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
FILED

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APPEAL FROM THE SUPERIOR COURT OF
RIVERSIDE COUNTY

Judge Samuel Diaz Jr. Presiding

PETITIONER LARA'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE

STATEMENT OF CASE 1

STATEMENT OF FACTS 3

ARGUMENT 4

PENAL CODE SECTION 490.2, ENACTED BY PROPOSITION 47, IS DIRECTLY APPLICABLE TO PETITIONER PURSUANT TO THE RETROACTIVITY PRESUMPTION OF *IN RE ESTRADA* (1965) 63 Cal.2d 740 BECAUSE THE PROPOSITION'S PETITION PROCESS SET OUT IN PENAL CODE SECTION 1170.18 IS EXPRESSLY INAPPLICABLE TO PETITIONER. . . 4

A. Summary of argument 4

B. General rules governing retroactivity of statutes reducing criminal punishment 7

C. Section 490.2 is directly applicable to defendants sentenced after the effective date of Proposition 47; the *Estrada* presumption applies to such defendants because they are excluded from the petition process set out in section 1170.18, subdivisions (a) and (f), which apply only to persons serving their sentence on the act's effective date or who have completed their sentence. 12

D. Pursuant to section 490.2, petitioner was convicted of only a misdemeanor theft because the verdict below does not establish jurors found he committed a post-theft act of driving or that the vehicle's value exceeded $950, as required for a felony violation of Vehicle Code section 10851. 18

1. The determination of whether petitioner was convicted of a felony is limited to his conviction in the trial below; any retrial has been forfeited by the prosecution and would violate double jeopardy. 18

2. The determination of whether petitioner was convicted of a felony is limited to the face of the conviction; it does not permit a judicial finding of fact based on a review of the underlying evidence. 31

CONCLUSION 41

TABLE OF AUTHORITIES

PAGE

CASES

Bailey v. United States (1995) 516 U.S. 137 28

Burks v. United States (1978) 437 U.S. 1 .... 26, 28

Carlos v. Superior Court (1983) 35 Cal.3d 131 16

In re D.N. (2018) 19 Cal.App.5th 898 .... 24, 25, 26, 30

In re Estrada (1965) 63 Cal.2d 740 .... 4, 5, 7, 8, 13, 19

In re J.R. (April 26, 2018, H043051) __ Cal.App.5th __ 24, 26, 28, 30

In re Michele D. (2002) 29 Cal.4th 600 16

People v. Anderson (1987) 43 Cal.3d 1104 16

People v. Birks (1998) 19 Cal. 4th 108 16

People v. Conley (2016) 63 Cal.4th 646 .... 5, 7, 8, 9, 10, 11, 36, 39

People v. Dehoyos (2018) 4 Cal.5th 594 .... 5, 10, 11, 36, 39

People v. Eagle (2016) 246 Cal.App.4th 275 25

People v. Figueroa (2003) 20 Cal.App.4th 65 .... 19, 20, 25, 33, 35, 36, 39

People v. Floyd (2002) 31 Cal.4th 179 13

People v. Gallardo (2017) 4 Cal.5th 120 .... 33, 34, 40

People v. Garza (2005) 35 Cal.4th 866 .... 18, 21, 23, 29, 30, 37, 40

People v. Gutierrez (2018) __ Cal.App.5th __ 24

People v. McGee (2006) 38 Cal.4th 682 34

People v. Morales (2016) 63 Cal.4th 399 7

People v. Mutter (2016) 1 Cal.App.5th 429 .... 13, 14

People v. Najera (1972) 8 Cal. 3d 504 .... 21, 22, 30, 31

People v. Page (2017) 3 Cal.5th 1175 .... 3, 4, 25, 31, 32, 37, 38

People v. Perez (2018) 22 Cal.App.5th 201 .... 22, 23, 30

People v. Perez (May 7, 2018, S238354) __ Cal.5th __ 35

People v. Robbins (2018) 19 Cal. App. 5th 660 8

People v. Romanowski (2017) 2 Cal. 5th 903 39

People v. Sanchez (2016) 63 Cal.4th 665 .... 23, 29

People v. Sanders (1979) 98 Cal. App. 3d 273 17

People v. Shirley (1982) 31 Cal.3d 18 26

People v. Wiley (1995) 9 Cal. 4th 580 21

Ratzlaf v. United States (1994) 510 U.S. 135 27

United States v. Hoyland (9th Cir. 1990) 914 F.2d 1125 27

United States v. Wacker (10th Cir 1995) 72 F.3d 1453 .... 27, 28

United States v. Weems (9th Cir. 1995) 49 F.3d 528 .... 27, 28, 29

STATUTES

Penal Code
Section 245, subdivision (a) 33
Section 490.2 .... *passim*
Section 496, subdivision (a) 1
Section 666.5, subdivision (a) 1
Section 667, subdivision (b) - (e) 3

Section 667, subdivision (e)(2)(C)(iv) 11
Section 667.5, subdivision (b) 2
Section 1170.18 .... *passim*
Section 1170.18, subdivision (a) .... *passim*
Section 1170.18, subdivision (b) 11
Section 1170.18, subdivision (c) 11
Section 1170.18, subdivision (f) .... *passim*
Section 1170.18, subdivision (I) 10
Section 1170.126 .... 5, 9
Section 1170.126, subdivision (a) 9
Section 1170.126, subdivision (f) 9
Section 1170.126, subdivision (g) 9
Section 12022 21
Section 12022.5 .... 21, 22

Vehicle Code
Section 10851 .... *passim*
Section 10851, subdivision (a) .... *passim*

Evidence Code
Section 500 39

Health and Safety Code
Section 11353.6 19

CONSTITUTIONS

California Constitution
Article II, section 10, subdivision (c) 14

PROPOSITIONS

Proposition 36 .... *passim*
Proposition 47 .... *passim*

SUPREME COURT NO. S243975

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. HENRY ARSENIO LARA II, Defendant and Petitioner.	Court of Appeal No. E065029 Superior Court No. INF1302723

APPEAL FROM THE SUPERIOR COURT OF
RIVERSIDE COUNTY

Judge Samuel Diaz Jr. Presiding

PETITIONER LARA'S OPENING BRIEF ON THE MERITS

STATEMENT OF CASE

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

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

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

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

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

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

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

Petitioner petitioned for review, and this court granted review, but ordered briefing deferred pending its decision in *People v. Page* (2017) 3 Cal.5th 1175. Then on March 21, 2018 this court issued an order directing briefing of the following question: "Does Penal Code section 490.2, added by Proposition 47, effective November 5, 2014, apply directly (i.e., without a petition under Penal Code section 1170.18) in trial and sentencing proceedings held after Proposition 47's effective date, where the charged offense was allegedly committed before Proposition 47's effective date?"

STATEMENT OF FACTS

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

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

ARGUMENT

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

A. Summary of argument

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

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

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

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

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

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

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

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

B. General rules governing retroactivity of statutes reducing criminal punishment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Legislature may by majority vote amend, add, or repeal provisions to further reduce the penalties for any of the offenses addressed by this act." (Prop 47, approved Nov. 4, 2014, eff. Nov. 5, 2014.) Such amendment by the Legislature is permitted by the California Constitution, Article II, section 10, subdivision (c) and by the statutory language in section 15, quoted *ante*. The amendment was enacted by more than a two-thirds majority: 30-9 in the Senate and 58-19 in the Assembly. (https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=2015 20160AB2765)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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