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IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TIMOTHY WAYNE PAGE,

Defendant and Appellant.

Fourth District
Court of Appeal
No. E062760

PETITION FOR REVIEW

Appeal from the Superior Court of California
San Bernardino County Case No. FVI1201369
Honorable Lorenzo R. Balderrama and Michael A. Smith, Judges

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On Appeal from the Superior Court of California
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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE JUSTICES OF THE SUPREME COURT:

Pursuant to Rule 8.500(a), California Rules of Court, appellant Timothy Wayne Page hereby petitions this court to grant review from the published opinion filed by Division Two of the Fourth District Court of Appeal in the above entitled appeal on October 23, 2015. (The Court of Appeal's opinion is attached hereto as the appendix.)

Appellant did not file a petition for rehearing in the Court of Appeal in this matter.

QUESTIONS PRESENTED FOR REVIEW

1. Penal Code section 1170.18[1], as enacted via Proposition 47 by popular vote on November 4, 2014, added section 490.2, which provides that the taking of *any* property less than or equal to $950 in value shall be considered petty theft and shall be punished as a misdemeanor. Should this provision equally apply to the taking of a motor vehicle under Vehicle Code section 10851 (assuming the value thereof does not exceed $950), although that statute neither was added nor amended by Proposition 47, because taking a vehicle is a lesser included offense to grand theft of an automobile?

2. Does it violate constitutional equal protection doctrines to allow the theft of an inexpensive vehicle charged under section 487, subdivision (d)(1) -- which requires the specific intent to permanently deprive the owner of his or her vehicle -- to be punished as a misdemeanor, whereas the taking of a vehicle charged under Vehicle Code section 10851 -- which does not require an intent to permanently deprive -- still may be punished as a felony?

NECESSITY FOR REVIEW

1. Division Two of the Fourth District Court of Appeal held that because the plain language of section 1170.18 limits application of its provisions to statutes that were added or amended under Proposition 47, convictions for the taking of a vehicle charged under Vehicle Code section 10851 -- which neither was added nor amended by Proposition 47 -- are not

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1. Further statutory references are to the Penal Code, unless otherwise designated.

subject to the ameliorative resentencing provisions of section 1170.18, even if worth less than $950.

However, the Legislative Analyst explained to the voting population of California the intended affects of Proposition 47, thus: "Under current law, theft of property worth $950 or less is often charged as petty theft, which is a misdemeanor or an infraction. However, such crimes can sometimes be charged as grand theft, which is generally a wobbler. For example, a wobbler charge can occur if the crime involves the theft of certain property (*such as cars*) or if the offender has previously committed certain theft-related crimes. This measure would limit when theft of property of $950 or less can be charged as grand theft. Specifically, *such crimes would no longer be charged as grand theft solely because of the type of property involved* or because the defendant had previously committed certain theft-related crimes." (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) analysis by Legislative Analyst, p. 35, emphasis added.)

As this court has observed, "'[T]he "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' (*Lungren v. Deukmejian*

(1988) 45 Cal.3d 727, 735.)" (*People v. King* (1993) 5 Cal.4th 59, 69.) Moreover, "'[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.'" (*People v. Pieters* (1991) 52 Cal.3d 894, 898-899.) This rule applies equally to statutes that have been adopted by the voters. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276; *Lungren v. Deukmejian*, *supra*, 45 Cal.3d at p. 735.)

Whereas it appears California voters intended that the resentencing provisions of Proposition 47 would apply to the taking of an inexpensive vehicle, possibly for a temporary period, as well as the permanent theft of someone's inexpensive vehicle, this court should grant review of this important question of law in order to effectuate that popular intention. (Rule 8.500(b)(1), Cal. Rules of Court.)

Moreover, in *People v. Romanowski* (B263164; November 13, 2015) ___ Cal.App.4th ___, Division Eight of the Second District Court of Appeal recently held that Proposition 47 reduced the offense of theft of access card information under 484e, subdivision (d) to a misdemeanor, provided the theft involved property valued at less than $950. The *Romanowski* court held thus despite the fact that section 484e, subdivision (d) was not expressly amended nor added by Proposition 47. Therefore, review of this matter additionally is warranted to secure uniformity of decision. (Rule 8.500(b)(1), Cal. Rules of Court.)

2. Constitutional doctrines of equal protection provide relief from disparate treatment for those similarly situated. Yet under the Court of

Appeal's interpretation of Proposition 47, a person who took someone's inexpensive vehicle with the specific intent to permanently deprive that person of his or her vehicle would be subject to punishment as a misdemeanant, whereas a person who only temporarily borrowed that same vehicle is subject to punishment as a convicted felon. This interpretation results in a potentially absurd consequence.

Moreover, the Court of Appeal relied in part on this court's statement in *People v. Romo* (1975) 14 Cal.3d 189, 197 that "a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code." (Slip opinion, p. 7, at appendix.) This court's observation in *People v. Romo*, *supra*, however, speaks to the obverse situation of that at issue here: of course one who specifically intends to permanently deprive the owner of the vehicle should be subject to the higher penalty provision. By contrast, under the Court of Appeal's interpretation of Proposition 47, a person who just intended to temporarily borrow the inexpensive vehicle would be subject to a felony conviction, whereas a defendant who specifically intended to forever deprive the owner of that vehicle might be sentenced as a misdemeanant.

This court therefore should grant review in order to rectify this apparent equal protection violation. (Rule 8.500(b)(1), Cal. Rules of Court.)

STATEMENT OF THE CASE

"On June 8, 2012, defendant pleaded guilty to three counts, including the unlawful taking of a vehicle (Veh. Code, § 10851, subd.(a)), evading an officer with willful disregard for safety (Veh. Code, § 2800.2, subd. (a)), and resisting an executive officer (Pen. Code, § 69)). He also admitted one prior strike conviction and two prison priors. Pursuant to the plea agreement, he received a sentence of 10 years eight months. [¶] On November 19, 2014, defendant filed in propria persona a petition for resentencing pursuant to Proposition 47. The trial court summarily denied the request on December 26, 2014." (Slip opinion, p. 2, at appendix.)

Division Two of the Fourth District Court of Appeal filed a published opinion on October 23, 2015 and affirmed the superior court's order denying appellant's petition for resentencing. (See opinion at appendix.)

ARGUMENT

UNDER PROPOSITION 47, A CONVICTION FOR TAKING AN AUTO UNDER VEHICLE CODE SECTION 10851 SHOULD BE ELIGIBLE FOR THE SAME REDUCTION TO A MISDEMEANOR AS WOULD A VEHICLE STOLEN UNDER PENAL CODE SECTION 487

A. A violation of Vehicle Code section 10851, subdivision (a) must be considered a theft for purposes of section 1170.18.

Proposition 47 was enacted by the voters on November 5, 2014. The proposition was codified in section 1170.18. Section 1170.18, provides in relevant part:

> (a) A person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section ("this act") had this act been in effect at the time

> of the offense may petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing in accordance with . . . Section 490.2 . . . of the Penal Code, as those sections have been amended or added by this act.

If a defendant is eligible for reduction of his or her conviction under subdivision (a), then subdivision (b) requires the trial court to determine whether the defendant poses "an unreasonable risk of danger to public safety," and lists criteria for the trial court to consider in making that determination, none of which applied to appellant.

Section 1170.18, subdivision (a), does not expressly refer to violation of Vehicle Code section 10851, subdivision (a). However, section 490.2, subdivision (a), provides, "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." Section 487, subdivision (d)(1) defines theft of an automobile as grand theft. Appellant's violation of Vehicle Code section 10851, subdivision (a), was subject to reduction to a misdemeanor under section 1170.18 because (1) a violation of section 487 is subject to reduction to a misdemeanor when the value of the vehicle was less than $950; (2) a violation of Vehicle Code section 10851, subdivision (a) is a lesser included offense of section 487; and (3) the voters who enacted section 1170.18 must have intended for it to apply to the enumerated offenses as well as their lesser included offenses.

1. **Section 1170.18 includes violations of section 487 by reference.**

Grand theft is punishable as a misdemeanor or a felony. (§§ 489,

subd. (c); 1170, subd. (h).) The clause in section 490.2, subdivision (a), "Notwithstanding Section 487 or any other provision of law defining grand theft . . ." reduces a violation of section 487 to a misdemeanor when the value of the vehicle taken is less than $950. Section 1170.18 thus applies to a violation of section 487 due to the express reference in section 490.2 to section 487.

2. **A violation of Vehicle Code section 10851, subdivision (a) is a lesser included offense to a violation of section 487.**

In *People v. Kehoe* (1949) 33 Cal.2d 711, this court recognized that unlawfully taking or driving an automobile is a lesser included offense of grand theft, stating, "[I]n the absence of any evidence showing a substantial break between [the defendant's] taking and his use of the automobile in that county, only the conviction for one offense may be sustained." (*Kehoe*, *supra*, 33 Cal.2d at p. 715.) This court has not retreated from that proposition in the ensuing years. (See *People v. Marshall* (1957) 48 Cal.2d 394, 400 [unlawfully taking or driving a vehicle is lesser included offense of grand theft of automobile]; *People v. Vera* (1997) 15 Cal.4th 269, 274 [tacitly recognizing same]; *People v. Barrick* (1982) 33 Cal.3d 115, 128; see also *People v. Buss* (1980) 102 Cal.App.3d 781, 784.)

On a related issue, this court held that "[i]f the [Vehicle Code section 10851] conviction is for the *taking* of the vehicle, with the intent to permanently deprive the owner of possession, then it is a theft conviction." (*People v. Garza* (2005) 35 Cal.4th 866, 881, emphasis in original.)

In this case, appellant pled guilty to a violation of Vehicle Code section 10851, subdivision (a) in which it was alleged appellant "did unlawfully drive *and* take a certain vehicle," on or about May 29, 2012.

(Clerk's Transcript on Appeal, vol. 1 of 1, pp. 1, 5.) There was no evidence or information suggesting appellant was *not* the person who took the vehicle. Thus, appellant's conviction for violating Vehicle Code section 10851, subdivision (a) was, for all intents and purposes, a conviction for vehicle theft.

3. Section 1170.18 applies to a violation of Vehicle Code section 10851, subdivision (a).

As noted above, section 1170.18, subdivision (a) does not refer to violations of Vehicle Code section 10851. However, it applies to violations of section 487 through the introductory clause in section 490.2, subdivision (a). If section 1170.18, subdivision (a), applies to violations of section 487, then logically it applies to a lesser included offense of section 487.

The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272.) In the case of a provision adopted by the voters, "their intent governs." (*People v. Jones* (1993) 5 Cal.4th 1142, 1146.) The rules of statutory construction that apply to legislation applies to interpreting a voter initiative like Proposition 47. (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) The ballot material for Proposition 47 promised enactment of the resulting statutes would, inter alia, stop wasting prison space on petty crimes and focus law enforcement resources on violent and serious crimes by changing low-level nonviolent crimes such as simple drug possession and petty theft from felonies to misdemeanors, saving hundreds of millions of taxpayer funds. (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.)

It is presumed the voters intended reasonable results consistent with

its expressed purpose, not absurd consequences. (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 235.) Applying section 1170.18 to a violation of Vehicle Code section 10851, subdivision (a) is consistent with the intent of the voters to not spend taxpayer money on incarcerating low-level offenders.

If the voters deemed grand theft of an automobile to be a sufficiently low-level crime to be eligible for reduction to a misdemeanor pursuant to section 1170.18, then the voters logically must have intended for felony vehicle theft in violation of Vehicle Code section 10851, subdivision (a) to be eligible for reduction to a misdemeanor. It would be illogical, indeed absurd, to allow a defendant who commits a greater offense -- grand theft of an automobile -- to benefit by having that crime eligible for reduction to a misdemeanor under section 1170.18, but deny that benefit to a defendant who committed a less serious violation of the law. And a statute should not be interpreted in a manner that leads to absurd results. (*People v. Morris* (1988) 46 Cal.3d 1, 15.)

The doctrine of retroactivity under *In re Estrada* (1965) 63 Cal.2d 740 also suggests that section 1170.18 should apply to a violation of Vehicle Code section 10851, subdivision (a). Under that doctrine, "when the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature 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." (*Id.* at p. 744.) The doctrine of retroactivity is not technically applicable to the instant case because the voters did not amend Vehicle Code section 10851, subdivision (a). However, the punishment for a violation of Vehicle Code section 10851, subdivision (a) was indirectly amended by the voters because a conviction for grand theft of an automobile is eligible for reduction to a misdemeanor by virtue of the introductory clause in section 490.2, subdivision (a), and a violation of Vehicle Code section 10851, subdivision (a) is a lesser included offense of grand theft of an automobile.

B. **The Equal Protection Clause requires that appellant's conviction for unlawfully taking a vehicle be treated in the same manner as a conviction for auto theft under section 487, subdivision (d)(1).**

Disparate treatment of similarly situated defendants, which infringes a fundamental right to liberty and implicates a suspect classification, violates the equal protection guarantees of the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution.

Under Proposition 47, the protections and relief of sections 490.2 and 1170.18 are afforded those who were convicted of stealing a motor vehicle valued at $950 or less because section 487, subdivision (d)(1) specifically is listed in the provisions of Proposition 47. The Equal Protection Clause requires those same protections and relief be afforded a defendant convicted of unlawfully taking a motor vehicle under Vehicle Code section 10851, subdivision (a).

1. **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 on another ground in *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 875; see also *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) In measuring this requirement, a 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 sections 490.2 and 1170.18 are saving money by reducing the costs of incarcerating minor criminals and promoting public health and safety. This is accomplished by diverting resources to higher risk crimes (felonies) and revoking the discretionary power of the District Attorney's Office to charge low-level thefts and drug possession crimes as felonies instead of misdemeanors. The reallocation of criminal justice resources also depends upon reduction of past and present felony charges to misdemeanors on a fair and level basis. One who simply takes a vehicle is similarly situated to a thief who steals the same vehicle.

2. **The law should not discriminate against a lesser offender.**

There is no plausible justification to withhold from appellant the same clemency granted a comparable thief. Even where a rational basis may exist for treating two classes of defendants differently, if the law

discriminates against the less dangerous class the law nevertheless will fail the rational basis test. (*Newland v. Board of Governors* (1977) 19 Cal.3d 705, 711 [providing relief to felons while withholding same relief from misdemeanants was irrational].) Even assuming arguendo the unlawful taking of a motor vehicle under Vehicle Code section 10851 intentionally was omitted from the provisions of Proposition 47 while grand theft auto under section 487 was included, the punitive relief afforded the latter must be afforded to an otherwise qualified defendant convicted of violating Vehicle Code section 10851, subdivision (a).

3. **Standard of review for disparate treatment.**

"Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest .... But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose." (*People v. Hofsheier*, *supra*, 37 Cal.4th at p. 1200, citing *Romer v. Evans* (1996) 517 U.S. 620, 635; *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 481-482; *Warden v. State Bar* (1999) 21 Cal.4th 628, 641.) The strict scrutiny standard should apply here because excluding appellant from the potential relief afforded by Proposition 47 infringes upon a fundamental right.

The fundamental interest in this case, uniformity in the sentences of offenders committing the same offenses under similar circumstances, encompasses the right to liberty. Personal liberty is a fundamental interest and, as such, any equal protection challenge to a law infringing on this interest must be judged under the strict scrutiny standard. (*People v. Olivas*

(1976) 17 Cal.3d 236, 250-251; see also *People v. Austin* (1981) 30 Cal.3d 155, 166 [strict scrutiny applies to challenge regarding credits]; *People v. Williams* (1983) 140 Cal.App.3d 445, 450 [criminal enhancement involves the deprivation of a fundamental liberty interest and, therefore, the state must demonstrate a compelling interest for any disparity in the treatment of defendants similarly situated].)

In *People v. Olivas*, *supra*, this court held it was an equal protection violation to allow a misdemeanant youth to be confined for a term longer than the maximum sentence which might have been imposed on an adult. (*Id.*, 17 Cal.3d at pp. 239-242.) The court reasoned that because incarceration was a deprivation of liberty, the classification-by-age scheme affected the defendant's personal liberty interests, which the court concluded was a "fundamental" interest deserving of strict scrutiny. (*Id.* at pp. 245-251.) The disparate treatment caused by a literal reading of Proposition 47, much as the different sentencing statutes at issue in *Olivas*, impinges upon a fundamental liberty interest: whether one is punished for a misdemeanor or a felony.

First, the distinction between the two statutes proscribing the unlawful taking of a vehicle determines whether one must serve up to one year in county jail or up to a three years in state prison for stealing a car. Further, the difference between the two sections also determines whether the convicted defendant suffers the stigma and loss of constitutional rights only associated with a felony conviction. "The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very

liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 495.) The denial of actual freedom, coupled with the loss of significant constitutional rights resulting from a conviction's classification as a felony in lieu of a misdemeanor, demands that any law creating such disparate treatment be subject to strict scrutiny. (*People v. Olivas*, *supra*, 17 Cal.3d at p. 251.)

"[O]nce it is determined that the classification scheme affects a fundamental interest or right the burden shifts; thereafter the state must first establish that it has a compelling interest which justifies the law and then demonstrate that the distinctions drawn by the law are necessary to further that purpose." (*People v. Olivas*, *supra*, 17 Cal.3d at p. 251; see also *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 274 [the law must be "supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored."]; *People v. Cole* (2007) 152 Cal.App.4th 230, 237-238.) Unless the state can assert any compelling interest which constitutionally justifies the disparate treatment between these two types of thieves, or can show the law accomplishes that goal in the least restrictive means possible, the mandates of the Equal Protection Clause require this court to treat the two the same.

4. **There is no rational basis for disparate treatment.**

Even were the court to ignore the disparate impact on liberty and assume this legislation is subject to mere rational basis scrutiny, the instant unequal treatment still fails to pass constitutional muster. There simply is no rational basis for the disparate treatment of two substantially identical

car thieves, one who unequivocally stole the car and the other for whom it is not clear whether he stole or merely borrowed the car without permission. (See *People v. Hofsheier*, *supra*, 37 Cal.4th at pp. 1200-1201.)

Any proffered basis for the distinction at issue must serve a "*realistically conceivable* legislative purpose[], rather than [a] fictitious purpose[] that could not have been within the contemplation of the Legislature." (*Warden v. State Bar*, *supra*, 21 Cal.4th at pp. 648-649 [emphasis in original, internal quotations and citations omitted].) Here, there is no rational basis to discriminate in favor of vehicle thieves and against those who merely may have borrowed the vehicle without permission. As such, even under the more deferential standard of scrutiny, the unequal treatment of these two types of thieves violates the equal protection clauses of both the state and federal Constitutions.

CONCLUSION

For the reasons stated above, appellant respectfully requests that this court grant review in this matter.

Dated: November 20, 2015

JEFFREY S. KROSS
State Bar No. 142882
Attorney for Appellant
TIMOTHY WAYNE PAGE

WORD COUNT CERTIFICATION

Pursuant to Rule 8.504(d)(1), California Rules of Court, I hereby certify, under penalty of perjury, that according to the word-count function of my computer's word processing program, this petition for review contains 4,208 words.

Executed this 20th day of November 2015 at Sebastopol, California.

JEFFREY S. KROSS

Filed 10/23/15; reposted to delete transcript references

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY WAYNE PAGE, Defendant and Appellant.	E062760 (Super.Ct.No. FVI1201369) OPINION

APPEAL from the Superior Court of San Bernardino County. Lorenzo R. Balderrama and Michael A. Smith, Judges.[1] Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, and Arlene A. Sevidal and Christen Somerville, Deputy Attorneys General, for Plaintiff and Respondent.

[1] Judge Balderrama conducted defendant's plea hearing on June 8, 2012; Judge Smith heard defendant's resentencing petition on December 26, 2014.

Defendant Timothy Wayne Page pleaded guilty to several charges, including one count of unlawfully taking a vehicle in violation of Vehicle Code section 10851, subdivision (a). Subsequently, California voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which among other things established a procedure for specified classes of offenders to have their felony convictions reduced to misdemeanors and be resentenced accordingly. (Pen. Code, § 1170.18.) In this appeal, defendant challenges the denial of his petition for resentencing pursuant to Proposition 47 with respect to his Vehicle Code section 10851 conviction. He contends that the trial court erred by determining that he was not eligible for relief. We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

On June 8, 2012, defendant pleaded guilty to three counts, including the unlawful taking of a vehicle (Veh. Code, § 10851, subd.(a)), evading an officer with willful disregard for safety (Veh. Code, § 2800.2, subd. (a)), and resisting an executive officer (Pen. Code, § 69)). He also admitted one prior strike conviction and two prison priors. Pursuant to the plea agreement, he received a sentence of 10 years eight months.

On November 19, 2014, defendant filed in propria persona a petition for resentencing pursuant to Proposition 47. The trial court summarily denied the request on December 26, 2014.

II. DISCUSSION

A. Background Regarding Proposition 47.

On November 4, 2014, voters enacted Proposition 47, and it went into effect the next day. (Cal. Const., art. II, § 10, subd. (a).) "Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors)." (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) "Proposition 47 also created a new resentencing provision: [Penal Code] section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47." (*Id.* at p. 1092.)

As relevant to the present case, Proposition 47 added Penal Code section 490.2, which provides as follows: "Notwithstanding [Penal Code] Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ." (Pen. Code, § 490.2, subd. (a).) Section 490.2 is explicitly listed in Penal Code section 1170.18 as one of "those sections [that] have been amended or added" by Proposition 47. (Pen. Code, § 1170.18, subd. (a).)

B. Analysis.

Penal Code section 1170.18 does not identify Vehicle Code section 10851, the offense at issue in the present appeal, as one of the code sections amended or added by Proposition 47. (Pen. Code, § 1170.18.) Vehicle Code section 10851 is, however, a lesser included offense to Penal Code section 487, subdivision (d)(1), grand theft, auto. (*People v. Barrick* (1982) 33 Cal.3d 115, 128.) Defendant argues that Penal Code section 1170.18 explicitly applies to violations of Penal Code section 487, through the introductory clause of Penal Code section 490.2, so "logically" it must apply to lesser included offenses of Penal Code section 487, including Vehicle Code section 10851. We disagree.

As noted, Penal Code section 1170.18 provides a mechanism for a person "who would have been guilty of a misdemeanor," if Proposition 47 had been in effect at the time of the offense, to petition for resentencing in accordance with certain enumerated sections that were amended or added by Proposition 47. (Pen. Code, § 1170.18, subd. (a).) We cannot say that defendant would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of his offense. Vehicle Code section 10851 is a "wobbler" offense, punishable either as a felony or misdemeanor. (Veh. Code, § 10851, subd. (a); see *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 974, fn. 4 [listing Veh. Code § 10851, subd. (a) as a statute that provides for "alternative felony or misdemeanor punishment"].) Proposition 47 left intact the language in Vehicle Code section 10851, subdivision (a), which makes a violation of that statute punishable as

either a felony or a misdemeanor. Based on the statutory language alone, therefore, whether before or after Proposition 47, defendant could be convicted for a felony violation of Vehicle Code section 10851.

In arguing otherwise, defendant focuses on the circumstance that, with Proposition 47's addition of Penal Code section 490.2, the theft of an automobile valued $950 or less is no longer grand theft, but instead petty theft, unless the offense was committed by certain ineligible defendants. (Pen. Code, §§ 490.2, subd. (a), 487, subd. (d)(1).) Thus, a defendant who could demonstrate that his or her conviction for a violation of section 487, subdivision (d)(1), was based on theft of an automobile valued $950 or less may be eligible to apply for relief under Proposition 47 and Penal Code section 1170.18. (Pen. Code, § 1170.18, subd. (a).) The gravamen of defendant's arguments on appeal is that a defendant convicted of a lesser included offense of section 487 should be entitled to similar relief.

The plain language of Penal Code section 1170.18, however, is incompatible with defendant's proposed interpretation. Penal Code section 1170.18, subdivision (a) provides a mechanism for an offender to request to be resentenced "in accordance with" certain enumerated sections that were amended or added by Proposition 47, and which provide for different, lesser punishment than applied before the enactment of Proposition 47. (Pen. Code, § 1170.18, subd. (a).) As noted, the statutory language setting the punishment for violations of Vehicle Code section 10851 remains the same, before and after Proposition 47, and is not included among the enumerated sections amended or

added by Proposition 47. (Veh. Code, § 10851, subd. (a); see Pen. Code, § 1170.18, subd. (a).) Defendant therefore could not be resentenced in accordance with any of the sections added or explicitly amended by Proposition 47. Put another way: Exactly the same sentencing considerations apply to defendant's conviction offense before and after Proposition 47, so there is no basis for reconsidering or reducing the sentence that was initially imposed.

Defendant contends that Vehicle Code section 10851 was "indirectly amended" by virtue of Penal Code section 490.2's reference to Penal Code section 487, and the circumstance that Vehicle Code section 10851 is a lesser included offense of Penal Code section 487, subdivision (d)(1). On its face, however, Penal Code section 490.2 does no more than amend the definition of grand theft, as articulated in Penal Code section 487 or any other provision of law, redefining a limited subset of offenses that would formerly have been grand theft to be petty theft. (Pen. Code, § 490.2.) Vehicle Code section 10851 does not proscribe theft of either the grand or petty variety, but rather the taking or driving of a vehicle "with or without intent to steal." (Veh. Code, § 10851, subd. (a); see also *People v. Garza* (2005) 35 Cal.4th 866, 876 [Veh. Code, § 10851, subd. (a) "'proscribes a wide range of conduct,'" and may be violated "'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its

owner of possession (i.e., joyriding)'"].) Penal Code section 490.2 is simply inapplicable to defendant's conviction offense.[2]

Defendant contends that equal protection principles require that his conviction for unlawfully taking a vehicle in violation of Vehicle Code section 10851 be treated in the same manner as a conviction for grand theft auto in violation of Penal Code section 487, subdivision (d)(1). Not so. Applying rational basis scrutiny, the California Supreme Court has held that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles." (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838) Similarly, it has long been the case that "a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code." (*People v. Romo* (1975) 14 Cal.3d 189, 197.) The same reasoning applies to Proposition 47's provision for the possibility of sentence reduction for a

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[2] Even if we were to assume that Penal Code section 490.2 applied as defendant would have it—to reduce some Vehicle Code section 10851 convictions that would otherwise be felonies to misdemeanors, at least where the facts underlying the conviction involve theft (as opposed to merely joyriding) of a vehicle valued $950 or less—it does not appear that defendant would be entitled to relief. Defendant's guilty plea shows only that he unlawfully took or drove a vehicle; nothing in the record establishes the value of the vehicle to be $950 or less. The burden of proof lies with defendant to show the facts demonstrating his eligibility for relief, including that the value of the stolen vehicle did not exceed $950. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 877.) Defendant did not attempt to meet that burden in his petition, providing no information at all regarding his eligibility for resentencing in his petition.

limited subset of those previously convicted of grand theft (those who stole an automobile or other personal property valued $950 or less), but not those convicted of unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851. Absent a showing that a particular defendant "'has been singled out deliberately for prosecution on the basis of some invidious criterion,' . . . the defendant cannot make out an equal protection violation." (*Wilkinson*, *supra*, 33 Cal.4th at p. 839.) Defendant here has made no such showing.

To be sure, "Vehicle Code section 10851 is not classified as a 'serious felony,' and it is not as serious as crimes in which violence is inflicted or threatened against a person." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 321.) It is not unreasonable to argue, as defendant has, that the same policy reasons motivating Proposition 47's reduction in punishment for certain felony or wobbler offenses would also apply equally well to Vehicle Code section 10851.[3] Nevertheless, if Proposition 47 were intended to apply not only to reduce the punishment for certain specified offenses, but also any lesser included offenses, we would expect some indication of that intent in the statutory language. We find nothing of the sort. It is simply not our role to interpose additional changes to the

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[3] That said, we find nothing absurd or irrational about the legislative determination that theft of certain automobiles of very low value should be treated as petty theft, and thus potentially a misdemeanor, while retaining the statutory option of punishing the unlawful taking or driving of an automobile, regardless of intent to steal, as a felony violation of Vehicle Code section 10851. (See *Wilkinson*, *supra*, 33 Cal.4th at pp. 838-839 [finding rational basis for statutory scheme allowing the "'lesser'" offense of battery without injury to be punished more severely than the "'greater'" offense of battery with injury].)

Penal Code or Vehicle Code beyond those expressed in the plain language of the additions or amendments resulting from the adoption of Proposition 47.

III. DISPOSITION

The order appealed from is affirmed.

CERTIFIED FOR PUBLICATION

HOLLENHORST
Acting P. J.

We concur:

MCKINSTER
J.

KING
J.

PROOF OF SERVICE BY MAIL AND E-SERVICE

I declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, an active member of the State Bar of California, and not a party to the within action. My business address is P.O. Box 2252, Sebastopol, California 95473-2252. On this date I served the attached PETITION FOR REVIEW by placing true copies thereof in a sealed envelope which I deposited in the United States mail at Sebastopol, California with the postage thereon fully prepaid, addressed as follows:

Office of the Clerk
San Bernardino County Superior Court
247 W. Third Street
San Bernardino, CA 92415

Office of the District Attorney
Appellate Services Division
412 W. Hospitality Lane, 1st Floor
San Bernardino, CA 92415-0042

Timothy Wayne Page
AL7644
Sierra Conservation Center
5150 O'Byrnes Ferry Road
Jamestown, CA 95327

I further declare that I electronically served from my electronic service address of *jeffskross@earthlink.net* the same above referenced document on this date to the following entities: Office of the Attorney General at *ADIEService@doj.ca.gov*; Appellate Defenders, Inc. at *eservice-criminal@adi-sandiego.com*; and the Court of Appeal, Fourth Appellate District, Division Two via e-submission through its official website.

Executed this 23rd day of November 2015 at Sebastopol, California.

JEFFREY S. KROSS