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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. MARK ANTHONY COLBERT Defendant and Appellant.	No. _____ Court of Appeal No. H042499 No. 206805 (Santa Clara County)

APPELLANT'S PETITION FOR REVIEW

On Appeal from an Order after Judgment of the Superior Court
of the State of California
for the County of Santa Clara

Honorable Linda Clark, Judge

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By appointment of the Court of Appeal
In Association with
The Sixth District Appellate Program

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	)	Court of Appeal No.
vs.	)	H042499
	)	
MARK ANTHONY COLBERT	)	No. 206805
	)	(Santa Clara
Defendant and Appellant.	)	County)
	)	

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Appellant Mark Anthony Colbert (hereinafter appellant) petitions this Court for review following the decision of the Court of Appeal, Sixth Appellate District, filed in that court on November 9, 2016 (See Exhibit A), and modified on November 18, 2016 (no change in judgment). (See Exhibit B). A copy of the decision of the Court of Appeal, including the dissenting opinion, is attached hereto as Exhibit C.

ISSUE PRESENTED FOR REVIEW

Does entry into a commercial establishment during business hours to commit larceny constitute "shoplifting" under Penal Code section 459.5 where the theft does not occur in an area of the business that is open to the public where merchandise is sold?

NECESSITY FOR REVIEW

This case presents a published conflict in the courts of appeal and raises a significant issue of statutory interpretation regarding the newly-enacted offense of shoplifting under Penal Code section 459.5.[1] Appellant urges this Court to grant review given the split in authority in the appellate courts—and the disagreement in the instant court of appeal—regarding an important issue of statewide importance that is likely to recur. Moreover, the majority opinion in this case creates tension with this Court's recent decision in *People v. Garcia* (2016) 62 Cal.4th 1116 (*Garcia*). Thus, this Court's guidance is necessary to resolve the division in the courts of appeal on an important matter that will likely continue to cause confusion in the appellate courts.

STATEMENT OF THE CASE

Following his felony convictions for four counts of second degree burglary (§§ 459, 460, subd. (b)) in 1998, appellant was sentenced to two years and eight months in prison. (CT 1-2.)

On November 4, 2014, the voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act," which went into effect the next day. Proposition 47 created a new resentencing provision under section 1170.18 and added section 459.5, defining the crime of "shoplifting" and

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[1] All further unspecified statutory references are to the Penal Code.

designating the crime as a misdemeanor.

On May 6, 2015, appellant, acting in propria persona, filed a "Petition to Redesignate Felony Conviction As Misdemeanor" pursuant to section 1170.18, subdivision (f), alleging his felony second degree burglary convictions in case No. 206805 should be redesignated as misdemeanor shoplifting convictions. (CT 7.)

On May 12, 2015, a denial order, authored by the Honorable Linda Clark, Judge of the Superior Court, was filed. (CT 12-13.) The order denied appellant's petition on the ground that the offenses—four counts of second degree burglary (§§ 459, 460, subd. (b))—were ineligible for redesignation under section 1170.18, subdivisions (a)-(b) because they did not constitute "shoplifting" under section 459.5. The order reasoned that the offenses were based upon entries into "private . . . office areas" rather than entries into commercial establishments that were open during business hours. (CT 13.) Further, the order reasoned the value taken in one of the counts exceeded $950, and, because the counts involved the same modus operandi, the value taken in that case "strongly suggested" that appellant intended to take over $950 in each case. (CT 13.)

On June 12, 2015, appellant filed a notice of appeal challenging the denial of his redesignation petition. (CT 15.)

On appeal, appellant contended the trial court erred in denying his

petition to redesignate three of his felony convictions as misdemeanor convictions on the ground that his conduct constituted misdemeanor shoplifting under the plain language of section 459.5 as enacted by the voters with Proposition 47.

In a published opinion, a majority of the appellate court affirmed the trial court's order denying appellant's petition to redesignate his felony convictions as misdemeanors, reasoning appellant's conduct did not meet the definition of shoplifting as provided in section 459.5.[2] (Exhibit C, pp. 1-4; 5 Cal.App.5th 385.) In his dissenting opinion, Presiding Justice Rushing disagreed, relying on the Second District Court of Appeal's decision in *People v. Hallam* (2016) 3 Cal.App.5th 905 (*Hallam*) in concluding appellant's conduct constituted misdemeanor shoplifting under section 459.5, assuming the property taken or intended to be taken did not exceed $950.[3] (Exhibit C, pp. 4-5; 5 Cal.App.5th 385.)

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[2] In its opinion, the majority noted it did not need to reach the alternative basis of the trial court's denial, i.e., that appellant intended to take property valued over $950. (Exhibit C, p. 4; 5 Cal.App.5th 385.) Nevertheless, the majority concluded that available evidence did not support the trial court's finding on that issue. (*Ibid.*)

[3] Specifically, the dissent concluded counts 1 and 2 constituted misdemeanor shoplifting because the value taken in each of those counts did not exceed $950. (Exhibit C, p. 5; 5 Cal.App.5th 385.) As to count 4, the dissent stated that remand for further proceedings was necessary to determine whether the amount intended to be taken exceeded $950. (*Ibid.*) The dissent also noted that further proceedings were required to determine whether appellant posed a risk of danger to society. (*Ibid.*)

STATEMENT OF THE FACTS[4]

Facts Relating to Count 1[5]

On December 26, 1996, appellant and his accomplice entered a convenience store of a Shell gas station in Campbell. (Exhibit C, p. 2; 5 Cal.App.5th 385.) Appellant spoke with the clerk about lottery tickets while his accomplice took about $300 from the store's back office. (*Ibid.*)

Facts Relating to Count 2

On December 30, 1996, appellant and his accomplice entered a 7-Eleven store in Sunnyvale during business hours. (Exhibit C, p. 2; 5 Cal.App.5th 385.) While appellant scratched lottery tickets, his accomplice went into a hallway that led to a back office and took roughly $316. (*Ibid.*)

Facts Relating to Count 4

On January 27, 1997, appellant and his accomplice entered a 7-Eleven store in Los Gatos during business hours. (Exhibit C, p. 2; 5 Cal.App.5th 385.) While appellant asked for lottery tickets, his accomplice

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[4] On November 4, 2015, the Court of Appeal denied appellant's request for judicial notice of the trial record in Santa Clara County Superior Court case No. 206805. (See Exhibit C, p. 5, fn. 2; 5 Cal.App.5th 385.) Instead, on its own motion, the appellate court took judicial notice of its unpublished opinion on the direct appeal from that case, *People v. Colbert* (Feb. 29, 2000, H019315). (*Ibid.*) It also derived the amounts taken in each burglary from the trial court's order denying appellant's petition for redesignation. (Exhibit C, p. 5, fn. 3; 5 Cal.App.5th 385.)

[5] Since count 3 involved a taking over $950, count 3 does not constitute shoplifting under section 459.5. Thus, the facts relating to that count are not discussed.

went to the back office. (*Ibid.*) An employee discovered the accomplice inside the office, before the accomplice took anything. (*Ibid.*)

ARGUMENT

Entry Into a Commercial Establishment During Business Hours to Commit Larceny Constitutes Misdemeanor Shoplifting Under Section 459.5 Where the Theft Ultimately Occurs In An Area That Is Not Open to The Public Where Merchandise Is Sold, And This Court Should Grant Review of This Case To Resolve A Published Conflict In the Courts of Appeal On An Issue of Statewide Importance That Is Likely to Recur.

Here, the trial court erred in denying appellant's petition to redesignate his felony convictions as misdemeanors pursuant to Proposition 47 because the second degree burglary offenses at issue here constituted misdemeanor shoplifting under section 459.5. This is so because appellant's felony offenses satisfied the elements of section 459.5 as his convictions were based on his entries into commercial establishments that were open during business hours and involved thefts of property valued at $950 or less. While the majority here held otherwise, the Second District Court of Appeal in *Hallam, supra,* 3 Cal.App.5th 905 and the dissenting opinion in this case properly recognized that appellant's conduct constituted misdemeanor shoplifting even though the ultimate thefts occurred in areas that were not open to the public where merchandise was sold.

Given the conflict in the appellate courts, this Court should grant

review on this issue of statutory interpretation and hold that the offense of misdemeanor shoplifting does not require that the taking occur in a specific area of the commercial establishment that is open to the public where goods are sold.

I. Basic Legal Principles

The basic rules for statutory construction are well settled. "As in any case involving statutory interpretation, our fundamental task here is to determine the Legislature's intent so as to effectuate the law's purpose." (*People v. Murphy* (2001) 25 Cal.4th 136, 142.) "We begin with the plain language of the statute, affording the words of the provision their ordinary and usual meaning and viewing them in their statutory context, because the language employed in the Legislature's enactment generally is the most reliable indicator of legislative intent." (*People v. Watson* (2007) 42 Cal.4th 822, 828; accord *Catlin v. Superior Court* (2011) 51 Cal.4th 300, 304.) The plain meaning controls if there is no ambiguity in the statutory language. (*People v. King* (2006) 38 Cal.4th 617, 622.) If, however, "the statutory language may reasonably be given more than one interpretation, ' " 'courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.' " ' " (*Ibid.*; see also *People v. Cornett* (2012) 53 Cal.4th 1261, 1265.) " 'In interpreting a voter

initiative . . . we apply the same principles that govern statutory construction. [Citation.]' " (*People v. Briceno* (2004) 34 Cal.4th 451, 459.)

" 'On November 4, 2014, the voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47), which went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).)' " (*People v. Contreras* (2015) 237 Cal.App.4th 868, 889, citation omitted.) Proposition 47 created a new resentencing provision under section 1170.18. (*Id.* at p. 891.) Under section 1170.18, subdivision (f), "[a] person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

In addition, Proposition 47 added section 459.5 to the Penal Code. (*Contreras, supra,* 237 Cal.App.4th at p. 890.) Section 459.5 defines the crime of "shoplifting" and designates the crime as a misdemeanor. Section 459.5 states in relevant part: " . . . shoplifting is defined as entering a commercial establishment with intent to commit larceny while the establishment is open during regular business hours, where the value of the

property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with the intent to commit larceny is burglary."

"Larceny requires the taking of another's property, with the intent to steal and carry it away. 'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.' " (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255, citations and footnote omitted.) "[L]arceny requires a 'trespassory taking,' which is a taking without the property owner's consent. [Citation.]" (*People v. Williams* (2013) 57 Cal.4th 776, 788.)

Because this claim raises an issue of statutory interpretation, the de novo standard of review applies. (*Doe v. Brown* (2009) 177 Cal.App.4th 408, 417 [applying de novo standard of review to a claim involving the denial a petition for writ of mandate where the claim was based on an issue of statutory interpretation].)

II. Appellant's Conduct Constituted Misdemeanor Shoplifting Under Section 459.5 As Provided By the Voters In Enacting Proposition 47, and Thus, The Trial Court Erred In Denying His Petition to Redesignate His Felony Convictions as Misdemeanors.

In this case, appellant's conduct constituted misdemeanor shoplifting under the plain language of section 459.5 since the offenses at issue were based on appellant's entries into commercial establishments during

business hours and involved takings or the intended taking of property not exceeding $950. This is so even though the thefts ultimately occurred in areas of the commercial establishments that were not open to the public where goods were sold, as recognized by the Second District Court of Appeal in *Hallam, supra,* 3 Cal.App.5th 905 and by the dissent in this case.

In *Hallam*, the Second District Court of Appeal held the appellant's conduct in that case constituted misdemeanor shoplifting as defined in section 459.5 where the appellant entered a store through the back entrance and committed theft of an air compressor in an employee rest room. (*Hallam, supra,* 3 Cal.App.5th at pp. 908, 911.) In reversing the trial court's order denying the appellant's petition for resentencing and to redesignate his offense as misdemeanor shoplifting, the appellate court in that case rejected the trial court's reasoning that the statute " 'anticipates' " entry into an area of a commercial establishment to which the public has access and where merchandise is sold. (*Id.* at p. 909.) Instead, the *Hallam* court stated: "we find no indication that shoplifting can occur only in specific areas of a commercial establishment," "[n]or does there appear any requirement that the business's commercial activity must be taking place in the area from which the theft occurs in order to qualify the offense as shoplifting." (*Id.* at p. 912.) The court in *Hallam* concluded that the trial court "added an element to the offense that is absent from the plain

language of the statute itself when it determined that appellant's theft would qualify as shoplifting only if it occurred in an area of the commercial establishment open to the public where merchandise is sold." (*Ibid.*)

In holding that the appellant's conduct constituted misdemeanor shoplifting, the *Hallam* court found support in the reasoning of *In re J.L.* (2015) 242 Cal.App.4th 1108, which held that a high school was not a commercial establishment as required for shoplifting under section 459.5. (*Id.* at pp. 1115-1116.) The *Hallam* court noted that the appellate court in *J.L.* "applied its commonsense interpretation of 'commercial establishment' not to a single room or area within a commercial venue, but to an entire school facility, and concluded that '[a] public high school is not an establishment primarily engaged in the sale of goods and services; rather, it is an establishment dedicated to the education of students.' " (*Hallam, supra,* 3 Cal.App.5th at pp. 912-913.)

Furthermore, the *Hallam* court also found guidance in this Court's recent decision in *Garcia, supra,* 62 Cal.4th 1116. (*Hallam, supra,* 3 Cal.App.5th at pp. 913-914.) In *Garcia*, this Court reversed dual burglary convictions on the grounds that insufficient evidence established a rest room in a commercial establishment afforded "its occupants a separate and reasonable expectation of protection from intrusion and danger, beyond that provided by the shop itself." (*Garcia, supra,* 62 Cal.4th at p. 1120.) In

Garcia, this Court explained: "Where a burglar enters a structure enumerated under section 459 with the requisite felonious intent, and then subsequently enters a room within that structure with such intent, the burglar may be charged with multiple burglaries only if the subsequently entered room provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure. Such a separate expectation of privacy and safety may exist where there is proof that the internal space is owned, leased, occupied, or otherwise possessed by a distinct entity; or that the room or space is secured against the rest of the space within the structure, making the room similar in nature to the stand-alone structures enumerated in section 459." (*Id.* at pp. 1119-1120.) This Court continued by pointing out various features—such as a locked door and signs to prevent unauthorized access—that would indicate an interior room had the same type of enhanced expectation of privacy and security as a separate structure (*id.* at p. 1129). This Court further noted that these characteristics demonstrate "a separate and objectively reasonable expectation of protection from intrusion, distinct from that provided by the security of the overarching structure." (*Id.* at p. 1127.)

As in *Garcia*, the *Hallam* court concluded that, while the rest room was separate from the main area of the business and was not generally open to the public, the rest room only provided " 'a limited transitory source of

privacy.' " (*Hallam, supra,* 3 Cal.App.5th at p. 913, quoting *Garcia, supra,* 62 Cal.4th at p. 1132.) The appellate court in *Hallam* noted that "there appeared to be no obstacles to gaining entry to this 'employee area.' " (*Hallam, supra,* 3 Cal.App.4th at pp. 913-914.) The *Hallam* court concluded that "[t]he area thus lacked any objective indications of a heightened expectation of privacy and security beyond what the store itself provided such that the offense should be deemed burglary rather than shoplifting." (*Id.* at p. 914.)

Here, in contrast, the majority affirmed the trial court's denial of appellant's petition for resentencing and redesignation, and held his felony convictions did not meet the definition of misdemeanor shoplifting because the thefts ultimately occurred in "separate office areas—areas off-limits to the general public—within [the] establishment[s]." (Exhibit C, p. 3; 5 Cal.App.5th 385.) It reasoned that, "by crossing the threshold into these office areas[,] . . . [appellant] and his accomplice exit[ed] the 'commercial' part of the establishment and enter[ed] a discrete area where their thefts could not be considered shoplifting." (*Ibid.*) The majority emphasized the office areas where the ultimate takings and intended taking occurred "were not areas in which goods were bought and sold." (Exhibit C, p. 4; 5 Cal.App.5th 385.) The majority opined that appellant had no interest "in stealing the goods on offer in these establishments" since his accomplice

"intrud[ed] into private areas where the employees were likely to keep their personal belongings . . . and where the business was likely to store larger amounts of cash." (*Ibid.*)

In his dissenting opinion, Presiding Justice Rushing disagreed with the majority, and concluded appellant's conduct constituted misdemeanor shoplifting under the plain language of section 459.5. (Exhibit C, pp. 4-5; 5 Cal.App.5th 385.) He reasoned that the offense of shoplifting was complete once appellant and his accomplice entered the commercial establishments and their conduct inside the establishments merely evidenced their intent to commit larceny. (Exhibit C, p. 5; 5 Cal.App.5th 385.) He noted that neither section 459.5 nor any other authority excludes nonpublic areas from the definition of a commercial establishment. (*Ibid.*) He also opined that a defendant cannot " 'exit' an establishment by entering an office inside it." (*Ibid.*) The dissenting opinion also found the reasoning of *Hallam, supra,* persuasive, and noted it was "squarely on point" with the instant case. (*Ibid.*)

As persuasively explained by the Second District Court of Appeal in *Hallam* and the dissenting opinion in this case, the majority here is incorrect in holding that appellant's conduct did not constitute misdemeanor shoplifting. When appellant entered the commercial establishments with the requisite intent, the shoplifting offenses were

complete. There was no "exiting" the commercial part of the establishment by entering an interior, non-commercial part of the establishment, as the majority suggests. Instead, as noted by the dissent, the commission of the thefts in interior office areas merely evidenced appellant's larcenous intent when he made his initial entries into the commercial establishments. Thus, it is irrelevant that the thefts ultimately occurred in interior office areas.

Regardless, even if the offenses were based on appellant's accomplice's entries into these separate areas, these interior office areas were *part of* the greater commercial establishment; therefore, the conduct would still constitute misdemeanor shoplifting as the offenses would still be based on entries into commercial establishments. (*Hallam, supra,* 3 Cal.App.5th at pp. 912-913 [recognizing that "commercial establishment" does not apply to a single room or area within a venue, but to an entire facility]; *see also J.L., supra,* 242 Cal.App.4th at pp. 1115-1116.) As pointed out by the appellate court in *Hallam* and by the dissent in this case, section 459.5 contains no requirement that the offense of shoplifting occur in an area of a commercial establishment that is open to the public where goods are sold. Moreover, there were no specific characteristics of these office areas that indicated they shared the same level of privacy as a non-commercial, stand-alone structure "such that the offense should be deemed burglary rather than shoplifting." (*Hallam, supra,* 3 Cal.App.4th at p. 914,

relying on *Garcia, supra,* 62 Cal.4th at pp. 1119-1127.) Thus, even if the offenses were based on distinct entries into the separate office areas, appellant's conduct occurred within commercial establishments. Therefore, his conduct met the definition of shoplifting under section 459.5.

In sum, since appellant's burglary convictions were based on entries into commercial establishments during business hours and involved less than $950, the offenses at issue constituted shoplifting under section 459.5. Therefore, the trial court erred in denying appellant's petition to redesignate these convictions as misdemeanor shoplifting convictions.

III. This Court Should Grant Review Because The Majority Created A Published Conflict On An Important Issue of Statutory Interpretation That is Likely to Recur.

As outlined above, the majority opinion creates a published conflict in the courts of appeal regarding an important issue of statutory interpretation. (See *Hallam, supra,* 3 Cal.App.5th 905.) Thus, the Court should grant review of this case because this Court's guidance is necessary to resolve this split in authority on an issue of statewide importance.

Moreover, this Court should grant review of this case to ensure that the instant majority opinion does not create further confusion regarding the definition of shoplifting—a matter likely to recur with frequency in the courts of appeal—nor undermine this Court's recent holding in *Garcia, supra,* 62 Cal.4th 1116.

CONCLUSION

This Court should grant review of this case, reverse the majority opinion, and hold the trial court erred in denying appellant's petition for redesignation pursuant to Proposition 47.

DATED: December 12, 2016

Respectfully submitted,

By: _____

Kimberly Taylor
Attorney for Appellant
Mark Anthony Colbert

CERTIFICATE OF WORD COUNT

I certify that, according to my word processing software, this petition contains 3,670 words excluding the cover page, tables and the case caption on page 1.

I declare under penalty under the laws of the state of California that this declaration is true and correct. Executed at Alameda, California on December 12, 2016.

KIMBERLY TAYLOR
Attorney for Appellant
Mark Anthony Colbert

EXHIBIT A

Filed 11/9/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARK ANTHONY COLBERT, Defendant and Appellant.	H042499 (Santa Clara County Super. Ct. No. 206805)

Defendant Mark Anthony Colbert appeals from an order denying his petition to redesignate certain felony convictions as misdemeanors under Proposition 47, the Safe Neighborhoods and Schools Act. On appeal, Colbert contends the trial court erred in ruling these convictions were eligible for redesignation.[1]

We find no merit to Colbert's arguments and will affirm the order.

I. FACTUAL AND PROCEDURAL BACKGROUND[2]

Following his conviction on four felony counts of second degree burglary (Pen. Code, §§ 459, 460, subd. (b)), Colbert was sentenced to a total term of two years eight months in prison, consecutive to a six year prison term he incurred due to a robbery he committed in San Mateo County while out on bail on the burglary charges.

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

[2] By order dated November 4, 2015, we denied Colbert's request to take judicial notice of the trial record in Santa Clara County Superior Court case No. 206805. On the court's own motion, we take judicial notice of this court's unpublished opinion on the direct appeal from that case, *People v. Colbert* (Feb. 29, 2000, H019315).

A. Facts relating to Count 1

"On December 26, 1996, while Susan Welter, the manager of a Shell service station in Campbell, California, saw one Black man talking to a clerk about lottery tickets, another Black man took money from the back office. Welter was shown a photo lineup almost a year after the incident and identified the man who was talking about lottery tickets. The clerk was unable to positively identify anyone." (*People v. Colbert, supra*, H019135.)

"[A]bout $300 in cash was taken [in this burglary]."[3]

B. Facts relating to Count 2

"On December 30, 1996, Maria Ramirez, the manager of a 7-Eleven store in Sunnyvale, saw two men enter the store together and then separate. One stayed at the front register and purchased lottery tickets and the other went to a back room, came out of it, and left the store. The other then left the store. Both men were six feet tall and were between the ages of 20 to 30 years old. Appellant is under six feet tall and was 40 years old." (*People v. Colbert, supra*, H019135.)

The trial court's May 12, 2015 order noted that "approximately $318 dollars [*sic*] was taken [in this burglary]."

C. Facts relating to Count 3

"On January 6, 1997, Chuong Doan was working at a 7-Eleven store in Los Gatos when two Black men entered the store. The taller man asked to use the rest room, which Doan would not allow. While the shorter man bought a lottery ticket, the taller man 'just walked through.' They then left the store together. Thu Cates, the franchisee, saw a Black man closing the door to the office and later found a bank deposit bag missing.

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[3] Our prior unpublished opinion did not specify the amounts taken in each burglary, with the exception of count 4 in which no money was taken. With respect to counts 1, 2 and 3 we derive the amounts taken from the trial court's May 12, 2015 order denying Colbert's petition for redesignation.

When the man saw Thu, he stated that he was looking for the bathroom. She was unable to identify anyone in a photo lineup. Another employee on her way to work saw two Black men, one with lotto tickets in his hand, get into a maroon car with a dent on the side. She was unable to identify anyone in a photo lineup.

"However, a month later, Doan identified appellant from the photo lineup, and at the preliminary hearing in May 1997, he identified appellant as a man who had been in the store. At trial he was unable to positively identify appellant." (*People v. Colbert, supra*, H019135.)

According to the trial court's May 12, 2015 order, the bank deposit bag taken in this burglary contained "more than $3000."

D. Facts relating to Count 4

"On January 27, 1997, Mohammed Elissa, cashier at a 7-Eleven store in Los Gatos, observed two Black men enter the store together and then split up. The shorter one remained at the cash register and was involved with lottery tickets and the taller man proceeded to the wine cooler and 'vanished.' Elissa went to the store office and saw the tall man with a cup of coffee. The man said he was looking for the manager and then he left the area. The tall man told the other to pay for the coffee, which he did. The two men left the store together. Elissa wrote down the license plate number of their car. The tall man asked Elissa if there was a problem. No money was missing from the store on January 27. About a week after the incident, Elissa identified appellant in a photo lineup as the shorter man." (*People v. Colbert, supra*, H019135.)

E. Colbert's petition to redesignate under Proposition 47

On May 6, 2015, Colbert petitioned the trial court to redesignate certain of his felony convictions for second degree burglary as misdemeanors pursuant to section 1170.18, subdivision (f). By written order dated May 12, 2015, the trial court denied Colbert's petition, finding that he was not eligible for the relief requested. The trial court noted that, in each case, "[Colbert] and an accomplice entered an establishment

and, while one of them distracted the cashier . . . , the other snuck into the non-public areas of the building to commit the intended thefts." As a result, the offenses were based "upon entry into a private . . . office area and not a commercial establishment that was open during business hours" and could not qualify as "shoplifting" under section 459.5. As an additional basis for denying relief, the trial court noted that the amount stolen in count 2 was over $950. Because Colbert and his accomplice employed the same "modus operandi" in each theft, it "strongly suggests that the amount *intended to be taken* in each case exceeded $950."

Colbert timely appealed.

II. DISCUSSION

Colbert argues he was entitled to redesignation of the three counts at issue because they all involved theft of less than $950 from a commercial establishment during business hours. According to Colbert, the trial court erred by finding that the thefts were based on entry into "private . . . office area." He further argues it erred by finding, without any supporting evidence, that Colbert and his companion "intended to take" more than $950 from the stores they entered.

A. Overview of Proposition 47

Under Proposition 47, an individual who has completed his or her sentence for a felony conviction can file a petition with the trial court to have the conviction designated as a misdemeanor, so long as that conviction would have qualified as a misdemeanor under Proposition 47 had its provisions been in effect at the time of the offense. (§ 1170.18, subd. (f).) If a petitioner's application satisfies the requirements set forth under section 1170.18, subdivision (f), the court "shall designate the felony offense or offenses as a misdemeanor." (*Id.*, subd. (g).)[4] No hearing is necessary in order to grant an application filed under section 1170.18, subdivision (f). (*Id.*, subd. (h).)

[4] A petitioner is not eligible to have his felonies designated as misdemeanors if he or she has one or more prior convictions for an offense specified in section 667,