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

SUPREME COURT
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APPEAL FROM THE SUPERIOR COURT OF
RIVERSIDE COUNTY

Judge Samuel Diaz Jr. Presiding

PETITIONER'S REPLY BRIEF ON THE MERITS

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PETITIONER'S REPLY BRIEF ON THE MERITS

ARGUMENT

I. 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; THE PROPOSITION'S PETITION PROCESS SET OUT IN PENAL CODE SECTION 1170.18 IS INAPPLICABLE TO A PERSON, SUCH AS PETITIONER, WHO IS SERVING A PRISON SENTENCE IMPOSED AFTER THE EFFECTIVE DATE OF PROPOSITION 47.

A. As respondent concedes, Penal Code section 490.2[1], designating all thefts of $950 or less a misdemeanor, is directly applicable to petitioner, who was tried and sentenced for violating Vehicle Code section 10851 after the effective date of Proposition 47.

Subdivisions A through C of petitioner's opening brief contend section 490.2, the provision reclassifying any theft of $950 or less as a misdemeanor, is directly applicable to appellant under the retroactivity presumption of *In re Estrada* (1965) 63 Cal.2d 740, applicable to judgments not final on the effective date of an ameliorative legislative change in the law. Petitioner is not subject to the petition provisions of Proposition 47, set out in section 1170.18, subdivisions (a) and (f), because those provisions expressly apply only to persons serving a prison sentence on the effective date of Proposition 47 or who have completed their sentences. (See *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 855 [defendant whose offense, trial, and sentencing occur after effective date of Proposition 47 may not petition under section 1170.18].) Petitioner is not subject to the petition process of section 1170.18 because he was convicted and sentenced after the effective date of Proposition 47 and has not completed his sentence.

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[1] All statutory references are to the Penal Code, except for Vehicle Code section 10851, which for conciseness is referred to as section 10851.

Petitioner's position is consistent with this court's recent holding in *People v. Buyks* (2018) __ Cal.5th __, 2018 WL 3615629. In *Buyks* this court addressed the effect of Proposition 47 on a previously imposed prior-based enhancement where the requisite felony prior is subsequently reduced to a misdemeanor pursuant to a section 1170.18 petition. *Buyks* held that while the petition process set out in section 1170.18 does not apply to vacate such an enhancement, nonetheless the *Estrada* presumption of retroactivity does apply to vacate such an enhancement if it was imposed in a case not yet final on the effective date of Proposition 47. (*Id.*, 2018 WL 3615629, at pp. *6-*10.)

Respondent concedes this issue. (RABOM pp. 11-13.)

B. Petitioner's felony conviction cannot stand because the record does not establish jurors convicted appellant of a felony violation of Vehicle Code section 10851, i.e., post-theft driving of a vehicle over $950.

1. Summary

Respondent argues the jury necessarily found petitioner committed a non-theft violation of section 10851, which is therefore not subject to the misdemeanor theft provision of section 490.2. Respondent bases this contention on several arguments: First, respondent argues the jury instructions, together with the verdict, establish jurors found petitioner drove the vehicle days after the theft occurred, an act separate from the

taking of the vehicle. Second, respondent argues the evidence at trial likewise established petitioner drove the vehicle days after the theft. And third, respondent argues the lack of a jury finding of intent to permanently deprive precludes construing the verdict as a finding of theft under section 490.2.

As detailed below, respondent's first contention is incorrect because the instructions and verdict establish only that jurors found petitioner drove the vehicle, not whether that driving was committed as part of the initial taking versus days later.

Respondent's second contention–that there was evidence petitioner drove the vehicle days after the theft–is correct; but there was also evidence from which it could be inferred petitioner was the person who took the vehicle; and the record does not establish whether jurors based their finding petitioner "drove" on the act of taking versus a later act of driving.

And respondent's third argument–that there was no finding of intent to permanently deprive–establishes only that jurors may have convicted petitioner of joyriding rather than theft or post-theft driving. Respondent is correct, but misapprehends the effect of this fact. This is because under the principles of avoiding absurdity, equal protection, and the proscription against cruel and unusual punishment, joyriding a vehicle $950 or less

cannot be treated as a felony when the ***theft*** of the same vehicle is a misdemeanor.

2. Neither the verdict nor the jury instructions establish an act of post-theft driving.

Respondent argues the jury instructions, together with the verdict, establish the jury found petitioner drove the vehicle days after the car was taken, establishing a non-theft, felony violation of section 10851. (RABOM pp. 15-18.)

Respondent is correct that the instruction defining a section 10851 offense told jurors that the prosecution had to prove petitioner "drove someone else's vehicle without the owner's consent." (1 CT p. 181.) Respondent is also correct that the verdict on count 1 found petitioner guilty of "driving a vehicle without permission . . . ." (1 CT p. 193.) But plainly this establishes only that jurors found petitioner drove the vehicle, not whether he drove it during the initial taking versus at a later time.

As this court has expressly held, driving a vehicle to steal it is integral to the theft and thus subject to section 490.2; an act of driving after the theft is completed is required to prove a non-theft violation of section 10851. (*People v. Page* (2017) 3 Cal.5th 1175, 1183, 1187; see also *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].) Accordingly, the jury verdict finding petitioner "drove" the vehicle without consent does not establish a post-theft act of driving outside the scope of section 490.2.

Relatedly, respondent argues the prosecutor's argument to jurors ensures jurors found a post-taking act of driving. (RABOM pp. 16-17.) Respondent points out that the prosecutor told jurors they did not need to decide whether petitioner stole the vehicle and urged that the evidence showed he drove it days after it was taken. (RABOM p. 17, citing RT pp. 134-145, 149.) But this emphasis by the prosecutor on a purported post-taking act of driving did not foreclose jurors from inferring petitioner was the person who took the vehicle--and convicting him of unlawful driving on that basis. It is axiomatic that what the attorneys argue to jurors is neither evidence nor the law. (*People v. Morales* (2001) 25 Cal.4th 34, 47 [jury instructions state the law, while a prosecutor's comments are "words spoken by an advocate," which jurors are free to disregard].)

Where there is evidence of more than one act to support a finding of guilt, the prosecutor's primary emphasis on one act versus another does not amount to an "election" foreclosing jurors from relying on the other act. (*People v. Mehlado* (1998) 60 Cal.App.4th 1529, 1536 [prosecutor's emphasis on one act versus another did not convey to jurors a "dut[y]" to

limit their verdict to that act and thus left open the possibility jurors relied on the act de-emphasized by the prosecutor].) Accordingly, the prosecutor's urging that jurors need not find petitioner took the vehicle did not foreclose them from finding precisely that, nor from basing their verdict on that finding.

3. The evidence at trial was sufficient to find a post-theft act of driving; but it also permitted a finding petitioner drove the car to take it away; the record does not establish on which basis jurors convicted.

Initially, respondent disagrees with petitioner's contention a court is foreclosed from looking to the underlying evidence to determine whether jurors found an element missing from both the jury instructions and the jury verdict–in this case whether petitioner committed a post-taking act of driving. (RABOM p. 15, fn. 2.) Yet that is precisely what this court held in *People v. Gallardo* (2017) 4 Cal.5th 120. *Gallardo* held a court assessing whether the defendant used a deadly weapon in a prior case was precluded from considering preliminary hearing testimony indicating defendant used a knife, and instead was limited to elements necessarily admitted or found true by a jury. (*Id.* at pp. 123-126.) *Gallardo* expressly overruled *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.) *Gallardo*

based this conclusion on the Sixth Amendment right to a jury determination of every element of an offense. The court explained that substituting a judicial review of evidence underlying a conviction for an actual jury finding "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." (*Gallardo*, *supra*, 4 Cal. 5th at p. 136, internal citations omitted.)

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. While the procedural context of *Gallardo* was a review of an enhancement prior, the same Sixth Amendment principle applies with equal force to petitioner. The right to a jury finding on every essential element applies in assessing whether a conviction comports with an ameliorative change in the law applicable pursuant to *Estrada*, *supra*.

(*People v. Figueroa* (1993) 20 Cal.App.4th 65, 71.) Accordingly, the trial testimony suggesting petitioner drove the car days after it was taken may not be substituted for a jury finding on this essential fact.

However, even if it were permissible to review the underlying evidence to determine what the jury found, here that review would be inconclusive because there was also evidence suggesting petitioner was the person who took the vehicle. Specifically, petitioner lived only a few blocks from where the car was taken (RT pp. 94-95) and was apprehended alone in the car, which had its ignition punched out (RT pp. 85-86, 90-93). There is no basis to determine whether jurors convicted on this evidence as opposed to evidence he drove the car after the taking was complete.

Respondent argues it is "irrelevant" that jurors may have believed petitioner took the car because the evidence established he drove it days later. (RB pp. 18-19.) But respondent conflates the question of ***whether there is sufficient evidence*** to find post-taking driving with the question of ***whether jurors actually made that finding***. Plainly this conflation is incorrect because the Sixth Amendment right to a jury trial requires not only that sufficient evidence be presented, but that the jury actually make a finding of guilt based on that evidence. (*Gallardo*, *supra*, 4 Cal.5th at p. 136.) Here there is no assurance jurors even reached the question of

whether petitioner drove the car after the taking. For example, jurors may have decided to review the evidence chronologically, concluded petitioner was the person who initially drove the car away without permission, and ended their deliberations at that point. If so, the verdict was based on the initial taking and did not entail any finding petitioner drove the car days later.

For these reasons, the evidence does not establish the verdict was based on a post-taking act of driving outside the scope of section 490.2.

4. Respondent is correct that the jury did not find intent to permanently deprive, and that therefore the verdict was not a finding of theft; but this means jurors may have found only an act of joyriding; the rule of avoiding absurd results, the constitutional guaranty of equal protection, and the Eighth Amendment ban on cruel and unusual punishment all preclude treating joyriding as a felony when actually stealing the same vehicle is a misdemeanor.

a. Introduction

Respondent points out the jury did not find intent to permanently deprive, and therefore if they convicted petitioner of taking the vehicle, it was not a "theft" within the meaning of section 490.2. (RABOM pp. 14-15, 18.) Respondent notes that this court in *Page, supra*, held that taking a vehicle without intent to permanently deprive does not constitute a theft under section 490.2. (RABOM p. 18, citing *Page, supra*, 3 Cal.5th at pp.

1182-1183.) Accordingly, respondent reasons, even if petitioner was convicted based on a finding he drove the car away, this act was not a theft, but rather a felony violation of section 10851. (RABOM pp. 15, 18.)

Respondent is correct that jurors did not find intent to permanently deprive. But respondent misapprehends the significance of this fact. In the absence of a finding of intent to permanently deprive, taking a vehicle by driving it away is only joyriding. And while section 490.2 applies expressly to theft, the rule against absurdity, the constitutional guaranty of equal protection, and the Eighth Amendment bar against cruel and unusual punishment all preclude treating joyriding as a felony when the greater offense of ***stealing*** the same vehicle is a misdemeanor.

Respondent misconstrues *Page* to hold that since joyriding is not theft, it must instead be a felony violation of section 10851. (RABOM pp. 14-15, 18.) In fact, this court in *Page* expressly declined to decide this question. (*Page*, *supra*, p. 1188, fn. 5.[2]) This issue is currently before this court in *People v. Bullard*, S239488, rev. granted 2/22/17, briefing on this issue ordered 2/21/18.

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[2] In *Page*, this court found no occasion to consider this issue because the parties had not briefed it, and at oral argument defense counsel appeared to disavow it. (*Id.* at p. 1188, fn. 5.) Here, while petitioner did not raise this issue in the opening brief on the merits, respondent has briefed it (RABOM pp. 14-15, 18), and now petitioner has briefed it herein.

In the present case this issue is squarely presented by the facts and briefing. As detailed below it would violate the rule of avoiding absurd results, the constitutional guaranty of equal protection, and the Eighth Amendment ban on cruel and unusual punishment to treat driving a vehicle away with intent to permanently deprive as a misdemeanor under section 490.2, but treat driving the same vehicle away with ***temporary*** intent as a wobbler felony under section 10851.

b. The statutory scheme relating to joyriding and unlawful taking or driving of a vehicle.

Prior to 1996, joyriding, the non-consensual driving of a vehicle with intent to temporarily use the vehicle, was proscribed by section 499b as a misdemeanor. In 1996, the Legislature deleted the reference to vehicles from section 499b, meaning an act of joyriding could be prosecuted only as a wobbler felony under Vehicle Code section 10851. (*People v. Howard* (1997) 57 Cal.App.4th 323, 326–327.) Section 10851 applies to person who "drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle." Accordingly, section 10851 may be violated either by joyriding with temporary intent, by stealing the

vehicle with permanent intent, or by driving the vehicle subsequently with either intent.

Then in November 2014, with the enactment of Proposition 47, section 490.2 re-designated any theft of $950 or less as a misdemeanor. And in *Page*, *supra*, this court held that section 490.2 includes the theft that occurs when a person drives away the vehicle of another with intent to permanently deprive.

Accordingly, driving a vehicle $950 or less subsequent to the initial taking remains a wobbler felony under section 10851, regardless of whether the intent to deprive is permanent or temporary. But the initial taking of the same vehicle, including by driving, with intent to permanently deprive is misdemeanor under section 490.2. The question left unanswered by *Page* is whether the identical act of driving away the same vehicle, but with the less culpable intent of temporary use, can be subject to the harsher punishment provisions of section 10851.

c. Treating joyriding more severely than vehicle theft would violate the rule against avoiding absurd results.

An axiomatic rule of statutory construction is that a statute should not be construed to produce absurd results. (*People v. Cook* (2015) 60 Cal.4th 922, 927.) Any ambiguity in a statute should be resolved so as to

avoid an absurd consequence, and also to promote the purpose of the statute. (*People v. Cruz* (1996) 13 Cal.4th 764, 782-783.) As this court has stated:

> The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [] In order to determine this intent, we begin by examining the language of the statute. [] But "[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend." [] Thus, "[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act." []

(*People v. Pieters* (1991) 52 Cal.3d 894, 898–99, internal citations omitted.)

It would be absurd to construe section 490.2 to include stealing a vehicle by driving it away, but exclude the less culpable act of joyriding the same vehicle. It is not simply a matter of common sense that joyriding is a less culpable crime than vehicle theft; it is logically inescapable because joyriding is actually a lesser included offense within the act of theft by driving. This is because both crimes are comprised of the same act: driving away a vehicle without consent. The difference is that the joyrider has intent to use the vehicle temporarily, while the thief has the intent to permanently deprive. "Temporary" and "permanent" are simply periods of duration on the spectrum of time. Everything permanent must begin as something temporary. An event, such as the deprivation suffered by a

vehicle owner, must last a minute before it can last a day, a day before it can last a week, and a week before it can become permanent. Just as a journey of a thousand miles begins with a single step, permanence begins with a single second. Thus, a permanent deprivation necessarily subsumes a temporary use by the taker. Accordingly, one cannot possibly commit the act of theft by driving away without also committing the lesser act of joyriding.

This is consistent with this court's holding in *People v. Barrick* (1982) 33 Cal.3d 115, 134-135, that joyriding under then-section 499b was a lesser included offense of Vehicle Code section 10851 under the accusatory pleading test where the pleading charges the defendant drove the vehicle. This court later reaffirmed this holding in *People v. Moon* (2005) 37 Cal.4th 1, 26. If, as this court held in *Barrick* and *Moon*, a person who drives a vehicle with temporary or permanent intent to deprive the owner under section 10851 also necessarily drives it with intent to joyride by temporarily using the vehicle, then it must also be true that a person who commits theft by driving a vehicle away (a theft under *Page* and *Garza*) also necessarily commits the act of joyriding.

Petitioner's position is even more directly supported by *People v. Proby* (1998) 60 Cal.App.4th 922, where the court affirmed the defendant's

conviction of misdemeanor joyriding under then-section 499b "as a lesser included offense of the charged vehicle theft." (*Id.* at p. 927.)

Since joyriding is a lesser included, and plainly less culpable, offense than theft of the same vehicle, it would be absurd to punish joyriding more harshly than vehicle theft. Yet this is would be the result if section 490.2 were construed to re-designate vehicle theft of $950 or less as a misdemeanor, while leaving joyriding the same vehicle a wobbler felony under section 10851. Further, such a construction would be contrary to the plain intent of Proposition 47 to identify certain existing felony offenses and reduce them to misdemeanors based on their relatively low level of culpability. (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992, citing Voter Information Guide, Gen. Elec. Prop. 47, § 2, p. 70.) Neither the drafters nor the voters could have intended to reduce vehicle thefts of $950 or less to misdemeanors, but to leave the lesser included crime of joyriding the same vehicle a felony.

d. Treating joyriding more severely than vehicle theft would violate the constitutional guaranty of equal protection.

Another axiom of statutory construction is that courts must endeavor to construe a statute in a manner that avoids creating a constitutional infirmity, such as a violation of equal protection. *(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.) If a statute cannot be construed so as to avoid a constitutional infirmity, then the statute itself is unconstitutional. (*Plastic Pipe & Fittings Assn. v. California Bldg. Standards Com.* (2004) 124 Cal.App.4th 1390, 1410.) Construing section 490.2 to include theft by driving away a vehicle under $950, but to exclude the lesser act of joyriding the same vehicle, would violate equal protection.

Equal protection embodies the notion that "persons who are similarly situated with respect to a law's legitimate purposes must be treated equally." (People v. Martinez (2016) 5 Cal.App.5th 234, 243, citing People v. Brown (2012) 54 Cal.4th 314, 328.) Persons convicted of the same offense are considered "similarly situated" for equal protection purposes. (*People v. Olivas* (1976) 17 Cal.3d 236, 247, fn. 15; People v. Verba (2012) 210 Cal.App.4th 991, 996.) In *Olivas*, this court found a statutory scheme providing greater maximum confinement for offenders age 16 to 21 than for a person over 21 convicted of the identical offense violated equal protection. (*Olivas, supra*, 17 Cal.3d at p. 257.)

If, as *Olivas* held, persons convicted of identical offenses are similarly situated, it necessarily follows that a person convicted of a lesser

offense is similarly situated for equal protection purposes to a person convicted of a greater offense whom a statute treats more favorably. This court so held in *Newland v. Board of Governors* (1977) 19 Cal.3d 705, 710-713 [equal protection precluded a statutory scheme that permitted felony sex offenders to obtain certificate of rehabilitation and teaching credential, but denied same to misdemeanor sex offenders].) Accordingly, a person who joyrides a car is similarly situated with a person who drives away the same car to steal it, to the extent the law punishes the joyrider more harshly than the thief.

Once it is determined that two groups are similarly situated for equal protection purposes, and that the law disadvantages one relative to the other, it must be determined whether the government has a purpose justifying the law. At a minimum, the government must have a "rational basis" to justify the disparate treatment; but where the disparity involves a fundamental interest, the disparate treatment is subject to the higher standard of "strict scrutiny," meaning the government must demonstrate a "compelling" interest in maintaining the disparity. (*People v. Field* (2016) 1 Cal.App.5th 174, 195.) Personal liberty, i.e., one's interest in being free from incarceration, is a fundamental interest for equal protection purposes.

(People v. Olivas, supra, 17 Cal.3d at pp. 246-251; *People v. Field*, *supra*, 1 Cal.App.5th at pp. 194; In re Mabie (1984) 159 Cal.App.3d 301, 307.)

Here, the government cannot demonstrate a rational basis, much less a compelling interest, in punishing vehicle theft by driving a car away as a misdemeanor, while punishing the lesser included offense of joyriding the same car as a felony. Nothing in the legislative history of Proposition 47 suggests the drafters or the electorate were even aware of the anomalous treatment now urged by respondent. Accordingly, the drafters and voters had no basis for creating such a disparity. Nor could they. There is no conceivable justification for punishing a less culpable act more harshly than a more culpable act. And this is not a case where the two offenses are apples and oranges, with petitioner asking this court to make a legislative judgment as to which is more culpable. Instead, it is inescapable that joyriding is included within, and less culpable than, theft by driving the same vehicle away. Once again, this is because a joyrider drives a car away intending to use it temporarily, while the thief drives the vehicle away intending the same, and more, i.e., to permanently deprive the owner of the car.

The disparity urged by respondent not only confounds logic; it is fundamentally at odds with a primary purpose of Proposition 47–to reduce

the punishment for certain felonies based on their relatively low level of culpability. (*Harris v. Superior Court supra*, 1 Cal.5th at p. 992, citing Voter Information Guide, Gen. Elec. Prop. 47, § 2, p. 70.)

Accordingly, section 490.2 must be deemed to include joyriding a vehicle $950 or less, lest the statutory scheme violate equal protection. Because the jury may have convicted appellant of the act of joyriding, his felony conviction under section 10851 cannot stand and must be reduced to a violation of section 490.2.

e. Treating joyriding more severely than vehicle theft would violate the constitutional proscription against cruel and unusual punishment.

In *People v. Schueren* (1973) 10 Cal.3d 553, this court held it would violate the Eighth Amendment proscription against cruel and unusual punishment if a greater offense carried a lesser possible punishment than a lesser included offense. In *Schueren*, the defendant was charged with assault with a deadly weapon with the intent to commit murder (former § 217) and was convicted of the lesser included offense of assault with a deadly weapon under a former version of section 245. (*Schueren*, at pp. 555-556.) The defendant was sentenced under the indeterminate sentencing law then in effect to six months to life in prison. (*Id.* at p. 556.) The maximum term for violating greater, charged, offense (§ 217) would have

been 14 years. (*Ibid.*) This court held that any punishment greater than 14 years for the lesser included offense would be unconstitutionally unusual in violation of the Eighth Amendment. (*Id.* at pp. 560-561, fn. omitted.)

Similarly, it would be unusual within the meaning of the Eighth Amendment to construe section 490.2 to exclude joyriding. As detailed *ante*, theft of a vehicle by driving it away necessarily includes the lesser offense of joyriding the same vehicle. If section 490.2 were construed to exclude such an act of joyriding, the result would be that theft by driving away a vehicle $950 or less would carry a maximum punishment of 365 days in jail while the lesser included offense of joyriding the same vehicle would carry a maximum sentence of 3 years under section 10851. This would violate the Eighth Amendment under *People v. Schueren*, *supra*, and so this construction must be avoided, lest the statute itself be rendered unconstitutional.

II. THE DOCTRINES OF FORFEITURE AND DOUBLE JEOPARDY PRECLUDE THE PEOPLE FROM RETRYING PETITIONER FOR A FELONY VIOLATION OF SECTION 10851.

As detailed in section D-1 of petitioner's opening brief, at the time of trial in 2015, Proposition 47 was already in effect, and the People were thus aware section 490.2 had re-designated vehicle theft $950 or less a misdemeanor. Further, the People were aware this court had previously

held that driving away a vehicle with intent to permanently deprive in violation of Vehicle Code section 10851, subdivision (a), constituted "a form of theft." (*People v. Garza, supra*, 35 Cal.4th at p. 880.) Under these circumstances, in order to obtain a felony conviction it was incumbent on the prosecution to obtain a verdict establishing a post-taking act of driving, or that the vehicle's value exceeded $950.

Respondent argues that if this court finds the verdict does not establish a felony violation of section 10851, the proper remedy would be "to remand the matter to the trial court to permit the People to accept reduction of the conviction to a misdemeanor, or to retry the case." (RABOM p. 20, citing *In re J.R.* (2018) 22 Cal.App. 5th 805, 822; *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 856-858, 863; *People v. Figueroa* (1993) 20 Cal.App.4th 65, 72; *People v. Eagle* (2016) 246 Cal.App.4th 275, 280; and *U.S. v. Wacker* (10th Cir. 1995) 72 F.3d 1453, 1465.)

But as detailed in section D-1 of petitioner's opening brief, *Figueroa*, *Eagle*, and *U.S. v. Wacker* are inapposite because those cases permitted retrial where a conviction was undermined by a change in the law ***after the trial proceedings***, of which the prosecution had no notice. Here, by contrast, the handwriting was on the wall prior to trial in the form of

section 490.2 and *Garza*; the People either chose to ignore it or failed to comprehend it.

In re J.R. and *Gutierrez*, also discussed in detail in section D-1 of petitioner's opening brief, are apposite and do support respondent's position. However, the analysis of both cases is faulty in that it relies on prior cases permitting retrial because a change in the law, of which the prosecution could not have known, occurred ***after trial***. Specifically, *In re J.R.* relied on *U.S. v. Wacker*, which as noted above allowed retrial where the prosecution could not have known of the change in the law because it occurred after the trial. And *Gutierrez* relied on *People v. Chiu* (2014) 59 Cal.4th 155. (*Gutierriez, supra*, at pp. 857-858.) In *Chiu*, this court permitted retrial after reversing the defendant's conviction for premeditated murder after announcing an entirely new rule of law that premeditated murder could not be based on the natural and probable consequence theory of aiding and abetting. (See *In re Lopez* (2016) 246 Cal. App. 4th 350, 358 [*Chiu* "set forth a new rule of substantive law"].)

Here, by contrast, the prosecutor was aware at the time of trial that violating section 10851 by driving a car away to steal it was a form of "theft" (*Garza, supra*) and that Proposition 47 had enacted section 490.2, providing that "any" theft of $950 or less was a misdemeanor. In failing to

seek a verdict establishing petitioner drove the car separate from taking it, the prosecution either consciously gambled or else did not comprehend *Garza* and section 490.2. Either way, petitioner should not have to endure a second trial to permit the prosecution a do-over.

Petitioner urges this court to adopt the holding in *In re D.N.* (2018) 19 Cal.App.5th 898, 902-904, in which the Court of Appeal held retrial was precluded by double jeopardy under circumstances essentially identical to petitioner's case. There the court held that the enactment of Proposition 47, including section 490.2, prior to trial placed the People on notice of the statutory change adding the value element to the offense of felony theft–even though the Court of Appeal decisions were then 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.

(*In re D.N.*, *supra*, at p. 903.)

Similarly, the prosecution in petitioner's case was aware prior to trial both that section 490.2 had been enacted the prior year, declaring "any" theft of $950 or less to be a misdemeanor, and of *Garza*, in which this court

had held more than a decade earlier that violating section 10851 by driving a vehicle away to steal it was a form of "theft."

Respondent is correct that the law was not settled at the time of petitioner's trial because this court had not yet decided *Page.* But whether the law is settled is not the test. In *People v. Najera* (1972) 8 Cal.3d 504, 506, the court found the prosecution forfeited the right to a retrial of a firearm enhancement, despite lack of clarity in the law at the time of trial, where the prosecutor failed to take the foreseeable step of seeking a verdict that would have survived the change in the law which was afoot.

Similarly in, *People v. Perez* (2018) 22 Cal.App.5th 201, the court applied an identical forfeiture analysis–this time to inaction by defense counsel. In *Perez*, 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 Court of Appeal held the defense had forfeited the hearsay issue by failing to object, even though *Sanchez* had not been decided at the time of trial. (*Perez*, 22 Cal.App.5th at pp. 211-212.) 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 fact *Page* had not yet been decided. 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 $950 or less, including driving at the time of taking, was not a felony violation of section 10851. As in *Najera*, the prosecution could have sought a jury verdict resolving matter. The prosecution could have sought a verdict specifying whether a finding of guilt was based on petitioner's taking the vehicle, or instead on driving after the taking was complete. Alternatively, the prosecution could have sought a verdict finding the value of the vehicle exceeded $950; such a verdict would have mooted the question of when the act of driving occurred. The prosecution's failure to seek such a verdict forfeited any right to a retrial on these factual questions.

For these reasons, the prosecution should not be afforded an opportunity to retry petitioner for a felony violation of section 10851.

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 violation of section 490.2.

Dated: August 7, 2018

Respectfully submitted,

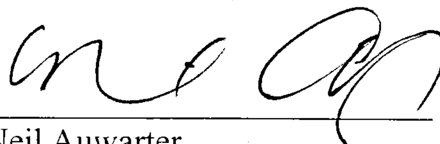
Neil Auwarter
Attorney for Petitioner
Henry Arsenio Lara II

CERTIFICATION OF WORD COUNT

I, Neil Auwarter, hereby certify that, according to the computer program used to prepare this document, petitioners reply breif on the merits contains 5,833 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 August 7, 2018 in San Diego, California.



Neil Auwarter
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PROOF OF SERVICE BY MAIL

Case Name: People v. Henry A. Lara

Supreme Court No. S243975
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 August 8, 2018, I served the attached

PETITIONER'S REPLY BRIEF ON THE MERITS

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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Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at San Diego, California on August 8, 2018.

Furthermore, I, Will Bookout, declare I electronically served from my electronic notification address of wrb@adisandiego.com, the same referenced above document on May 14, 2013, at 10:38 am to the following entity and electronic notification addresses: SDAG.Docketing@doj.ca.gov., Appellate-unit@rivcoda.org), appealsteam@riverside.courts.ca.gov

I declare under penalty of perjury that the foregoing is true and correct, and this declaration was executed at San Diego, California, on August 8, 2018

Will Bookout
(Typed Name)

Will Bookout
(Signature)