outside the scope of section 1170.18, subdivision (a). Likewise, he is outside the scope of section 1170.18, subdivision (f) because he is currently serving his 10-year prison term, and so is not a person "who has completed his or her sentence." Accordingly, the question before this court is identical to that posed by the court in *Mutter*, *supra*: Is a defendant sentenced after the Proposition's effective date properly brought within the petition process under section 1170.18; or is he instead entitled to direct ameliorative relief under *Estrada*? The statutory amendment to subdivision (a), discussed above, now generates the

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Legislature may by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this act." (Prop 47, approved Nov. 4, 2014, eff. Nov. 5, 2014.) Such amendment by the Legislature is permitted by the California Constitution, Article II, section 10, subdivision (c) and by the statutory language in section 15, quoted *ante*. The amendment was enacted by more than a two-thirds majority: 30-9 in the Senate and 58-19 in the Assembly. (https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=201520160AB2765)

opposite answer from that given in *Mutter*. Specifically, a person such as petitioner, who was sentenced after November 5, 2014, and who has not completed his or her sentence, cannot petition for relief under either subdivisions (a) or (f) of section 1170.18. It follows that the Proposition's petition provision does not rebut the *Estrada* presumption as to such persons. Such persons are therefore entitled to direct ameliorative relief under Proposition 47. And in petitioner's case the particular applicable provision of the Proposition is section 490.2, designating as a misdemeanor any theft of $950 or less.

Petitioner's position is in accord with the conclusion reached by Judge Couzens and Justice Bigelow in their treatise on Proposition 47, in which they state at page 12:

> If the crime was committed prior to November 5, 2014, but sentenced after that date, the new sentencing rules will apply to the case. This means that all persons charged with qualified crimes that have not been convicted or sentenced as of November 5 will be entitled to misdemeanor treatment without the need to request any kind of a resentencing under section 1170.18. The procedures authorized by section 1170.18 clearly apply only to persons either serving a sentence or who have completed a sentence–circumstances not applicable to persons who have not even been sentenced.

(www.courts.ca.gov/documents/Prop.47-Information.pdf, rev. 5/17.)

Petitioner's claim should prevail on the strength of the foregoing analysis alone. But it is further compelled by the fact a contrary

interpretation would be entirely anomalous. That is because Proposition 47 expressly extends retroactive ameliorative relief to those eligible to petition under section 1170.18; and it provides prospective ameliorative treatment to future defendants prosecuted for violating the re-designated offenses. So it would be absurd and anomalous to construe the Proposition as creating a gap, wherein persons such as petitioner are denied the ameliorative relief afforded to both previous and subsequent offenders convicted of the identical conduct. It is axiomatic that a statute should not be construed in manner that generates an absurd result. (*In re Michele D.* (2002) 29 Cal.4th 600, 606.)

This result is further compelled by the axiom that courts must endeavor to construe a statute in a manner that avoids creating a constitutional infirmity. *(People v. Birks* (1998) 19 Cal. 4th 108, 135; *Carlos v. Superior Court* (1983) 35 Cal.3d 131, 147, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1147.) Excluding petitioner from ameliorative relief under section 490.2 would violate his right to equal protection of the laws under the federal and California constitutions. Petitioner is similarly situated to defendants before and after him convicted of the identical conduct–theft of $950 or less. There is no rational basis, let alone a compelling governmental interest, to deny

petitioner the same ameliorative relief extended to identical defendants coming before and after him. To avoid violating petitioner's right to equal protection, section 490.2 must be construed to apply directly to petitioner. (See *People v. Sanders* (1979) 98 Cal. App. 3d 273, 279 [statute construed so as to avoid violating defendant's right to equal protection.])

Petitioner's position can be distilled as follows: Proposition 47–specifically section 490.2–re-designated petitioner's felony violation of Vehicle Code section 10851, subdivision (a) as a misdemeanor. The Proposition is expressly retroactive, providing a petition process in section 1170.18 that extends ameliorative relief to previously convicted persons–even those whose convictions are final. However, section 1170.18 is available only to persons already serving their terms on November 5, 2014 (subd. (a)) or to those who have completed their terms (subd. (f)). Where a defendant was sentenced after November 5, 2014, and has not completed his or her term, such person is excluded from the petition process; it necessarily follows that such person is entitled to direct ameliorative relief under the presumption of *Estrada*. This is the only construction consistent with the language and expressed intent of Proposition 47, and it is the only construction that avoids a result that would be both absurd and a violation federal and state equal protection.

D. Pursuant to section 490.2, petitioner was convicted of only a misdemeanor theft because the verdict below does not establish jurors found he committed a post-theft act of driving or that the vehicle's value exceeded $950, as required for a felony violation of Vehicle Code section 10851.

1. The determination of whether petitioner was convicted of a felony is limited to his conviction in the trial below; any retrial has been forfeited by the prosecution and would violate double jeopardy.

At the time of petitioner's trial in 2015, the prosecution was on notice of the 2014 enactment of Proposition 47, including section 490.2. The prosecution was also aware this court had previously held that the taking of a vehicle with intent to permanently deprive in violation of Vehicle Code section 10851, subdivision (a), constituted "a form of theft." (*People v. Garza* (2005) 35 Cal.4th 866, 880 [taking in violation of section 10851, including initial act of driving away, is a theft, while driving after the taking is complete is a non-theft violation of section 10851].) And while this court had not yet put the question to rest conclusively in *Page*, it was nonetheless incumbent on the prosecution to obtain a verdict establishing a non-theft, or a theft in excess of $950, if it wished to obtain a felony conviction secure against the future decisions construing the meaning of section 490.2.

Specifically, the prosecution could have sought a verdict stating whether guilt was based on taking a vehicle or instead on driving after the

taking was complete. As detailed below, the prosecution's failure to do so forfeited any right to a retrial on this factual question, and a retrial would violate petitioner's federal and state constitutional rights to be free from double jeopardy.

Where a reviewing court finds an ameliorative statutory change is applicable to a defendant pursuant to *In re Estrada*, *supra*, it is then the prosecution's burden to establish the conviction withstands the ameliorative change. (*People v. Figueroa* (2003) 20 Cal.App.4th 65, 71.) In *Figueroa*, the defendant was found guilty of a narcotics sale, along with a 3-year enhancement for committing the offense within 1000 feet of a school. (*Id.* at p. 69.) During the appeal, the enhancement statute, Health and Safety Code section 11353.6, was amended to require that school be in session or in active use by minors at the time of the offense. (*Ibid.*) The Court of Appeal in *Figueroa* held that the statutory amendment was applicable to the defendant under *Estrada*, *supra*, because his conviction was not final when the amendment went into effect. (*Id.* at pp. 69-70.) The court further held it was the prosecution's burden on remand to prove beyond a reasonable doubt that the school was in session or in active use by minors. (*Id.* at pp. 70-71.) The court expressly rejected the People's argument asking the court to review the preliminary hearing testimony or to take judicial notice of the

calendar date to establish the crime occurred on a school day. The court explained:

> Appellant is entitled to have the jury decide every essential element of the crime and enhancement charged against him, no matter how compelling the evidence may be against him. [citations] The issue whether school was in session or was being used by minors during the commission of the crime is now an element of the enhancement, and there has been no jury waiver on this issue. By referring us to the calendar, respondent is asking us to take away that issue through what amounts to judicial notice.

(*Id.* at p. 71.) The court in *Figueroa* remanded the case to the trial court to give the prosecution an opportunity to try to a jury the question of whether school was in session. (*Id.* at pp. 71-72.) In ordering the remand, the court noted that the trial had preceded the statutory change, and accordingly, "[t]he issue of whether school was in session or that minors were using the facility during the crime was not relevant at the time of trial and the issue was therefore never tried." (*Id.* at p. 72, fn. 2.)

But in petitioner's case the prosecution should not be afforded a retrial because here, unlike *People v. Figueroa*, *supra*, the operative statutory change was enacted and known to the prosecution *before* petitioner's trial. Specifically, at the time of petitioner's 2015 trial the prosecution was on notice of the 2014 enactment of Proposition 47, including section 490.2. Section 490.2 makes any theft not exceeding $950

a misdemeanor, presenting obvious question or whether it encompassed the taking of a vehicle in violation of Vehicle Code section 10851. This question was particularly obvious in light of this court's previous holding in *People v. Garza, supra*, 35 Cal.4th at p. 871 that unlawfully taking a vehicle with intent to deprive in violation of Vehicle Code section 10851, subdivision (a), was "a form of theft."

Being thus put on notice, the prosecution in petitioner's case had the opportunity to seek a verdict specifying whether guilt was based on the initial taking or instead on driving after the taking was complete. Having failed to do so, the prosecution forfeited any right to a retrial on this issue.

This court has held that where the prosecution fails to secure a verdict resolving a factual question the relevance of which it was on notice, the prosecution has forfeited any right to a retrial on that factual question. (*People v. Najera* (1972) 8 Cal. 3d 504, 508-512, disagreed with on other grounds in *People v. Wiley* (1995) 9 Cal. 4th 580.) In *Najera*, the defendant was charged with first degree robbery, which included as an element the use of a firearm, and with being armed with a firearm under section 12022. (*Id.* at p. 506.) The defendant was convicted of the charges; but the prosecution did not charge or obtain a jury verdict on whether the defendant *used* a firearm pursuant to another enhancement provision, section 12022.5. (*Id.* at

pp. 506-508.) The prosecution's failure may have occurred because, as this court noted, at the time of trial there was disagreement among appellate courts on whether section 12022.5 applied to offenses including firearm use as an element, despite the statute's express language stating the section applied "even in those cases where the use of a weapon is an element of the offense." (*Id.* at pp. 508-509.) Against this backdrop, this court addressed whether the prosecution was entitled to a retrial to attempt to prove firearm use under section 12022.5. This court held the prosecution had forfeited any such retrial. This court explained:

> The People took no steps whatever at trial to secure a verdict or judgment stating the applicability of section 12022.5. The People did request and receive an instruction directing the jury to determine whether or not defendant was armed with a deadly weapon (as defined in another instruction) at the time of the offense. However, the People failed to request an instruction under section 12022.5 directing the jury to find whether or not defendant 'used' a firearm during the offense, as that term is defined in cases cited above.

(*Id.* at p. 506.) Accordingly, this court stated, "We conclude that the People waived the application of section 12022.5 by failing to have the matter resolved at trial." (*Id.* at p. 512.)

A more recent case applying forfeiture under similar circumstances is *People v. Perez* (2018) 22 Cal.App.5th 201. There the defendant had failed to make a hearsay objection to prosecution gang expert witness

testimony in a trial that preceded this court's decision in *People v. Sanchez* (2016) 63 Cal.4th 665. The defendant argued on appeal that evidence was inadmissible case-specific hearsay under *Sanchez*. The Court of Appeal held the defense had forfeited the issue by failing to object, even though *Sanchez* had not been decided at the time of trial. (*Perez*, 22 Cal.App.5th at p. __; 231 Cal.Rptr.3d 316, 323.) The court explained that the United States Supreme Court and California cases forming the rationale of *Sanchez* were known at the time of trial and "alerted competent and knowledgeable counsel to the need to object to such evidence on hearsay and Crawford grounds. [] We therefore conclude that the failure of Chavez's trial counsel to object on these grounds below constituted a forfeiture." (*Ibid.*)

In petitioner's case, as in *Najera* and *Perez*, the prosecution was on notice of the relevant issue and had the means to address it at trial, despite the lack of clear decisional law at the time. Specifically, the plain language of section 490.2 and this court's earlier holding in *Garza*, *supra*, "alerted competent and knowledgeable counsel" that taking a vehicle, including driving at the time of taking, constituted a theft. As in *Najera*, the prosecution could have sought a jury verdict resolving this question–by specifying whether a finding of guilt was based on taking, or instead on driving after the taking was complete. And just as in *Najera*, the

prosecution's failure to secure such a verdict forfeited any right to a retrial on this factual question.

In another recent decision, the Court of Appeal held retrial was precluded by double jeopardy under circumstances essentially identical to petitioner's case. (*In re D.N.* (2018) 19 Cal.App.5th 898; contra, *In re J.R.* (April 26, 2018, H043051) __ Cal.App.5th __ [permitting retrial where prosecution in a pre-*Page* trial failed to secure jury findings on vehicle value and whether attempted crime was a theft versus a post-theft driving] and *People v. Gutierrez* (2018) __ Cal.App.5th __; 229 Cal.Rptr. 531 [permitting prosecution to retry on value element of felony vehicle theft because the failure to establish value at trial was construed as instructional error].) In *In re D.N.* the People charged the minor in November of 2016 with "vehicle theft" in violation of Vehicle Code section 10851, subdivision (a). The juvenile court found the charge true and at disposition designated the offense a felony. (*Id.* at p. 900.) While the case was on appeal, this court decided in *Page*, *supra*, that a vehicle theft under Vehicle Code section 10851, subdivision (a), constituted a "theft" within the meaning of section 490.2. (*Ibid.*) The Court of Appeal in *In re D.N.* found that because there was no proof or finding the vehicle's value exceeded $950, the People had proven only a misdemeanor theft offense. (*Id.* at pp. 901, 904.) The

court rejected the People's argument for a retrial on the value of the vehicle. The court held that the enactment of Proposition 47, including section 490.2, prior to the minor's jurisdictional hearing placed the People on notice of the statutory change adding the value element to the offense of felony theft. The court found this despite the fact the Court of Appeal decisions were at the time of the trial in disagreement on the question ultimately decided by this court in *Page*, *supra*. The court explained:

> The People should have been well aware the value of the stolen vehicle was relevant on whether the offense was a felony. The People chose instead to gamble, and lost their bet, that the Supreme Court would find Vehicle Code section 10851 outside the ambit of Proposition 47 and Penal Code section 490.2.

(*Id.* at p. 903.)

The court in *In re D.N.* distinguished two cases cited by the People in which the reviewing court had remanded for retrial where new legislation had imposed an additional factual element not established in the initial trial. The court found those cases inapposite because in each case the prosecution was not on notice because legislative change had occurred *after* the trial. (*Id.* at pp. 902-203, distinguishing *People v. Eagle* (2016) 246 Cal.App.4th 275, 280 and *People v. Figueroa*, *supra*, 20 Cal.App.4th 65, 71–73.) Accordingly, the court in *In re D.N.* concluded: "The People were on notice of the relevant change in the law and are not, therefore, entitled to retry

D.N. to prove the value of the stolen vehicle. To permit retrial on this point would violate double jeopardy." (*Id.* at pp. 903-904, citing *People v. Shirley* (1982) 31 Cal.3d 18, 71; *Burks v. United States* (1978) 437 U.S. 1, 14–15.)

More recently the court in *In re J.R. supra*, (April 26, 2018, H043051) __ Cal.App.5th __, distinguished *In re D.N.* and held retrial was permitted under similar circumstances. In *In re J.R.*, the Juvenile Court in a jurisdictional hearing in late 2015 found the minor defendant had attempted to take or drive a vehicle in violation of Vehicle Code section 10851, subdivision (a). (*In re J.R.*, at p. *7.) On appeal, after the decision in *Page*, the parties stipulated the true finding did not establish whether the attempted offense involved taking/theft versus post-theft driving; nor was vehicle value exceeding $950 established. (*Id.* at pp. *7-*8.) Rejecting a defense claim of double jeopardy, the court remanded for a retrial on these factual questions. The court explained that at the time of trial in late 2015 there was no published decision on whether Proposition 47 applied to Vehicle Code section 10851 (*id.* at p. *7), and that the eventual outcome in *Page* was not foreseeable (*id.* at p. 9). In this regard the court distinguished *In re D.N., supra,* where the trial took place in late 2016. (*Ibid.*) The court in *In re J.R.*, at pp. *8-*9 relied on two federal decisions: *United States v.*

Weems (9th Cir. 1995) 49 F.3d 528 and *United States v. Wacker* (10th Cir 1995) 72 F.3d 1453. In each of these cases, discussed in more detail below, the Circuit Court found double jeopardy permitted retrial where a post-trial decision of the United States Supreme Court overruled settled case law by holding the crime in question required an additional factual element.

In the first federal case relied on in *In re J.R.--United States v. Weems*--the defendant was convicted of an illegally structured currency transaction in violation of 31 U.S.C. 5324, subd. (a)(3) at a time when the Ninth Circuit had previously held in *United States v. Hoyland* (9th Cir. 1990) 914 F.2d 1125, 1128-1130, that offense did not require knowledge of illegality. (*Weems*, 49 F.3d at pp. 529-530.) After the trial, however, the United States Supreme Court held in *Ratzlaf v. United States* (1994) 510 U.S. 135 that knowledge of illegality is an element of the offense. The Circuit Court found *Ratzlaf* applied to the defendant's non-final judgment and therefore reversed, but remanded for retrial on the knowledge element. (*Weems*, at p. 532.) The court found double jeopardy did not bar retrial because the prosecution had followed the "clear" law of the circuit at the time of trial, i.e. *Hoyland*. The court explained:

> The government had no reason to introduce [evidence of knowledge] because, at the time of trial, under the law of our

> circuit, the government was not required to prove that a defendant knew that structuring was illegal. E.g., Hoyland, 914 F.2d at 1128-30. The district court at trial could have required such proof only by disregarding clear rulings by this court. The government therefore is not being given a second opportunity to prove what it should have proved earlier, and double jeopardy protections do not bar retrial.

(*Weems*, at p. 531.)

The other federal case relied on by the court in *In re J.R.*, *supra*, is *United States v. Wacker*, *supra*. In that case the defendant was convicted of using a firearm in connection with narcotics trafficking. (*Wacker*, 72 F.3d at p. 1459.) At the time of trial, established Tenth Circuit case law had held that the firearm "use" element of the offense meant having "ready access" to a firearm as an "integral part" of the predicate narcotics offense. Following trial, however, the United States Supreme Court held in *Bailey v. United States* (1995) 516 U.S. 137 that the firearm use element required the defendant "actively employ[]" the firearm during the offense. (*Wacker*, at p. 1463.) The court in *Wacker* remanded for retrial on the firearm use element, holding such remand did not violate double jeopardy. The court began by stating the rule that, "the prosecution may not, consistent with the Double Jeopardy Clause, be afforded a second opportunity to supply evidence which it "failed to muster in the first proceeding." (*Id.* at p. 1465, citing *Burks v. United States* (1978) 437 U.S. 1.) However, the court stated,

"the government here cannot be held responsible for 'failing to muster' evidence sufficient to satisfy a standard which did not exist at the time of trial." (*Ibid.*, citing *United States v. Weems*, *supra*, 49 F.3dat pp. 530–31.)

Petitioner submits that these federal decisions, *Weems* and *Wacker* are distinguishable from petitioner's case in that in each case the prosecution was at trial acting on clear decisional law circumscribing the elements of the offense in question; and in each case it was not foreseeable that the United States Supreme Court would overrule those decisions, effectively creating an additional element of the offense. In petitioner's case, by contrast, there was no decisional law holding section 490.2 inapplicable to a vehicle taking under Vehicle Code section 10851, subdivision (a). To the contrary, at the time of trial in 2015 there was section 490.2 itself, providing any theft of $950 or less is a misdemeanor; and there was *People v. Garza*, *supra*, where this court had previously held that taking a vehicle in violation of Vehicle Code section 10851, subdivision (a), is "a form of theft." (*Garza*, 35 Cal.4th at p. 871.) This court's eventual decision in *Page* was, if not obvious, at least foreseeable. *Page* was foreseeable based on section 490.2 and *Garza*, just as this court's decision regarding expert witness hearsay in *People v. Sanchez, supra*, was held to be foreseeable to "competent and knowledgeable counsel" based on

preceding decisions in *People v. Perez*, *supra*, 22 Cal.App.5th 201; 231 Cal.Rptr.3d at 316, 323.)

At the time of trial in 2015, the prosecution was on notice that if it wished to secure an enduring felony conviction, it would need to obtain a jury finding of either driving after the taking was complete, or that the vehicle was worth more than $950. In failing to do so the prosecution was gambling that section 490.2 would be construed as inapplicable to Vehicle Code section 10851. Thus, the prosecution passed on its one opportunity to convict petitioner of a felony violation of section 10851, subdivision (a), and double jeopardy bars a second opportunity.

For these reasons the purported reliance in *In re J.R.*, *supra*, on *Weems* and *Wacker* is misplaced. And petitioner asks this court to follow *In re D.N.* and reject *In re J.R.* as incorrectly decided. The court in *In re J.R.* was simply incorrect in finding the rule of *Page* was unforeseeable in 2015. Petitioner concedes the decision in *Page* was not then a *certainty*; but it was *foreseeable* based on the plain language of section 490.2 and this court's prior decision in *Garza*. In this respect, petitioner's case is similar to *People v. Najera*, *supra*, in which this court found that despite unsettled case law at the time of trial, the prosecution's failure to obtain a verdict on

the use of a firearm forfeited any right to do so in a retrial. (*Najera*, 8 Cal.3d at pp. 508-512.)

Here the prosecution could readily have sought a special verdict that, if returned guilty, would have survived *Page*. But the People failed to do so at their peril. Petitioner should not have to undergo a second trial to permit the prosecution to obtain a jury finding they failed to seek in the first trial.

Accordingly, any remand proceeding should be limited to whether it can be determined the jury below necessarily convicted petitioner of a felony offense. No retrial should be permitted. If on remand the prosecution is unable to establish petitioner's offense was a non-theft or that it exceeded $950, then petitioner's conviction must be reduced to a misdemeanor. And petitioner's prior felony strike and four prior prison term enhancements must also be stricken because these enhancements apply only where the defendant is convicted of a felony.

2. The determination of whether petitioner was convicted of a felony is limited to the face of the conviction; it does not permit a judicial finding of fact based on a review of the underlying evidence.

Whether it is this court or the Court of Appeal on remand that determines whether petitioner was convicted of a felony offense, it is the prosecution's burden to establish the jury below found a felony offense, as detailed in the previous section . And as detailed below, this determination

must be made based on the face of the conviction, not on a judicial finding of fact based on a review of the underlying evidence.

First, it is evident that the verdict below does not establish a felony offense. Petitioner acknowledges that the given jury instruction defining the Vehicle Code section 10851 offense referred only to driving and omitted mention of taking (1 CT p. 181); and likewise the verdict stated jurors convicted petitioner of "driving" a vehicle (CT p. 193). However, this does not establish jurors convicted petitioner of a non-theft--because a jury finding a defendant violated Vehicle Code section 10851 by driving a vehicle does not establish the conviction was based on an act other than theft. This is because virtually every unlawful taking of a vehicle is accomplished by driving the vehicle away; and this act of driving merges with the taking as part of the theft, while only a subsequent act of driving after the taking is complete is a non-theft violation of section 10851. (*People v. Page*, *supra*, 3 Cal.5th at pp. 1183, 1188 [act of driving after taking is complete is not be a theft within the meaning of section 490.2].)

Nor may this court (or the Court of Appeal on remand) look to the underlying evidence to make a factual finding absent from the jury verdict itself. Appellant acknowledges that at trial a police officer testified appellant was driving the vehicle days after it was initially taken. (RT pp.

66-67.) But where a court reviews a conviction to determine whether the defendant is subject to a greater (or lesser) punishment, the Sixth Amendment right to a jury determination of all essential elements dictates that the review is limited to the face of the conviction; and it does not permit the court to review the underlying evidence and draw inferences regarding the basis of a jury's verdict. This is evident from *People v. Figueroa*, where, as detailed *ante*, the Court of Appeal declined on Sixth Amendment grounds to review the preliminary hearing testimony or take judicial notice of a calendar date to determine a narcotics offense occurred which school was in session. (*Figueroa*, *supra*, 20 Cal.App.4th at p. 71.)

The same conclusion is compelled by this court's more recent holding in *People v. Gallardo* (2017) 4 Cal.5th 120. In *Gallardo*, the defendant was convicted of robbery; and in a bench trial the court further found the defendant had previously pled guilty to an assault that qualified as a prior serious felony and a prior felony strike. The prior offense was an assault under former section 245, subdivision (a), which could be based either on use of a deadly weapon or on use of force likely to cause great bodily injury. The former is a serious felony and a strike offense; the latter is not. The trial court had reviewed the preliminary hearing transcript in the prior case and determined the defendant had used a deadly weapon, a knife.

(*Id.*, 4 Cal.5th at pp. 123-126.) This court reversed, holding that a judicial determination of the factual nature of a conviction is limited to the elements necessarily found true by the jury. The court expressly overruled its previous decision in *People v. McGee* (2006) 38 Cal.4th 682, 706, which had held that a court could look to the underlying evidence to determine "realistically" what conduct the conviction was based on. (*Gallardo*, *supra*, 4 Cal.5th at p. 124.) This court explained its holding in *Gallardo* was required by the Sixth Amendment right to a jury determination of every element of an offense. (*Id.* at p. 136.) This court explained:

> [W]e now hold that a court considering whether to impose an increased sentence based on a prior qualifying conviction may not determine the "nature or basis" of the prior conviction based on its independent conclusions about what facts or conduct "realistically" supported the conviction. That inquiry invades the jury's province by permitting the court to make disputed findings about "what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct." The court's role is, rather, limited to identifying those facts that were established by virtue of the conviction itself—that is, facts the jury was necessarily required to find to render a guilty verdict, or that the defendant admitted as the factual basis for a guilty plea.

(*People v. Gallardo*, *supra*, 4 Cal. 5th at p. 136)

The Sixth Amendment dictate set out in *Gallardo* applies with equal force in petitioner's case. The only difference is that, while the inquiry in *Gallardo* was to determine a necessary element of an enhancement prior,

the present inquiry is whether the jury found a necessary element of a substantive felony offense. And as the court held in *People v. Figueroa*, *supra*, the right to a jury finding on every essential element applies to a defendant subject to an ameliorative change in the law pursuant in *Estrada*. (*Figueroa,* 20 Cal.App.4th at p. 71.)

This court recently held in *People v. Perez* (May 7, 2018, S238354) __ Cal.5th __, 2018 WL 2090909 that a court assessing a Proposition 36 petition to reduce a Three Strikes indeterminate sentence may review the underlying evidence to determine whether the petitioner's offense was disqualifying under the terms of the Proposition, even though there was no jury finding of the disqualifying fact. (2008 WL 2090909, p. *4.) This permitted a finding petitioner had been armed with a deadly weapon (a car), which under section 1170.126, subdivision (e)(2), disqualified him from relief. (*Id.* at pp. *5-*6.) The holding was based on this court's conclusion that the Sixth Amendment right to a jury determination is inapplicable to a Proposition 36 petitioner seeking to reduce his or her sentence in a final judgment. This court explained that Proposition 36 "does not automatically reduce" the sentence of a petitioning defendant; instead, the defendant must petition for recall of the sentence. (*Id.* at p. *4.) Thus, the denial of such

petition does not increase the sentence but instead leaves a final judgment intact. (*Id.* at pp. *3-*4.)

This court's holding in *Perez* is inapplicable to petitioner, whose posture is fundamentally distinct from that of a Proposition 36 petitioner. Specifically, as detailed *ante*, a defendant with a non-final judgment on the effective date of Proposition 47 is not consigned to petition for relief. Instead, he or she is entitled under *Estrada*, *supra*, to direct application of the ameliorative statute. And as noted *ante*, a defendant entitled to direct ameliorative relief under the presumption of *Estrada* is to be "resentenced automatically." (*People v. Dehoyos*, *supra*, 4 Cal.5th at p. 602; accord, *People v. Conley*, *supra*, 63 Cal.4th at pp. 652, 659.) And as also noted *ante*, where an ameliorative change in the law requires proof of an additional statutory element, a defendant entitled to direct ameliorative relief under *Estrada* has a Sixth Amendment right to a jury determination of that additional element. (*People v. Figueroa*, *supra*, 20 Cal.App.4th at p. 71.) Accordingly, here petitioner is entitled to a jury determination of whether he committed a theft versus a post-theft act of driving; and the Sixth Amendment does not permit a judicial determination of this fact by reviewing the evidence underlying the jury's verdict.

In petitioner's case, the verdict shows only that the jury found petitioner drove a vehicle without consent. (1 CT p. 193.) But as detailed *ante*, the driving of a vehicle may be an integral part of taking the vehicle and thus under *Page* constitutes a theft under section 490.2; only if driving occurs after the taking is complete is it a non-theft. Here the jury's verdict does not indicate whether petitioner's driving the vehicle was part of, versus separate from, the taking.

Casting further doubt on the basis of the jury's guilty verdict is the fact they acquitted petitioner in count 2 of receiving a stolen vehicle. (1 CT p. 194.) A defendant may be convicted of both violating Vehicle Code section 10851 and receiving a stolen vehicle if the section 10851 conviction was based on a non-theft driving of the vehicle; but if the section 10851 violation is based on taking, i.e., theft, then such dual conviction is precluded by the rule a defendant may not be convicted of both stealing and receiving the same property. (*Page*, *supra*, 3 Cal.5th at p. 1183, citing *People v. Garza supra*, 35 Cal.4th at p. 871.) Accordingly, the jury's acquittal below of receiving a stolen vehicle leaves open the possibility they found petitioner stole the vehicle.

For these reasons the jury's guilty verdict on the Vehicle Code section 10851 does not indicate whether the jury found a theft versus a non-

theft act of driving. Accordingly, the prosecution cannot establish the jury found something other than a theft. Similarly, there was no jury finding as to the vehicle's value. On this record, the prosecution cannot establish the jury found commission of a felony offense, i.e., an offense other than a misdemeanor theft as defined by section 490.2.

Notably, the author of the concurring opinion below found petitioner's offense was not a theft by reviewing the evidence underlying the conviction to conclude petitioner committed a post-theft act of driving. (See Slip Opn., concurrence, pp. 1-4.) But this is precisely the sort of judicial fact-finding this court forbade in *Gallardo*, as detailed *ante*. Significantly, the Court of Appeal in petitioner's case rendered its decision before this court decided *Gallardo*. On any remand, the Court of Appeal will be informed by *Gallardo*.

Finally, petitioner acknowledges that this court in *People v. Page*, *supra*, disposed of that case by modifying the judgment to permit the defendant to file a new section 1170.18, subdivision (a) petition alleging his section 10851 violation was a "theft" and that it involved $950 or less; and this court noted that in the new petition proceeding the sentencing court would be able to review the trial evidence to make those determinations. (*Page*, *supra*, 3 Cal.5th at p. 1189.) But this disposition in *Page* reflects the

fact that Proposition 47's ameliorative changes are not directly applicable to defendants who must seek relief through the petition process. A defendant petitioning for relief under section 1170.18 carries the burden of proof. *(People v. Romanowski* (2017) 2 Cal. 5th 903, 916.) This court held in *Romanowski* that "in the context of a section 1170.18 petition to recall a sentence" the defendant carries the burden of proving he was convicted of a reduced offense. (*Id.*, 2 Cal.5th at p. 916, citing Evid. Code, § 500 [a party has the burden of proof as to each fact "essential to the claim for relief or defense that he is asserting].") However, where *Estrada* retroactivity applies, the defendant has an "automatic entitlement to resentencing" (*People v. Conley*, *supra*, 63 Cal. 4th at p. 659; accord, *People v. Dehoyos*, *supra*, 4 Cal.5th at p. 602); and accordingly the defendant need not make a "claim for relief" under section 1170.18. Therefore, unlike a section 1170.18 petitioner, a defendant entitled to the direct ameliorative benefit of Proposition 47 does not carry the burden of proving he or she was convicted of a misdemeanor offense. (*People v. Figueroa*, *supra*, 20 Cal.App.4th at pp. 70-71 [prosecution carries burden of establishing an existing conviction establishes essential elements imposed by ameliorative statutory change and applicable pursuant to *Estrada*].)

Consequently, as with a defendant prosecuted ***today*** for violating section 10851, it is the prosecution that carries the burden of proving beyond a reasonable doubt that petitioner's act was not a petty theft. And this entails the defendant's right to have a jury make that determination. Accordingly, the question in any further proceedings in petitioner's case must be whether the jury necessarily found petitioner committed a non-petty theft; and this inquiry must be based on the face of the jury's conviction, not a judicial fact finding based on a review of the underlying evidence.

Petitioner recognizes this presents the prosecution with a practical problem because here the prosecution failed to request a jury verdict specifying whether the verdict of guilty was based on an act of initially taking/driving a vehicle versus an act of driving after the taking was complete. But this practical challenge is inescapable because the alternative would be to undertake a judicial determination of fact that, for the reasons explained in *People v. Gallardo*, *supra*, is barred by the due process right to a jury finding.

Further, as argued *ante*, at the time of trial in 2015 the prosecution was on notice of section 490.2, as well as this court's previous holding in *Garza*, *supra*, that unlawfully taking a vehicle with intent to permanently deprive in violation of Vehicle Code section 10851, subdivision (a), was a

theft. And so as detailed *ante*, the prosecution's quandary results from its own failure to obtain a more specific jury verdict.

For these reasons, petitioner submits the verdict below fails to establish a felony offense, and so petitioner's conviction must be reduced to a misdemeanor theft.

CONCLUSION

For the reasons detailed above, petitioner asks this court to find that section 490.2 applies directly to petitioner because he is expressly excluded from Proposition 47's petition process set out in section 1170.18; and that the conviction by the jury below establishes no more than a misdemeanor theft pursuant to section 490.2, requiring the conviction be reduced to a misdemeanor.

Respectfully submitted,

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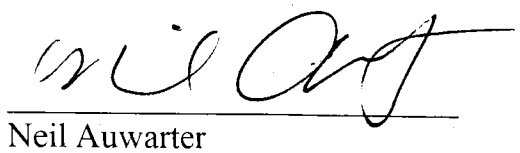
CERTIFICATION OF WORD COUNT

I, Neil Auwarter, hereby certify that, according to the computer program used to prepare this document, appellant's opening brief on the merits contains 9,233 number of words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed May 18, 2018 in San Diego, California.



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DECLARATION OF SERVICE

Case Name: People v. Henry A. Lara

Court of Appeal No. E065029
Superior Court No. INF1302723

I declare:

I am employed in the County of San Diego, California. I am over 18 years of age and not a party to the within entitled cause; my business address is 555 West Beech Street, Suite 300, San Diego, California 92101-2939.

On May 18, 2018, I served the attached

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of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on May 18, 2018.

Will Bookout
(Typed Name)

Will Bookout
(Signature)