IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	No. S230793
Plaintiff and Respondent,	Fourth District Court of Appeal No. E062760
v.	
TIMOTHY WAYNE PAGE,	
Defendant and Petitioner.	

OPENING BRIEF ON THE MERITS

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

JEFFREY S. KROSS
State Bar No. 142882
P.O. Box 2252
Sebastopol, CA 95473-2252
(707) 823-8665
kross142882@gmail.com

Attorney for Petitioner
TIMOTHY WAYNE PAGE

By appointment of the
Court of Appeal under the
Appellate Defenders, Inc.
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STATEMENT OF ISSUES

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

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

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?

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." (*People v. Page*, (E062760), formerly at 241 Cal.App.714, 716-717.)

Division Two of the Fourth District Court of Appeal affirmed the superior court's order denying petitioner's petition for resentencing on October 23, 2015. (*People v. Page, supra.*)

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. The voters of California presumably understood and intended Proposition 47 to apply to the theft of inexpensive automobiles.

On November 4, 2014, the voters enacted Proposition 47, "the Safe Neighborhoods and Schools Act" (hereafter Proposition 47), which went into effect the next day. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) The proposition was codified in section 1170.18, which 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 petitioner here. (§ 1170.18, subd. (b) & (c).)

The interpretation of a statute is subject to de novo review on appeal. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) "In interpreting a voter initiative like Proposition [47], [courts] apply the same principles that govern statutory construction."

(*People v. Rizo* (2000) 22 Cal.4th 681, 685.) "'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]'" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) "In determining intent, we look first to the words themselves. [Citations.] When the language is clear and unambiguous, there is no need for construction. [Citations.] When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part. [Citations.]" (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

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.)

Where there is some ambiguity, reviewing courts should "'refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' [Citation.]" (*People v. Rizo*, *supra*, 22 Cal.4th at p. 685.) If a penal statute is still reasonably susceptible to multiple constructions, reviewing courts ordinarily adopt the "construction which is more favorable to the offender." (*Id.* at pp. 685-686, quoting *People v. Davis* (1981) 29 Cal.3d 814, 828.)

Proposition 47 set forth a list of the Act's purposes, including to "ensure that prison spending is focused on violent and serious offenses"; "maximize alternatives for nonserious, nonviolent crime"; "invest the savings ... into prevention and support programs"; "ensure [ ] that sentences for people convicted of dangerous crimes like rape, murder, and child molestation are not changed"; "[r]equire misdemeanors instead of felonies for nonserious, nonviolent offenses like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes"; "[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses ... that are now misdemeanors"; and "[r]equire a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety. [Citation.]" (*Alejandro N. v. Superior*

Court (2015) 238 Cal.App.4th 1209, 1222.)

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.)

The electorate also directed that Proposition 47 "shall be liberally construed to effectuate its purposes." (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1222.)

It therefore appears safe to assume the voting population of California understood and intended the ameliorative and cost-saving effects of Proposition 47 to apply to the theft of vehicles worth less than $950, irrespective of which statute the theft was charged under.

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

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

The Court of Appeal here concluded a person convicted of the taking

of a vehicle charged under Vehicle Code section 10851 was not entitled to an offense reduction because Proposition 47 neither added nor amended that statute in enacting section 1170.18. (*People v. Page*, formerly at 241 Cal.App.4th at p. 718.) This narrow interpretation flouts the initiative's directive that it be liberally construed. (*Alejandro N. v. Superior Court*, *supra*, 238 Cal.App.4th at p. 1222.)

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 . . . ." (Emphasis added.) Section 487, subdivision (d)(1) defines theft of an automobile as grand theft. Petitioner'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 presumably understood and intended that it apply to the enumerated offenses as well as their lesser included offenses.

Grand theft is punishable as a misdemeanor or a felony. (§§ 489, subd. (c); 1170, subd. (h).) The clause "Notwithstanding Section 487 or any other provision of law defining grand theft . . ." contained in section 490.2, subdivision (a) 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: "[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." (*Id.*, 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. Barrick* (1982) 33 Cal.3d 115, 128 [same, citing *People v. Buss* (1980) 102 Cal.App.3d 781, 784]; *People v. Vera* (1997) 15 Cal.4th 269, 273 [referring to violation of Vehicle Code section 10851 as lesser included offense of grand theft of automobile].)

Indeed, this court has 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.) Petitioner in this case pled guilty to a violation of Vehicle Code section 10851, subdivision (a) in which it was alleged he "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 presented in this matter to suggest the vehicle was taken by someone other than petitioner. Thus, his 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 acknowledged 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, by logical extension it must apply to a lesser included offense of section 487.

If the voters of California deemed theft of an automobile worth less than $950 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 the theft of an identically valued vehicle charged under 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. A statute should not be interpreted in a manner that leads to absurd results. (*People v. Morris* (1988) 46 Cal.3d 1, 15.) In fact, punishing a lesser included offense more severely than the greater offense would be considered unusual punishment under the state Constitution. (*People v. Doyle* (2013) 220 Cal.App.4th 1251, 1268, citing *People v. Schueren* (1973) 10 Cal.3d 553, 560-561.)

Moreover, 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, the doctrine of retroactivity announced in *In re Estrada* (1965) 63 Cal.2d 740 further necessitates the application of section 1170.18 to a violation of Vehicle Code section 10851, subdivision (a). Under the *Estrada* 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.)

C. The Equal Protection Clause requires that petitioner'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).

The Court of Appeal here 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." (*People v. Page*, formerly at 241 Cal.App.4th at p. 719.) This court's observation in *People v. Romo*, *supra*, however, speaks to the obverse situation of that at issue here: one cannot credibly dispute that someone 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 same vehicle would be sentenced as a misdemeanant.

The equal protection guarantees of the Fourteenth Amendment and the California Constitution are substantially equivalent and analyzed in a similar fashion: if two classes are similarly situated with respect to the purpose of the law in question, but are treated differently, the state must then provide a rational justification for the disparity. (*People v. Noyan* (2014) 232 Cal.App.4th 657, 666; *People v. Lynch* (2012) 209 Cal.App.4th 353, 358.)

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 to save money by reducing the costs of incarcerating minor criminals and to promote 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 petitioner 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 petitioner 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 a statute which allowed a misdemeanant youth to be confined for a term longer than the maximum sentence which might have been imposed on an adult violated equal protection doctrines. (*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 [law must be supported by compelling state purpose and means chosen to accomplish that purpose must be 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 without question intended to permanently take the car and the other who took the car without permission, irrespective of whether he or she intended to return it. (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 federal and state Constitutions.

CONCLUSION

For the reasons stated above, a defendant convicted of felony taking a vehicle under Vehicle Code section 10851 should be deemed eligible to have that conviction reduced to a misdemeanor pursuant to section 1170.18, assuming he or she otherwise qualifies under the statute.

Dated: February 24, 2016

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

WORD COUNT CERTIFICATION

Pursuant to Rule 8.520(c)(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 Opening Brief on the Merits contains 4,236 words.

Executed this 24th day of February 2016 at Sebastopol, California.

JEFFREY S. KROSS

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 OPENING BRIEF ON THE MERITS 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:

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, X41-66L
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 Opening Brief on the Merits on this date to the following entities: Office of the Attorney General at *ADIEService@doj.ca.gov* and Appellate Defenders, Inc. at *eservice-criminal @adi-sandiego.com*.

Executed this 25th day of February 2016 at Sebastopol, California.

JEFFREY S. KROSS