In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA	)	
	)	Case No. S239488
Plaintiff and Respondent,	)	
	)	
v.	)	(4th Crim. B263164)
	)	
JULIAN MICAH BULLARD,	)	(Sup.Ct.No. FVI11200894)
	)	
Defendant and Appellant,	)	
	)	
	)	

SUPREME COURT
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Deputy

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF SAN BERNARDINO COUNTY
THE HONORABLE JOHN P. VANDER FEER, JUDGE

PETITIONER AND APPELLANT'S BRIEF ON THE MERITS

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By appointment of the Supreme Court

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TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

PETITIONER AND APPELLANT'S BRIEF ON THE MERITS 8

INTRODUCTION 9

STATEMENT OF THE CASE 10

STATEMENT OF FACTS 12

ARGUMENT 13

I. THE ABSURD CONSEQUENCES DOCTRINE REQUIRES THAT PETITIONER'S CONVICTION FOR THE UNLAWFUL DRIVING OF A MOTOR VEHICLE UNDER VEHICLE CODE SECTION 10851 BE TREATED THE SAME WAY AS A CONVICTION FOR THE UNLAWFUL TAKING OF A VEHICLE IS NOW TREATED UNDER *PEOPLE V. PAGE* 13

A. Vehicle Code Section 10851. 14

B. People v. Page 15

C. The Absurd Consequences Doctrine 16

D. Excluding Those Convicted Of Merely Driving, Or Taking A Vehicle Without The Intent To Permanently Deprive The Owner Of Possession, From Proposition 47 Relief Would Lead To Absurd Consequences 20

II. THE EQUAL PROTECTION CLAUSE ALSO REQUIRES THAT PETITIONER'S CONVICTION FOR THE UNLAWFUL DRIVING OF A MOTOR VEHICLE UNDER VEHICLE CODE SECTION 10851 BE TREATED THE SAME WAY AS A CONVICTION FOR THE UNLAWFUL TAKING OF A VEHICLE IS NOW TREATED UNDER *PEOPLE V. PAGE* 24

A. The Two Classes Of Thieves Are Similarly Situated 25

B. The Law Must Not Discriminate Against A Lesser Offender 26

C. Standard Of Review For Disparate Treatment 27

D. There Is No Rational Basis For Disparate Treatment 31

III. EVEN IF THE HOLDING OF PEOPLE V. PAGE IS NOT EXTENDED TO THOSE NOT CONVICTED OF A THEFT-BASED VIOLATION OF VEHICLE CODE SECTION 10851, SUBDIVISION (A), THE MATTER MUST BE REMANDED SO THE SUPERIOR COURT CAN MAKE A FACTUAL DETERMINATION AS TO WHETHER PETITIONER STOLE THE CAR 34

CONCLUSION 35

WORD COUNT CERTIFICATION 36

PROOF OF SERVICE 37

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Apprendi v. New Jersey (2000)
530 U.S. 466 [147 L.Ed 2d 435, 120 S.Ct. 2348] 30

Nordlinger v. Hahn (1992)
505 U.S. 1 [120 L.Ed.2d 1, 112 S. Clerk's Transcript. 2326] 32

Romer v. Evans (1996)
517 U.S. 620 [134 L.Ed.2d 855, 116 S.Ct. 1620] 27

Wygant v. Jackson Board of Education (1986)
476 U.S. 267 [90 L.Ed.2d 260, 106 S.Ct. 1842] 30

STATE CASES

Brown v. Superior Court (1984)
37 Cal.3d 477 . . . . 19, 20

In re Lance W. (1985)
37 Cal.3d 873 22

Cooley v. Superior Court (2002)
29 Cal.4th 228 25

Harris v. Superior Court (2016)
1 Cal.5th 984 . . . . 22, 23, 33

Johnson v. Department of Justice (2015)
60 Cal.4th 871 25

Kasler v. Lockyer (2000)
23 Cal.4th 472 27

Lungren v. Deukmejian (1988)
45 Cal.3d 727 21

Newland v. Board of Governors (1977)
19 Cal.3d 705 26

People v. Alvarez (2001)
88 Cal.App.4th 1110 27

People v. Austin (1981)
30 Cal.3d 155 28

People v. Barrick (1982)
33 Cal.3d 115 14

People v. Brown (2012)
54 Cal.4th 314 25

People v. Cole (2007)
152 Cal.App.4th 230 30

People v. Cook (2015)
60 Cal.4th 922 16

People v. Cruz (1996)
13 Cal.4th 764 17

People v. Garza (2005)
35 Cal.4th 866 . . . . 14, 15

People v. Hofsheier (2006)
37 Cal.4th 1185 . . . . 25, 27, 31, 32

People v. Jackson (1985)
37 Cal.3d 826 . . . . 19, 23

People v. Jaramillo (1976)
16 Cal.3d 752 14

People v. Olivas (1976)
17 Cal.3d 236 . . . . 28, 30

People v. Page (2017)
3 Cal.5th 1175 .... 9, 11, 13, 15, 16, 21, 23, 24, 26, 29, 34, 35

People v. Pieters (1991)
52 Cal.3d 894 .... 17, 18, 21, 23

People v. Romanowski (2017)
2 Cal.5th 903 .... 15, 21, 22, 33

People v. Rubalcava (2000)
23 Cal.4th 322 .... 17, 23

People v. Van Orden (2017)
9 Cal.App.5th 1277 16

People v. Williams (1983)
140 Cal.App.3d 445 28

Warden v. State Bar (1999)
21 Cal.4th 628 .... 27, 31, 32

Younger v. Superior Court (1978)
21 Cal.3d 102 .... 16, 17, 18, 23

STATE CONSTITUTION

Article:

I, § 7 24

STATE STATUTES

Code of Civil Procedure:

395 20

Government Code section:

12965 20

Health and Safety Code sections:

11361.5 18

11370.4 .... 18, 19

Penal Code sections:

17 21

490.2 .... 9, 13, 15, 16, 21, 24, 25

667 19

1170 14

1170.1 .... 18, 19

1170.18 .... 9, 13, 15, 16, 24, 25, 29

Vehicle Code section:

10851 .... 9, 10, 13 - 16, 20 - 24, 26, 29 - 31, 33 - 35

Other source:

Voter Information Guide, Gen. Elec., Prop. 47 .... 22, 25, 33

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PETITIONER AND APPELLANT'S BRIEF ON THE MERITS

INTRODUCTION

This Court originally granted review and held the instant case pending its decision in *People v. Page*. On February 21, 2018, the Court ordered the parties to brief the following question: "Does equal protection or the avoidance of absurd consequences require that misdemeanor sentencing under Penal Code section 490.2 and 1170.18 extend not only to those convicted of violating Vehicle Code section 10851 by theft, but also those convicted of taking a vehicle without the intent to permanently deprive the owner of possession? (See *People v. Page* (2017) 3 Cal.5th 1175, 1188, fn. 5.)"

The short answer to the Court's question is that treating those convicted of merely driving a vehicle in violation of Vehicle Code section 10851 more harshly than those who stole the vehicle would lead to absurd consequences. Doing so would also violate the equal protection clause of both the state and federal constitutions. For these reasons, petitioner urges this Court to hold that anyone convicted of violating Vehicle Code section 10851, no matter the underlying facts, is entitled to the ameliorative benefits of Proposition 47 if the value of the vehicle involved was worth $950 or less.

STATEMENT OF THE CASE

On April 23, 2012, Bullard waived his constitutional rights and pled guilty to a violation of Vehicle Code section 10851, subdivision (a). Pursuant to the terms of the plea agreement, the court sentenced Bullard to the low-term of one year, four months. (Slip Opn. p. 3.)

On March 9, 2016, Bullard filed a petition, pursuant to Proposition 47, to have his conviction reduced to a misdemeanor. On April 15, 2016, the Superior Court denied the petition, finding that a conviction suffered under Vehicle Code section 10851, subdivision (a) is not a qualifying offense under Proposition 47. Bullard filed a timely notice of appeal. (Slip Opn. 3.)

On December 12, 2016, the Court of Appeal affirmed the denial of the Proposition 47 petition, finding that convictions suffered under Vehicle Code section 10851 do not qualify. Justice Miller, in dissent, opined that some convictions suffered under section 10851 qualify for reduction under Proposition 47. Justice Miller concurred in the result because the justice believed that Bullard failed to prove that the vehicle involved was worth $950 or less and also failed to show that he intended to permanently deprive the owner of the vehicle of possession thereof.[1] (Opn. Justice Miller p. 1.)

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[1]/ Petitioner believes the police report relied upon by the majority opinion demonstrates the value of the vehicle was only $500. (Slip Opn. p. 2.)

On February 22, 2017, this Court granted review and held this case pending the opinion in *People v. Page* (2017) 3 Cal.5th 1175. On February 21, 2018, the Court asked the parties to brief an equal protection/absurd consequences issue, which was framed by the Court in its order. The issue was not raised by petitioner in his Court of Appeal briefing or in his petition for review.

STATEMENT OF FACTS

Relying on a police report, the Court of Appeal described the facts surrounding Bullard's arrest as follows:

> "In April 2012, defendant stayed overnight at his girlfriend's residence in Apple Valley, California. On the morning of April 11, 2012, defendant took his girlfriend's car keys from her purse without her permission and took her 1993 Lincoln Towncar while she was not home. Later that night, hours after his girlfriend reported the vehicle stolen, defendant agreed to meet his girlfriend and return her vehicle. Police were waiting for defendant at his girlfriend's place of employment when he showed up to drop off the vehicle and arrested him. The vehicle had approximately 260,000 miles on it and was valued at $500." (Slip Opn. 2.)

ARGUMENT

I.

THE ABSURD CONSEQUENCES DOCTRINE REQUIRES THAT PETITIONER'S CONVICTION FOR THE UNLAWFUL DRIVING OF A MOTOR VEHICLE UNDER VEHICLE CODE SECTION 10851 BE TREATED THE SAME WAY AS A CONVICTION FOR THE UNLAWFUL TAKING OF A VEHICLE IS NOW TREATED UNDER *PEOPLE V. PAGE.*

This Court asked the parties to address an issue left open in the Court's recent opinion in *People v. Page, supra,* 3 Cal.5th 1175: "Does equal protection or the avoidance of absurd consequences require that misdemeanor sentencing under Penal Code section 490.2 and 1170.18 extend not only to those convicted of violating Vehicle Code section 10851 by theft, but also those convicted of taking a vehicle without the intent to permanently deprive the owner of possession?" Petitioner argues that under both the doctrine of absurd consequences, as well as the equal protection clause, that the ameliorative benefits of Proposition 47, which this Court extended in *Page* to those convicted of stealing a car under Vehicle Code section 10851, subdivision (a), also apply to those convicted of merely driving or temporarily depriving the owner of possession of his or her automobile.

A. Vehicle Code Section 10851.

Vehicle Code section 10851, subdivision (a), provides in relevant part as follows:

> "(a) Any 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, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment." (Veh. Code, § 10851, subd. (a).)

This Court has found that this often confusing statute "proscribes a wide range of conduct." (*People v. Garza* (2005) 35 Cal.4th 866, 876.) Specifically, the Court has held that "a person can violate that section by driving or taking a vehicle. The acts constituting driving a vehicle and taking a vehicle are separate and distinct." (*People v. Barrick* (1982) 33 Cal.3d 115, 135, citing *People v. Jaramillo* (1976) 16 Cal.3d 752, 759, fn. 6.) Thus, while a defendant can violate section 10851 by stealing the vehicle, he can also do so simply by driving the vehicle after the theft occurs. And, according to this Court, "a conviction under section 10851(a) for posttheft driving is not a theft conviction . . . ." (*People v. Garza, supra,* 35 Cal.4th at p. 871.) "The same is true when

a defendant acted with intent only to deprive the owner *temporarily* of possession. Regardless of whether the defendant drove or took the vehicle, he did not commit auto theft if he lacked the intent to steal." (*People v. Page, supra,* 3 Cal.5th at p. 1183 [emphasis in original], citing *People v. Garza, supra,* 35 Cal.4th at p. 871.)

B. People v. Page

In *People v. Page, supra,* 3 Cal.5th 1175, this Court opined that the lower courts which had held defendants convicted under Vehicle Code section 10851 were "categorically ineligible for resentencing under Proposition 47" were incorrect. (*Id.,* at p. 1180.) The Court relied on its earlier decision in *People v. Garza, supra,* 35 Cal.4th 866, where it explained that a defendant who has been convicted under Vehicle Code section 10851 for taking a vehicle with the intent to permanently deprive the owner of the vehicle had been convicted of a theft offense. (*Id.,* at p. 871.) In the context of Proposition 47, this Court has explained that wrongfully obtaining any property valued at $950 or less constitutes a petty theft. (*People v. Romanowski* (2017) 2 Cal.5th 903, 908.)

This Court concluded, therefore, that while "Penal Code section 1170.18 (section 1170.18) does not expressly refer to Vehicle Code section 10851, . . . it does permit resentencing to a misdemeanor under Penal Code section 490.2 (section 490.2) for theft of property worth $950 or less." (*People v. Page, supra,* 3 Cal.5th at p. 1180.) "As a result, after the passage of Proposition 47, an offender who obtains a car valued at less

than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision." (*Id.*, at p. 1183, citing *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1288, rev. granted June 14, 2017, S241574.) Further, anyone so convicted and sentenced prior to the passage of Proposition 47 is entitled to have that conviction reversed to a misdemeanor. (See Pen. Code, § 1170.18, subd. (a).)

In reaching its decision in *People v. Page,* this Court did "not reach defendant's alternative contentions that a statutory distinction between automobile thieves convicted under the two statutes would be absurd or would violate equal protection principles." (*Id.*, at pp. 1187 - 1188.) The Court also noted, in footnote 5, that it did not have occasion "to consider whether equal protection or the avoidance of absurd consequences requires that misdemeanor sentencing under sections 490.2 and 1170.18 extend not only to those convicted of theft under Vehicle Code section 10851, but also to those convicted for taking a vehicle *without* the intent to permanently deprive the owner of possession." (*Id.*, at p. 1188, fn. 5 [emphasis in original].) That issue is now squarely before the Court in the instant appeal.

C. The Absurd Consequences Doctrine.

Under the doctrine of absurd consequences, referenced in this Court's opinion in *People v. Page* and its order for briefing in this case, "the 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. [Citation.]" (*People v. Cook* (2015) 60 Cal.4th 922,

927, quoting *Younger v. Superior Court* (1978) 21 Cal.3d 102, 113.) Rather, courts should adopt a statutory construction that most closely comports with the apparent intent of the voters, with a view toward promoting, rather than defeating, the general purpose of the initiative. (See *People v. Rubalcava* (2000) 23 Cal.4th 322, 332.) Any ambiguities in the law should not be interpreted in a manner that causes "an absurd result, or a result inconsistent with apparent legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 782–783.) Perhaps the Court best summed up the absurd consequences doctrine in *People v. Pieters* (1991) 52 Cal.3d 894 when it opined:

> "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] 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 [legislative body] did not intend.' [Citations.] 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.' [Citation.] Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]" (*Id.,* at pp. 898-899.)

This Court has had several occasions to read provisions or exceptions into a new act or initiative in order to effectuate the clear intent of the new law and to avoid the absurd consequences that blindly following the express language of the law would engender. For instance, in *Younger v. Superior Court, supra*, 21 Cal.3d 102, the Court

was forced to interpret newly enacted Health and Safety Code section 11361.5, subdivision (b), which permitted the destruction of certain official records pertaining to possession of marijuana convictions. Relying, in part, upon the principle of absurd consequences, the Court found that the Legislature meant the statute to apply only to persons who have completed their punishment before seeking relief, even though the statute is silent on this point. To hold otherwise would allow defendants whose case was still pending on appeal, or who had not completed parole, or who had not paid all of their fines and fees, to possibly "escape or reduce that punishment by the device of compelling destruction of the very records on which it is based." (*Id.,* at p. 113.) This Court, therefore, held "that section 11361.5, subdivision (b) . . . , neither requires nor authorizes destruction of records of a conviction that remains subject to review on appeal, or is the basis of a term of imprisonment that has not been fully served, or of a fine that has not been wholly paid, or of periods or conditions of parole or probation that have not been satisfactorily completed." (*Id.,* at pp. 113 - 114.)

Similarly, in *People v. Pieters, supra,* 52 Cal.3d 894, the Court had to decide "whether 'drug quantity' enhancements imposed pursuant to Health and Safety Code section 11370.4 . . . were impliedly excepted from the double-base-term limitation of former Penal Code section 1170.1, subdivision (g) . . . prior to the effective date of the present explicit exception." (*Id.,* at pp. 896 - 897.) The express legislative purpose of adding section 11370.4 to the Health and Safety Code was "to punish more severely those

persons who are in the regular business of trafficking in, or production of, narcotics and those persons who deal in large quantities of narcotics as opposed to individuals who have a less serious, occasional, or relatively minor role in this activity." (*Id.*, at p. 898, quoting Stats. 1985, ch. 1398, § 1, p. 4948.) The Court of Appeal below had "assumed the Legislature was aware of former Penal Code section 1170.1(g) when it enacted section 11370.4 and concluded that creating a statutory exception where the Legislature has failed to do so would intrude upon a legislative function[.]" (*Id.,* at pp. 900 - 901 [citations omitted].) Citing the absurd consequences doctrine, this Court concluded that "the Court of Appeal's interpretation of section 11370.4 [was] inconsistent with the Legislature's stated purpose for that section," and, therefore, "decline[d] to adopt it[.]" Instead, the Court found that "the Legislature impliedly created an exception to former Penal Code section 1170.1(g) when it enacted section 11370.4."[2] (*Id.,* at p. 902.)

In *Brown v. Superior Court* (1984) 37 Cal.3d 477, the Court was faced with

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[2]/ The Court noted that it had employed similar reasoning in *People v. Jackson* (1985) 37 Cal.3d 826, where it was confronted with a "draftsman's error" in Proposition 8 which added the five-year prior serious felony enhancement of Penal Code section 667, subdivision (a). The issue before the Court was whether the double the base term limitation contained in Penal Code section 1170.1, subdivision (g) could be used to bar imposition of this new status-based enhancement. (*Id.,* at p. 837.) The Court found that the double base term limitation was inapplicable to the new five- year enhancements because it would bar implication of the enhancement in situations where the base term was less than five years. In order to carry out the clear intent of the voters, the Court considered the failure to amend former section 1170.1, subdivision (g) to be a "draftsman's oversight." (*Id.,* at p. 838, fn. 15.) The Court, therefore, found the provision of section 667, subdivision (a) to be impliedly excluded from the double the base term limitation. (*Id.,* at p. 838.)

the following question: "Do the special venue provisions of the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12965, subd. (b)) control over the general venue provisions of Code of Civil Procedure section 395, subdivision (a) where both FEHA and non-FEHA causes of action are alleged?" (*Id.,* at p. 480.) Citing the intent of the legislature that the FEHA be **liberally construed** and relying, in part, upon the absurd consequences doctrine (*Id.,*at p. 485),[3] the Court held that "the special provisions of the FEHA venue statute control in cases involving FEHA claims joined with non-FEHA claims arising from the same facts. Thus, the FEHA venue statute governs the entire action and section 395 does not apply. In so construing section 12965," the Court added the new statute to a growing list of Court created exceptions. (*Id.*, at p. 487.)

D. Excluding Those Convicted Of Merely Driving, Or Taking A Vehicle Without The Intent To Permanently Deprive The Owner Of Possession, From Proposition 47 Relief Would Lead To Absurd Consequences.

Excluding those convicted under Vehicle Code section 10851 of only driving the vehicle, or only temporarily depriving the owner of possession, from the ameliorative benefits of Proposition 47 is both patently absurd and wholly inconsistent

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3/ The Court found that "[t]he express purpose of the FEHA is 'to provide effective remedies which will eliminate such discriminatory practices.' In addition, the Legislature has directed that the FEHA is to be **construed 'liberally'** so as to accomplish its purposes." (*Brown v. Superior Court, supra,* 37 Cal.3d at p. 486 [emphasis added, citations omitted].)

with the purposes of Proposition 47. Prior to the passage of Proposition 47, a conviction suffered under Vehicle Code section 10851, subdivision (a) was a wobbler and, therefore, could be punished as a misdemeanor or felony – at the trial court's discretion. (Pen. Code, § 17, subdivision (b).) After this Court's decision in *People v. Page,* a conviction for taking a vehicle, worth $950 or less, with the intent to permanently deprive the owner of possession thereof must be punished as a misdemeanor under Penal Code section 490.2. (*People v. Page, supra,* 3 Cal.5th at p. 1186, citing *People v. Romanowski, supra,* 2 Cal.5th at p. 908.) Yet, as the law presently stands now, those convicted of merely driving or temporarily taking a vehicle worth $950 or less, are still left to the mercy of the sentencing judge. As a result, some defendants convicted of a less culpable act will still be subject to felony sentences, while no one convicted of the more culpable act of stealing the vehicle will ever be in peril of suffering a felony conviction. It is simply illogical to punish someone who commits a similar, but less serious, offense more harshly.

Again, "'[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 [the voters] did not intend.' [Citations.] 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, supra,* 52 Cal.3d at p. 898 - 899, citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) This Court has also held that courts may look to "the ballot summary and arguments" as well as "the preamble to the initiative" to discern

its intended purpose. (*In re Lance W.* (1985) 37 Cal.3d 873, 890 & fn. 10.)

The overall purpose of Proposition 47 is to "ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment." (Voter Information Guide, Gen. Elec., supra, text of Prop. 47, § 2, p. 70.) Clearly, therefore, "[o]ne of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.)

To achieve this end, Proposition 47, like the FEHA at issue in *Brown v. Superior Court,* directs "that the text of the initiative 'shall be broadly construed to accomplish its purposes' and 'shall be liberally construed to effectuate its purposes.'" (*People v. Romanowski, supra,* 2 Cal.5th at p. 909, quoting Voter Information Guide, supra, text of Prop. 47, §§ 15, 18, p. 74.) Certainly, downgrading the punishment for all violations of Vehicle Code section 10851, subdivision (a) "no doubt serves Proposition 47's purposes of '[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes.'" (*People v. Romanowski, supra,* 2 Cal.5th at p. 909, quoting Voter Information Guide, supra, text of Prop. 47, § 3.)

Conversely, treating those who merely drive the vehicle more harshly than

those who took the vehicle with the intent to permanently deprive is both counter intuitive and runs afoul of the primary objectives of Proposition 47 – to save money by keeping non-serious, non-violent offenders out of State prison. (See *Harris v. Superior Court, supra,* 1 Cal.5th at p. 992.) Since courts should adopt a statutory construction that most closely comports with the apparent intent of the voters, with a view toward promoting, rather than defeating, the general purpose of the initiative (*People v. Rubalcava, supra,* 23 Cal.4th at p. 332; *People v. Jackson, supra,* 37 Cal.3d at p. 838), this Court should extend the holding of *People v. Page* to include all defendants convicted under Vehicle Code section 10851, subdivision (a). (See e.g., *Younger v. Superior Court, supra,* 21 Cal.3d at pp. 113 - 114; *People v. Pieters, supra,* 52 Cal.3d at p. 902.) As long the vehicle was worth $950 or less, it should not matter whether the defendant stole the vehicle, took it without the intent to permanently deprive the owner of possession or merely drove it. The doctrine of absurd consequences, as well as the clearly enunciated goals of Proposition 47, require that all three types of crimes be treated as misdemeanors if the vehicle is worth $950 or less.

II.

THE EQUAL PROTECTION CLAUSE ALSO REQUIRES THAT PETITIONER'S CONVICTION FOR THE UNLAWFUL DRIVING OF A MOTOR VEHICLE UNDER VEHICLE CODE SECTION 10851 BE TREATED THE SAME WAY AS A CONVICTION FOR THE UNLAWFUL TAKING OF A VEHICLE IS NOW TREATED UNDER *PEOPLE V. PAGE.*

The equal protection clause of the Fourteenth Amendment, as well as of that found in Article I, section 7 of the California Constitution, also mandates application of the ameliorative provisions of Penal Code sections 490.2 and 1170.18 to petitioner's case. Under this Court's holding in *People v. Page, supra,* 3 Cal.5th 1175, the clear language of Proposition 47, the protections and relief of Penal Code sections 490.2 and 1170.18 are afforded to those who were convicted of stealing a motor vehicle valued at $950 or less under Vehicle Code section 10851. The equal protection clauses of both the State and Federal Constitution require those same protections and relief be afforded to one who is merely convicted of either the unlawful driving of a vehicle or taking a vehicle without the intent to permanently deprive the owner of possession thereof. For the reasons which follow, the equal protection clause mandates that all convictions suffered under Vehicle Code section 10851, subdivision (a), which involved a vehicle valued at $950 or less, be reduced to misdemeanors in accordance with the provisions and clear objectives of Proposition 47.

A. The Two Classes Of Thieves Are Similarly Situated.

"The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purpose must be treated equally." (*People v. Brown* (2012) 54 Cal.4th 314, 328.) "The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more similarly situated groups in an unequal manner.' [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199, overruled in part on other grounds in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 888; see also *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) In applying this requirement, the Court must ask whether the two classes in question are similarly situated with respect to the purpose of the law challenged. (*People v. Hofsheier, supra,* 37 Cal.4th at pp. 1199 - 1200, citing *Cooley v. Superior Court, supra*, 29 Cal.4th at p. 253.)

The legitimate purposes of Penal Code section 490.2 and 1170.18 are saving money by reducing the costs of incarcerating minor criminals and promoting public health and safety. (Voter Information Guide, Gen. Elec., supra, text of Prop. 47, § 2, p. 70.) This is accomplished by diverting resources to higher risk crimes (serious and violent felonies) and revoking the District Attorney's discretion to charge low level thefts and drug possession crimes as felonies instead of misdemeanors. The reallocation of criminal justice resources, by reducing the prison population, also depends upon reduction of past and present felony charges to misdemeanors on a fair and level basis.

Petitioner asserts that had he stolen the vehicle, or otherwise intended to never return it to his girlfriend, he would presently be in a better position than if he had merely taken it without the intent to permanently deprive his girlfriend of her car. Under this Court's holding in *People v. Page,* had Bullard clearly stolen his girlfriend's vehicle he would unequivocally be entitled to have his Vehicle Code section 10851 conviction reduced to a misdemeanor. Because of the theft distinction drawn by this Court in *People v. Page,* however, Bullard is presently not entitled to relief for his conviction for merely driving or taking his girlfriend's car without the intent to permanently deprive her of possession thereof. Hence, even though he violated the same Code section as someone convicted of stealing a vehicle, petitioner is presently not entitled to have his conviction reduced to a misdemeanor under Proposition 47 because he arguably did not steal the car. (*People v. Page, supra,* 3 Cal.5th at p. 1183.)

B. The Law Must Not Discriminate Against A Lesser Offender.

It confounds the mind to even ponder the possibility that there may be a logical justification for withholding from petitioner the same clemency granted to someone convicted of taking a vehicle with the intent to permanently deprive the owner of possession. Even where a rational basis may exist for treating two classes of defendants differently, if the law discriminates against the less dangerous or culpable class, the law will fail the rational basis test as well. (*Newland v. Board of Governors*