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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **MARK ANTHONY COLBERT,** **Defendant and Appellant.**

Case No. S238954

Sixth Appellate District, Case No. H042499
Santa Clara County Superior Court, Case No. 206805
The Honorable Linda R. Clark, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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ISSUE

Whether entries into private offices inside commercial establishments fall outside the scope of Penal Code section 459.5, the misdemeanor shoplifting statute added by the Safe Neighborhoods and Schools Act (Proposition 47).

INTRODUCTION

Proposition 47, the Safe Neighborhoods and Schools Act, was enacted in 2014 and reclassified certain nonviolent felonies and "wobblers" as misdemeanors, providing funding for education and crime prevention programs to make communities safer.[1] Among its other provisions, Proposition 47 enacted Penal Code section 459.5.[2] With a few exceptions, the statute makes shoplifting punishable exclusively as a misdemeanor and defines the act of shoplifting "as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." (§ 459.5, subd. (a).) "Any other entry into a commercial establishment is burglary." (*Ibid.*)

Appellant Mark Anthony Colbert entered four private offices inside open commercial establishments apparently during regular business hours and took less than $950 on three of the four occasions. The Court of Appeal correctly rejected appellant's contention that section 459.5 requires three of his convictions of felony second degree burglary to be punished as misdemeanor shoplifting. (Typed Opn. at pp. 5-7.) Appellant entered private offices with larcenous intent, not "commercial establishments" as

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[1] Voter Information Guide, Prop. 47, Ballot Pamp., Gen. Elec. (Nov. 4, 2014) §§ 5-13, pp. 71-73.

[2] Further undesignated statutory references are to the Penal Code.

required (§ 459.5 subd. (a)). The entries into the interior offices provided separate bases for burglary charges notwithstanding appellants' initial entries into the convenience stores and gas station because the offices had heightened expectations of privacy and security that exceeded those of the surrounding structures. Even assuming the private offices were "commercial establishments," they were not "open" to appellant during regular business hours or any hours. Therefore, his entry of each office constituted a burglary as "[a]ny other entry into a commercial establishment" (§ 459.5, subd. (a)). The Court of Appeal's judgment should therefore be affirmed.

STATEMENT

A. The Burglaries

In December 1996 and January 1997, appellant and an accomplice burglarized the private offices of one gas station and three convenience stores. (Typed Opn. at pp. 2-3; CT 12-13.) Each time, one of the two bought lottery tickets to distract a clerk while the other one entered the office. (Typed Opn. at pp. 2-3; CT 12-13.) In this manner, the two stole about $300 from a locked file cabinet inside the gas station's private back office, about $318 from the locked, private back office of the first convenience store, and more than $3,000 from the private back office of the second convenience store. (Typed Opn. at pp. 2-3; CT 12-13.) At the third convenience store, the perpetrator in the back office got nothing when he was followed by a cashier and left, claiming that he was looking for the store manager. (Typed Opn. at p. 3.)

In 1998, appellant was convicted of four felony counts of second degree burglary (§§ 459, 460, subd. (b)). (CT 1-2; Typed Opn. at p. 1.)

B. Trial Court Proceedings on the Petition to Reduce the Felony Convictions

In May 2015, appellant filed a petition to designate two of the felony second degree burglary convictions as misdemeanors (§ 1170.18, subd. (f)). (CT 7-9.) The trial court denied the petition, concluding that none of appellant's offenses constituted misdemeanor shoplifting under section 459.5. (CT 12-13.) The court reasoned, "Because the record reflects that each offense was based upon entry into a private area and not a commercial establishment that was open during business hours, those offenses are not subject to redesignation . . . . In addition, the value of property taken in Count 2 exceeded $950 and is ineligible for that reason. The theft of over $3000 involved the same *modus operandi* as in the other counts and also strongly suggests that the amount *intended to be taken* in each case exceeded $950." (CT 13.)

C. The Court of Appeal's Decision

Appellant appealed to the Sixth District Court of Appeal. He claimed the burglaries in which he took property worth less than $950 had to be designated misdemeanor shoplifting violations of section 459.5 because the trial court incorrectly found "that the thefts were 'based on entry into 'private . . . office area[s]" and that he and his accomplice "'intended to take'" more than $950 from the stores. (Typed Opn. at p. 4.)

The Court of Appeal affirmed, holding that appellant's conduct did not constitute "shoplifting" under section 459.5. (Typed Opn. at pp. 5-7.) The court gave the statutory term "commercial establishment" its commonsense meaning of an establishment "'that is primarily engaged in commerce, that is, the buying and selling of goods or services.'" (Typed Opn. at p. 5.) By crossing the threshold into offices off limits to the general public, the court reasoned, appellant and his accomplice exited the "commercial" part of the establishments and entered "a discrete area where

their thefts could not be considered shoplifting." (Typed Opn. at p. 5.) The court observed, "The office areas from which Colbert and his accomplice stole money were not areas in which goods were bought and sold. There was no merchandise offered for sale in those offices, or at least there is no evidence in the record suggesting there was. Colbert was not interested in stealing the goods on offer in these establishments, otherwise he and his accomplice would have remained in the area where those goods were displayed rather than intruding in the private areas where the employees were likely to keep their personal belongings, such as purses and wallets, and where the business was likely to store larger amounts of cash." (Typed Opn. at p. 6.)

The Court of Appeal disagreed with the trial court's other basis for denying appellant's petition—that appellant intended to take property worth more than $950. (Typed Opn. at pp. 6-7.) The appellate court concluded the available evidence did not support the trial court's finding of intent. The Court of Appeal reasoned, "The most that can be said about Colbert's intent is that he and his accomplice intended to take whatever they could, of whatever value, from the offices they entered. There is no evidence that property valued in excess of $950 was customarily present in those back rooms, let alone that Colbert or his accomplice believed that to be the case. It was therefore a matter of circumstance, not intent, which dictated the value of the property taken." (Typed Opn. at pp. 6-7.)

Justice Rushing dissented, concluding that "each of the four offenses occurred at a 'commercial establishment'" that appellant and his confederate entered during business hours. (Typed Diss. Opn. at p. 1.)

This Court granted appellant's petition for review.

SUMMARY OF ARGUMENT

The Court of Appeal correctly determined that appellant was ineligible for Proposition 47 relief to redesignate three of his burglary

convictions as misdemeanor shoplifting. Appellant and the accomplice entered the private offices of a gas station and convenience stores. Those acts did not constitute "entering a commercial establishment" within the meaning of section 459.5, subdivision (a). The plain language of section 459.5, subdivision (a), applies only to entries into "commercial establishments," not entries into other areas. Entries into private offices are not entries into commercial establishments because no commerce with invitees takes place inside those areas. Moreover, under this Court's jurisprudence, an entry of a private office supports a burglary charge notwithstanding any preceding entry into an overarching structure that is a "commercial establishment" because private offices have heightened expectations of privacy and security separate from the larger structure.

A contrary interpretation of section 459.5 would defeat the purpose of burglary laws and contravene the voters' intent. Entries into private offices are much more dangerous to personal safety than entries into commercial areas within the scope of invitees' invitation, and part of the electorate's intent in passing Proposition 47 was to protect the public from dangerous criminals. Excluding entries into private offices from the scope of the shoplifting provision preserves the purpose of burglary laws and effectuates the voters' intent of protecting the public while allowing less culpable entries to be punished as shoplifting.

Alternatively, even assuming the private offices here were "commercial establishments," shoplifting can occur only in commercial establishments that are "open during regular business hours." The offices in this case were private and not "open." Accordingly, this Court should affirm the Court of Appeal's judgment.

ARGUMENT

I. THE COURT OF APPEAL'S JUDGMENT SHOULD BE AFFIRMED BECAUSE LARCENOUS ENTRIES INTO PRIVATE OFFICES OFF LIMITS TO A COMMERCIAL ESTABLISHMENT'S INVITEES ARE NOT SHOPLIFTING

Appellant contends that three of his felony second degree burglary convictions should be redesignated as misdemeanor shoplifting convictions under section 459.5. (OBM 5.) Appellant's contention fails because entries into private offices that are off limits to invitees in the public areas of gas stations or convenience stores are not entries into "commercial establishments," as required by section 459.5.

A. Proposition 47

"'On November 4, 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act.'" (*People v. Morales* (2016) 63 Cal.4th 399, 404.) "Proposition 47 makes certain drug-and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants." (*Ibid.*; see also Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 5-13, pp. 71-73 [listing reduced offenses].) "'These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors).'" (*Morales*, at p. 404.) Included among the redesignated offenses are certain acts of second degree burglary that previously would have been charged under section 459, which provides in relevant part, "Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building . . . with intent to commit grand or petit larceny or any felony is guilty of burglary." (*People v. Sherow* (2015) 239 Cal.App.4th 875, 877, 879.) Proposition 47 now requires certain second degree burglaries where a defendant "enters a

commercial establishment with the intent to steal" to be characterized as shoplifting under new section 459.5. (*Id.* at p. 879.)

Section 459.5 provides:

> (a) Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary.
>
> (b) Any act of shoplifting as defined in subdivision (a) shall be charged as shoplifting. No person who is charged with shoplifting may also be charged with burglary or theft of the same property.

The purpose of section 459.5, as explained by the ballot materials, is to prevent felony burglary charges from substituting for "shoplifting," a particular type of petty theft:

> *Shoplifting*: Under current law, shoplifting property worth $950 or less (a type of petty theft) is often a misdemeanor. However, such crimes can also be charged as burglary, which is a wobbler. Under this measure, shoplifting property worth $950 or less would always be a misdemeanor and could not be charged as a burglary.

(Voter Information Guide, *supra*, analysis of Prop. 47 by Legislative Analyst, p. 35.)

Proposition 47 accompanied its substantive amendments with certain procedural changes to sentencing, codified in section 1170.18. (Voter Information Guide, *supra*, text of Prop. 47, § 14, pp. 73-74.) Two of those procedural changes have retroactive effect on individuals who, at the time of Proposition 47's enactment, were already convicted of crimes amended by the initiative. First, "[a] person currently serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [that initiative] 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" as a misdemeanor. (§ 1170.18, subd. (a).) Second, "[a] person who has completed his or her sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47] had [that initiative] been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f).)

These resentencing provisions "[a]uthorize consideration of resentencing for anyone who is currently serving a sentence for any of the offenses listed herein that are now misdemeanors," while still "[r]equir[ing] 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." (Voter Information Guide, *supra*, text of Prop. 47, § 3, p. 70; see also *id.*, rebuttal to argument against Prop. 47, p. 39 ["*Proposition 47 does not require automatic release of anyone.* There is no automatic release. It includes strict protections to protect public safety and make sure . . . the most dangerous criminals cannot benefit"].)

B. Interpretation of Voter Initiatives

A reviewing court's construction of a statute is "guided by the overarching principle that [the] task is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent." (*In re R.V.* (2015) 61 Cal.4th 181, 192, internal quotation marks omitted.) In deciding the electorate's intent in approving Proposition 47 and enacting section 459.5, this Court looks to "the same principles that govern statutory construction." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, internal quotation marks omitted.) First among those principles is honoring "the language of the statute" as "construed in

the context of the statute as a whole and the overall statutory scheme." (*Id.* at p. 901, internal quotation marks omitted.) If the language of section 459.5 is ambiguous, this Court "can look to legislative history [citation] and to rules or maxims of construction" to resolve the ambiguity. (*People v. Smith* (2004) 32 Cal.4th 792, 798; see also *Robert L.*, at p. 901 [when the language of an initiative is ambiguous, courts may "refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet," internal quotation marks omitted].) Any ambiguities in an initiative statute "are not interpreted in the defendant's favor if such an interpretation would provide an absurd result, or a result inconsistent with apparent legislative intent." (*People v. Cruz* (1996) 13 Cal.4th 764, 783.)

C. Under the Plain Language of Penal Code Section 459.5 and This Court's Burglary Jurisprudence, Appellant's Entering of Gas Station and Convenience Store Offices Off Limits to Invitees Is Burglary

Appellant's conduct during the burglaries did not constitute shoplifting. Section 459.5 requires entry into a "commercial establishment." Private offices are not commercial establishments, and under *People v. Garcia* (2016) 62 Cal.4th 1116, entries into private offices support burglary charges.

1. Private offices are not primarily engaged in commerce and have heightened expectations of privacy and security distinct from any overarching commercial structure

Section 459.5, subdivision (a), defines shoplifting as "entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950)." The language mentions only one criminal act—

entering a commercial establishment. The language does not address entries into areas that are not commercial establishments. By its express terms, then, the statute does not apply to those areas.

Private offices are not "commercial establishments." "[A] commercial establishment is one that is primarily engaged in commerce, that is, the buying and selling of goods or services." (*In re J.L.* (2015) 242 Cal.App.4th 1108, 1114; Webster's 3d New Internat. Dict. (2002) p. 456 ["commercial" means "occupied with or engaged in commerce" and "commerce" means "the exchange or buying and selling of commodities esp. on a large scale"]; The Oxford English Reference Dict. (2d ed. 1996) p. 290 [defining "commerce" as "financial transactions, esp. the buying and selling of merchandise, on a large scale"]; Black's Law Dict. (10th ed. 2014) p. 325 ["commercial" means "[o]f, relating to, or involving the buying and selling of goods; mercantile"].) Private offices are not primarily engaged in the buying and selling of goods or services. They are primarily engaged in managing and supporting the buying and selling of goods or services that occurs in areas open to invitees. (See *Morris v. De La Torre* (2005) 36 Cal.4th 260, 271-273 ["'invitee[s] or business visitor[s]'" include people "'within the class of persons a merchant normally desires to have observe and inspect his merchandise, whether or not [the person is] in a position to make a purchase on [that] particular [occasion]'"].) Because private offices are not commercial in terms of the goods and services offered to the business's invitees, entries into those areas are not shoplifting.

Other language in section 459.5, subdivision (a), also shows that the statute does not encompass entries into private offices. Under the principle of *noscitur a sociis* ("it is known by its associates") the meaning of a word may be determined by reference to the whole clause in which it is used. (*People v. Prunty* (2015) 62 Cal.4th 59, 73.) In other words, "a word takes

meaning from the company it keeps." (*People v. Drennan* (2000) 84 Cal.App.4th 1349, 1355.) Section 459.5, subdivision (a), provides that an act constituting shoplifting requires entry of a "commercial establishment [. . .] *while that establishment is open during regular business hours* . . . ." (Italics added.) The italicized phrase highlights the electorate's intent to define shoplifting as an entry done within the parameters of the establishment's invitation to enter. Members of the public are invitees only to the extent of their presence during regular business hours in the portions of the establishment open for commerce with those persons. (*Maynard v. Walker* (1959) 175 Cal.App.2d 145, 147-149 [an invitee may exceed the scope of his invitation and thereby cease "to enjoy the status of an invitee"].) The general public is not invited into private offices.

Entries into private offices support burglary charges notwithstanding any preceding entry into a commercial establishment. In *Garcia*, *supra*, 62 Cal.4th 1116, this Court addressed the kinds of entries into discrete places within a larger structure that support burglary charges independent of the initial entry into the overall structure. In *Garcia*, the defendant was convicted of two burglaries that resulted from his entry into a store with the intent to commit robbery and his entry into the store's bathroom to commit rape. (*Id.* at p. 1119.) The Court concluded that the defendant should have been charged with and convicted of only one burglary based on the entry into the store. (*Id.* at p. 1133.) The Court explained: "Where a burglar enters a structure enumerated under section 459 with the requisite felonious intent, and then subsequently enters a room within that structure with such intent, the burglar may be charged with multiple entries only if the subsequently entered room provides a separate and objectively reasonable expectation of protection from intrusion relative to the larger structure. Such a separate expectation of privacy and safety may exist where there is proof that the internal space is owned, leased, occupied, or otherwise

possessed by a distinct entity; or that the room or space is secured against the rest of the space within the structure, making the room similar in nature to the stand-alone structures enumerated in section 459." (*Id.* at pp. 1119-1120.) The Court identified several characteristics that may indicate an interior room is similar in nature to the stand-alone structures listed in section 459: "A locked door to an external space, a sign conveying restricted access to those present in the external space, or the location of a room in relation to a public area may demonstrate objectively reasonable expectations of privacy and security. These attributes can show that a space is similar in nature to the stand-alone structures listed in section 459." (*Id.* at p. 1129.) The Court also noted that differences in the character of an interior space from the character of its enclosing structure may "provide a separate and objectively reasonable expectation from intrusion[] distinct from that provided by the security of the overarching structure." (*Id.* at p. 1127.)

Applying those principles, the Court analyzed the nature of the bathroom and found that Garcia's entry into it did not support a separate burglary charge. (*Garcia*, *supra*, 62 Cal.4th at pp. 1132-1133.) The Court acknowledged that the case was close because the bathroom's location in a back hallway outside public view "might convey to a reasonable onlooker that the back hallway, and rooms located off that hallway, were areas that members of the public could not enter without permission." (*Id.* at p. 1132.) Nevertheless, the Court reasoned "there [was] no evidence in the record suggesting that the bathroom was left locked to the public or other passersby; to the contrary, the record suggests that the bathroom, unlike the nearby office, could be accessed by anyone and was at best merely a limited transitory source of privacy." (*Id.* at p. 1132-1133.)

Under the reasoning of *Garcia*, private offices are structures similar in nature to stand-alone structures listed in section 459. Private offices have

attributes demonstrating objectively reasonable expectations of privacy that signal the public is not invited. Those attributes may include locked doors or signs stating "employees only," "private" and the like. Private offices are also more likely to be placed in the back of the overarching structure, away from areas open to invitees. The presence of those attributes makes private offices distinct from the commercial establishments that they abut.

Unlike the bathroom in *Garcia*, private offices are not transitory sources of privacy. The overarching structure of a business anticipates entries by invitees it attracts to the premises into areas within the scope of the invitees' invitation. Commercial establishments provide private offices because they fall outside the scope of invitees' invitation to engage in commerce and afford added security from intrusion for employees who may keep valuables or proprietary information there. These differences between the character of private offices and the character of their enclosing business structures "provide a separate and objectively reasonable expectation from intrusion[] distinct from that provided by the security of the overarching structure." (*Garcia*, *supra*, 62 Cal.4th at p. 1127.) The Court's finding in *Garcia* that the bathroom there could be accessed by anyone, and thus was not an area off limits to invitees, suggests a larcenous entry of an interior private office that is off limits to invitees supports a burglary charge.

Applying the plain language of section 459.5, subdivision (a), and the reasoning of *Garcia* to this case, appellant is not entitled to Proposition 47 relief. Although appellant and his accomplice entered "commercial establishments" in the areas open to the public inside the gas station and convenience stores, the larcenous entries in this case are entries into offices. Those entries were of distinctly private areas off limits to invitees, not entries into "commercial establishments." As the Court of Appeal observed, there is no evidence that the private offices contained

merchandise for sale or that any other business with invitees was transacted in the offices. (Typed Opn. at p. 6.) The Court of Appeal and the trial court noted that all of the offices were located in the back of the establishments away from public areas, and at least two of the offices had doors partitioning the offices from the overarching structure. (Typed Opn. at pp. 2-3; CT 12-13.) The trial court noted at least one of the office doors was locked (CT 13), which certainly indicated a separate, heightened expectation of privacy. (*Garcia*, at pp. 1129, 1132.)

Equally important is that the character of the offices as private and their locations away from the areas where open commerce with the public occurred is the reason appellant and his accomplice had to distract the employee in the public area to approach the office and take whatever measures were needed to gain entry undetected. This conduct demonstrates that no expectations were conveyed that the offices could be entered by invitees, even during normal business hours. The record demonstrates that objectively reasonable and heightened expectations of privacy and security attended those offices that were distinct from those provided by the overarching business structures. (See *Garcia*, *supra*, 62 Cal.4th at pp. 1127, 1129.) Because the entries into the private offices were not entries into "commercial establishments" but rather entries into noncommercial areas off limits to invitees akin to structures listed in section 459, they were burglaries, not shoplifting.

2. Appellant's interpretation contravenes the plain language of section 459.5 and this Court's burglary jurisprudence

Appellant argues that his conduct constituted misdemeanor shoplifting under the plain language of section 459.5 because "when [he] entered the commercial establishments with the requisite intent, the shoplifting offenses were complete." (OBM 8.) He claims that his convictions were

based on entries into the gas station and convenience stores, not on entries into the private offices inside those establishments, and that the thefts inside the offices "merely evidenced [his] larcenous intent when he made his initial entries into the commercial establishments." (OBM 9.) Appellant's arguments fail.

The operative criminal entries in this case are the entries into the private offices, not the entries into spaces open to invitees in the gas station and convenience stores. Proposition 47's resentencing provisions direct courts to consider whether a defendant would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense at issue. (See § 1170.18, subds. (a) & (f).) Therefore, in cases involving entries into private offices inside a larger structure, the question is whether the entry of an office would have justified a burglary conviction even if Proposition 47 had been in effect at the time of the offenses. Under the reasoning in *Garcia* and the plain language of section 459.5, subdivision (a), each of the entries into the private offices would have justified a finding of burglary even had Proposition 47 been in effect when appellant committed the crimes.

Appellant's focus on the initial entries of the larger structures open to invitees is misplaced. He made subsequent larcenous entries of the offices to which the shoplifting statute does not apply. The burglary statute expressly encompasses certain entries into discrete areas within a larger structure such as a room in a house and thus makes entries into interior spaces a crime. (§ 459.) But the shoplifting statute does not address entries of interior spaces within an overarching commercial structure. The shoplifting statute addresses only one entry—the entry into a "commercial establishment." (§ 459.5, subd. (a).) This difference between the two statutes evidences the electorate's intent for the shoplifting statute not to apply to subsequent entries, at least with respect to interior offices that

intrude on heightened expectations of privacy and security separate from an overarching business structure. Because the shoplifting statute is silent as to these more dangerous entries, the inference is clear that they are unaffected by Proposition 47. Had the electorate intended for the shoplifting statute to apply to those subsequent entries, it could have included language akin to that in section 459.

Appellant contends that the entries into areas off limits to invitees, "still constituted misdemeanor shoplifting because the areas were part of the commercial establishment." (OBM 9.) Appellant maintains that "[n]either section 459.5 nor any other authority excludes nonpublic areas from the definition of a commercial establishment." (OBM 10-11.) Appellant attempts to apply section 459.5 to conduct not covered by the statute. The statute requires "entering a commercial establishment" (§ 459.5, subd. (a)), not entering into private offices inside the already entered commercial establishments. Thus, appellant's approach would effectively insert additional language into the statute. "[I]nsert[ing] additional language into a statute violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes." (*People v. Guzman* (2005) 35 Cal.4th 577, 587, internal quotation marks omitted.)

Appellant relies on the Court of Appeal's interpretation of section 459.5's plain language in *People v. Hallam* (2016) 3 Cal.App.5th 905. (OBM 10-11.) In that case, the defendant entered a computer store during business hours and used the employee restroom with the store's permission. (*Hallam*, at p. 908.) After leaving the store, the defendant reentered it though a back door, returned to the restroom, and took an air compressor worth $350. (*Ibid.*) Based on this conduct, the defendant pleaded no contest to one count of second degree burglary. (*Ibid.*) After Proposition 47 passed, the defendant sought to redesignate his burglary conviction as a misdemeanor shoplifting conviction. (*Id.* at p. 909.) The trial court

concluded the defendant was ineligible for Proposition 47 relief because section 459.5 "'anticipates' entry into an area of a commercial establishment to which the public has access and where merchandise is sold," and the defendant did not make such an entry. (*Ibid.*)

The Court of Appeal disagreed. (*Hallam*, *supra*, 3 Cal.App.5th at p. 914.) It looked to the plain language of section 459.5 and found "no indication that shoplifting can occur only in specific areas of a commercial establishment" or "any requirement that the business's commercial activity must be taking place in the area from which the theft occurs." (*Id.* at p. 912.) It concluded the trial court added an element to the offense of shoplifting that was absent from the plain language of section 459.5. (*Ibid.*)

Hallam incorrectly interprets the language of section 459.5, subdivision (a). The statute's exclusive focus only on entries into "*commercial*" establishments means that commercial activity—i.e., the buying and selling of goods and services by the establishment and its invitees—must take place there. Commercial activity does not take place in areas off limits to a business's invitees because the invitees' very absence prevents the buying and selling of goods and services. The phrase "open during regular business hours" bolsters the conclusion that shoplifting can occur only in areas open to invitees. Accordingly, contrary to the *Hallam* court's conclusion, the plain language of section 459.5, subdivision (a), requires the discrete area of the establishment entered to be commercial for the entry to constitute shoplifting.

Appellant additionally relies on *In re J.L.*, *supra*, 242 Cal.App.4th 1108, a case which the *Hallam* court distinguished in reaching its conclusion. (OBM 10; *Hallam*, *supra*, 3 Cal.App.5th at pp. 912-913.) In *J.L.*, the minor entered a locker room inside a school and stole a phone from a locker. (*J.L.*, at p. 1111.) The minor admitted the allegation that he committed burglary. (*Ibid.*) After Proposition 47 passed, the minor filed a

petition for recall of sentence to reduce his burglary conviction to misdemeanor shoplifting under section 459.5. (*Id.* at p. 1112.) The trial court denied the petition, finding that "'entering a school is not the same thing as shoplifting under 459.5.'" (*Id.* at pp. 1112-1113.) The Court of Appeal upheld the trial court's order, concluding the minor's "theft of a cell phone from a school locker room was not a theft from a commercial establishment." (*Id.* at p. 1114.) The court looked to the commonsense understanding and dictionary definitions of the phrase "commercial establishment" and reasoned that "[a] public high school is not an establishment primarily engaged in the sale of goods and services; rather, it is an establishment dedicated to the education of students." (*Ibid.*) The court continued, "Except for perhaps a school cafeteria or bookstore (circumstances not at issue here, where the phone was stolen from a school locker), a public school is not engaged in the business of selling merchandise or goods at all." (*Id.* at p. 1115.) Based on the plain meaning of the statutory language, the court "simply d[id] not believe that the voters enacting Proposition 47 understood a public high school to be a commercial establishment or a theft from a school locker to be 'shoplifting.'" (*Ibid.*)

In *Hallam*, the People relied on *J.L.* in urging the Court of Appeal "to hold that the term ['commercial establishment'] excludes any room within [a] business where the buying and selling of goods and services does not occur." (*Hallam*, *supra*, 3 Cal.App.5th at p. 912.) In rejecting the People's position, the *Hallam* court distinguished *J.L.* (*Id.* at pp. 912-913.) *Hallam* reasoned that the *J.L.* court "applied its commonsense interpretation of 'commercial establishment' not to a single room or area within a commercial venue, but to an entire school facility . . . ." (*Id.* at p. 912.) The *Hallam* court continued, "In contrast to the public high school in *J.L.*, the [computer store in *Hallam*] unquestionably qualifies as a 'commercial establishment' within the meaning of section 459.5. We find nothing in

J.L.'s discussion of schools to inform our decision as to whether shoplifting includes the entry into any area of a commercial establishment during business hours, whether open to the public or not, as long as the establishment as a whole is open for business." (*Id.* at p. 913.) Appellant similarly reads *J.L.* as standing for the proposition that the nature of the entire facility is what matters in determining whether an entry into a commercial establishment occurred rather than the nature of the discrete areas the defendant entered inside that facility. (OBM 10.)

Both the *Hallam* court's and appellant's readings of *J.L.* are incorrect. The *J.L.* court did not look exclusively to the nature of the entire school facility in determining whether the offense in that case constituted shoplifting. The *J.L.* court also considered the nature of the locker room in reaching its conclusion, expressly stating that "theft of a cell phone from a school locker room was not a theft from a commercial establishment" (*J.L.*, *supra*, 242 Cal.App.4th at p. 1114) and that the voters did not understand "theft from a school locker to be 'shoplifting'" (*id.* at p. 1115). The *J.L.* court also indicated certain rooms of a school could be considered a "commercial establishment," like a cafeteria or bookstore. (*Ibid.*) Because the *J.L.* court took into account the nature of the discrete area within the larger school in which the theft occurred in determining whether the minor entered a "commercial establishment," *J.L.* undermines rather than supports appellant's and the *Hallam* court's positions.

Appellant further reasons that section 459.5, subdivision (a), should be read to include entries into the private offices in this case because "there were no specific characteristics of these offices that indicated they shared the same level of privacy as a non-commercial, stand-alone structure 'such that the offense should be deemed burglary rather than shoplifting.'" (OBM 13.) Appellant inappositely relies on the *Hallam* court's interpretation of *Garcia*, *supra*, 62 Cal.4th 1116. (OBM 13-14.) The

Hallam court based its conclusion that the offense constituted shoplifting in part on its comparison of the bathroom in that case to the bathroom in *Garcia*. (*Hallam*, *supra*, 3 Cal.App.5th at p. 913.) *Hallam* reasoned, "Here, like the store bathroom in *Garcia*, the rest room in the [computer] store was separate from the main part of the business and was not generally open to the public. But as in *Garcia*, there is no evidence the restroom in this case was kept locked or provided any more than 'a limited transitory source of privacy.'" (*Ibid.*) The *Hallam* court continued, "As demonstrated by appellant's use of the rest room before returning to steal the air compressor, there appeared to be no obstacles to gaining entry to this 'employee area.' The area thus lacked any objective indications of a heightened expectation of privacy and security beyond what the store itself provided such that the offense should be deemed burglary rather than shoplifting." (*Id.* at pp. 913-914.) Because *Garcia* takes into account the nature of every space within a structure in determining whether entry into that space constitutes a separately chargeable burglary, *Garcia* undermines rather than supports appellant's and the *Hallam* court's position that discrete areas within a business necessarily fall within the purview of the shoplifting statute.

The *Hallam* court also erroneously analogized the bathroom in that case with the bathroom in *Garcia* when it concluded that Hallam did not enter an area with heightened expectations of privacy and security beyond the store itself. Although the bathroom in *Garcia* was located in the back of the store, it was not an area off limits to the store's invitees. Other than its location in the back, access to the bathroom was not restricted in any other way relative to the rest of the store. (*Garcia*, *supra*, 62 Cal.4th at pp. 1132-1133.) The location in the back was insufficient to convey a clear message to invitees that they could not use the bathroom, although the *Garcia* Court acknowledged that the question was a close one. (*Id.* at pp.

1132-1133.) The bathroom in *Hallam*, by contrast, was an area clearly off limits to the store's invitees because (1) it "was not generally open to the public" (*Hallam*, *supra*, 3 Cal.App.5th at p. 913); (2) Hallam had to ask the store's permission to use the bathroom when he lawfully entered the store the first time (*id.* at p. 908), thus showing that invitees could not simply walk into the bathroom; and (3) the bathroom was located in an area of the store that was not "'open for business'" (*id.* at p. 912). Thus, unlike the bathroom in *Garcia*, the bathroom in *Hallam* had a heightened expectation of privacy and security distinct from the overarching commercial structure. Because no commerce took place in the *Hallam* bathroom and under *Garcia* entry into areas with a heightened expectation of privacy support burglary charges, the entry into the bathroom in *Hallam* was burglary, not shoplifting.[3]

In any event, the private offices in this case had characteristics indicative of a heightened expectation of privacy, including the offices' placement in the back of the establishments, doors separating at least some of the offices from the rest of the establishments, and a lock on at least one of the office doors. The nature of the areas as offices rather than areas where the stores' goods were displayed also signaled that they were outside the scope of invitees' invitation and thus had a heightened expectation of privacy distinct from the overarching structure. Bathrooms sometimes may be open to invitees. But *private* offices are not open to invitees.[4]

In another attempt to show that the private offices in this case should be deemed "commercial establishments," appellant contrasts this case with

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[3] *Hallam* should therefore be disapproved.

[4] There may be cases in which invitees can freely enter an office because its primary purpose is for the public to conduct commerce there. But that is not the case here, otherwise it would have been wholly unnecessary to distract the employees.

People v. Stylz (2016) 2 Cal.App.5th 530. (OBM 14-15.) In *Stylz*, the defendant was convicted of burglary after he forced entry into a locked storage unit and took property belonging to the person who rented the unit. (*Stylz*, at p. 532.) After Proposition 47 passed, the defendant filed a petition to reduce the burglary conviction to a misdemeanor shoplifting conviction under section 459.5. (*Id.* at p. 533.) The trial court denied the petition on the ground that "a public storage business is not 'open[] for the sale of items.'" (*Ibid.*) The Court of Appeal upheld the trial court's ruling, reasoning that the defendant failed to demonstrate "that a specific locked storage unit—as opposed to the storage facility—is a commercial establishment." (*Id.* at p. 534.) The court continued, "No evidence suggests that [the victim] rented the storage unit to engage in commerce. Similarly, no evidence suggests that the locked storage unit was open to the public during 'regular business hours.' Thus, [defendant's] conduct in forcing entry into a private locked storage unit did not constitute shoplifting, as defined by section 459.5." (*Id.* at p. 535.) Appellant claims that *Stylz* addressed "when a discrete area within a commercial establishment becomes *separate from* the commercial establishment." (OBM 14.) Appellant maintains that the private offices in this case were inseparable from the commercial establishments that housed them because, unlike the storage unit in *Stylz*, the offices were not leased out to private individuals. Additionally, appellant maintains, the private offices were "designated for persons involved in the operation of the commercial establishment[s] to advance the operation of the commercial establishment[s]." (OBM 15.)

Stylz demonstrates that the nature of discrete areas within a larger structure matters, and that the space must be *open to the public during regular business hours* before entry into that space can constitute shoplifting. Because the private offices in this case were not open to the

public during regular business hours, *Stylz* undermines rather than supports appellant's position. Moreover, appellant's blending together of all areas involved in the operation of a business with the overarching structure housing the business would prevent some defendants who enter private offices with the intent to commit larceny from being prosecuted for any crime. If, as appellant suggests, areas involved in operating a business are necessarily subsumed into the overarching structure, then there could only be one moment of potential criminal entry—the initial entry into the structure. Thus, someone who enters areas of the business open to the public without the intent to steal but who later forms that intent and enters a private office could not be charged with any crime unless that person actually attempted to steal something. It is absurd to absolve of all criminal liability entries with larcenous intent into areas with heightened expectations of privacy distinct from the overarching business structure. Accordingly, this Court should reject appellant's position. (*Cruz*, *supra*, 13 Cal.4th at p. 783.)

Finally, appellant contends that interpreting section 459.5, subdivision (a), as distinguishing between entries into commercial establishments and entries into discrete parts of those establishments would lead to an absurd result—misdemeanor classification of "theft based on the entry into a commercial part of a non-commercial establishment." (OBM 11.) Appellant claims that under the People's interpretation, someone taking or intending to take goods from a cafeteria inside a hospital or a school would be guilty of shoplifting "even though hospitals and schools are not commercial establishments." (OBM 12.) However, even assuming that hospitals and schools are not commercial establishments, there is nothing absurd about interpreting section 459.5, subdivision (a), as applying to entries into a commercial establishment located inside a noncommercial structure or facility. Indeed, based on the statute's plain language and its

purpose of preventing felony burglary charges from substituting for "shoplifting," the electorate intended precisely that result.

The People's interpretation comports with the electorate's intent and common sense because all defendants who enter discrete commercial areas with the requisite criminal intent are treated equally regardless of the overarching purpose of the structure in which the commercial areas are located. Under appellant's interpretation, by contrast, a person who enters and steals $949 from the locked back office of a convenience store would be guilty of a misdemeanor (shoplifting) (§ 459.5, subd. (b)), but a person who steals a candy bar from a cafeteria inside a hospital would be guilty of a wobbler (burglary). Accordingly, it is appellant's interpretation that would lead to absurd results.

D. Applying Section 459.5 to Defendants Who Enter Private Offices Would Defeat the Purpose of Burglary Laws and Contravene the Voters' Intent

Applying section 459.5 to entries into private offices would undermine the burglary statute, which seeks to prevent situations dangerous to personal safety. That result is inconsistent with the voters' intent of punishing conduct that creates such situations as burglary. Accordingly, the Court of Appeal's judgment should be affirmed.

1. Entries into private offices are more dangerous than entries into areas open to invitees

"Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence. The laws are primarily designed, then, not to deter the trespass and the intended crime, which are prohibited by other laws, so much as to forestall

the germination of a situation dangerous to personal safety. Section 459, in short, is aimed at the danger caused by the unauthorized entry itself." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1042, internal quotation marks omitted.) Furthermore, "[a]lthough entry into an *inhabited* structure is recognized as most dangerous and most likely to create personal injury, justifying assignment of the greater degree [citations], some risk of danger to human life and safety exists whether or not the structure is inhabited, because the intrusion may give rise to a confrontation between the intruder and persons lawfully on the premises." (*Id.* at p. 1043.)

Interpreting section 459.5, subdivision (a), as encompassing entries into private offices would defeat these purposes because those entries—which pose a high risk to safety—could no longer be charged as burglaries (§ 459.5, subd. (b)). (*Cruz*, *supra*, 13 Cal.4th at p. 783.) For example, the potential danger that the perpetrator "will harm the occupants . . . or . . . that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence" (*Montoya*, *supra*, 7 Cal.4th at p. 1042) is present when a perpetrator enters an office off limits to a store's invitees. The presence of a manager or a clerk inside the office may cause the situation to escalate quickly. In the areas of a shop that are open to the public, the employees expect members of the public to enter. But in a private office, the employees do not expect to encounter members of the public and may react violently to an unauthorized intrusion that catches them by surprise. Employees may also be cut off from the safety of public places that anyone can enter to provide aid at any moment. Thus, an employee confronted with a thief inside a private office is more vulnerable to harm and more likely to react out of fear in light of the greater danger from isolation.

Additionally, security officers and business personnel are likely to follow individuals into private offices and confront them regarding the unauthorized entry. Such a confrontation increases the risk for violence.

By contrast, security officers and business personnel are less likely to confront invitees who are in areas within the scope of the invitation unless it is obvious the invitee is committing a crime. When such a confrontation does occur, in many instances, the people most likely to encounter or attempt to stop the perpetrator are employees such as loss prevention officers who are trained to handle such situations. Such situations are also less likely to escalate dangerously because they lack the elements of vulnerability and surprise that are present during entries into private offices and because the perpetrator will more likely be able to flee the public area more readily than the private office. Interpreting section 459.5, subdivision (a), as excluding entries into private offices accounts for the unique dangers created by those entries and preserves the purpose of burglary laws.

2. The voters intended for criminal entries into private offices to remain burglary

Applying section 459.5 to entries into private offices would also contravene the voters' intent. A perpetrator who enters those offices is outside the public domain just as much as a perpetrator who enters a commercial establishment outside of regular business hours. Both of those types of entries carry a heightened level of risk of a hostile encounter between a person lawfully on the premises and the perpetrator. The statute's application only to entries that occur "during regular business hours" (§ 459.5, subd. (a)) highlights the electorate's intent to continue to treat entries that carry that heightened level of risk as burglaries, not shoplifting.

Voters were also told that Proposition 47: (1) aims to "[i]mprove public safety" (Voter Information Guide, *supra*, argument in favor of Prop. 47, p. 38); (2) "includes strict protections to protect public safety and make sure . . . the most dangerous criminals cannot benefit" (Voter Information Guide, *supra*, rebuttal to argument against Prop. 47, p. 39); and (3) "[s]tops

wasting prison space on petty crimes and focuses resources on violent and serious crime" (*ibid*). The ballot materials describe "shoplifting" as "a type of petty theft." (Voter Information Guide, *supra*, analysis of Prop. 47 by Legislative Analyst, p. 35.) The ballot materials make clear that the voters intended to protect the public from dangerous criminals and require misdemeanor sentencing for only the least dangerous of crimes. A reasonable voter could hardly have imagined that "shoplifting"—innocuously described as "a type of petty theft"—would encompass dangerous infiltrations of private offices off limits to the general public. (*Cruz*, *supra*, 13 Cal.4th at p. 783.)

This Court briefly considered the implications of the dangers posed by entries into areas off limits to the public while construing the mental state needed to satisfy section 459.5. (*People v. Gonzales* (2017) 2 Cal.5th 858.) In *Gonzales*, the defendant pleaded guilty to burglary after he cashed two forged checks at a bank. (*Id.* at p. 862.) The defendant petitioned for recall of his sentence and resentencing, claiming that his conduct constituted shoplifting under section 459.5. (*Id.* at pp. 863-864.) The prosecutor countered that the defendant did not "enter the bank with intent to commit *larceny*, but, instead, to pass forged checks, which constituted theft by false pretenses." (*Id.* at p. 864.) The trial court denied the petition and the Court of Appeal affirmed. (*Id.* at p. 862.) This Court reversed, reasoning that section 490a—which substituted the word "theft" for the words "larceny, embezzlement, or stealing" in any California statute—applied to section 495.5. (*Id.* at pp. 865, 868-875.) The Court concluded that because the defendant entered the bank with the intent to commit theft, his conduct qualified as shoplifting within the meaning of section 459.5. (*Id.* at p. 862.) In reaching its conclusion, the Court rejected the People's contention that "it would be absurd for the shoplifting statute to encompass any form of theft other than larceny *of openly displayed merchandise*" because that

construction would prevent defendants from being prosecuted for burglary even if they stole from areas closed the public—a scenario posing a danger to personal safety. (*Id.* at p. 873.) "Based solely on the use of the term 'shoplifting,' the argument discerns a limitation to 'displayed merchandise.' This argument is little more than a restatement of the rejected claim that the electorate intended to use 'shoplifting' in the colloquial sense. Further, if the electorate had intended to limit the shoplifting statute to an entry with intent to steal retail merchandise, it could have done so by using language similar to that in section 490.5," which "specifies, in part, the punishment for 'petty theft involving merchandise taken from a merchant's premises' [citation], and defines 'merchandise' . . . ." (*Id.* at pp. 873-874.)

The Court rejected the People's contention that the defendant's interpretation would lead "to absurd results because taking property displayed for sale is less blameworthy than taking other kinds of property, entering into areas not open to the public, or engaging in more sophisticated types of theft." (*Gonzales*, *supra*, 2 Cal.5th at p. 874.) The Court questioned the People's argument, explaining, "The degree of culpability can reasonably be linked to the value of property stolen, regardless of the technique employed. In each case, the thief has a specific intent to steal. In any event, the culpability levels of the various theft offenses are policy decisions for the electorate to make. Its decision to treat various theft offenses similarly may be debated but it is not absurd." (*Ibid.*)

The reasoning in *Gonzales* does not control this case. *Gonzales* was concerned with interpreting the term "larceny" and determining the mental state required for a defendant to be guilty of shoplifting. The heightened level of danger posed by entries into areas off limits to the general public was not very probative of the requisite mental state in light of the electorate's intent to link the culpability of that mental state to the *value* of the property taken rather than the nature of the property taken. Concluding

that an argued consequence of a particular interpretation of a statute is not absurd for one purpose is not the same as concluding that the argued consequence is within the statute's ambit for another purpose. (*People v. Avila* (2006) 38 Cal.4th 491, 566 ["'It is axiomatic that cases are not authority for propositions not considered'"].) This case concerns the portion of the shoplifting statute dealing with the criminal act—"entering a commercial establishment . . . while that establishment is open during regular business hours . . . ." (§ 459.5, subd. (a).) *Gonzales* did not address that issue. The statute treats only that narrow category of entry as an act worthy of exclusively misdemeanor punishment, leaving nonqualifying entries as burglaries. The dangers posed by different types of entries are extremely probative of the electorate's intent behind the differential treatment. The plain language of section 459.5, the ballot materials, and the purpose of burglary laws show that the electorate did not intend the more culpable conduct of entering a private office and creating the potential for a highly dangerous confrontation to be exclusively a misdemeanor.

Appellant contends that "arbitrarily" limiting the term "commercial establishment" to "'commercial areas" would frustrate the electorate's intent to require misdemeanor sentencing for individuals who commit nonserious, nonviolent crimes like petty theft. (OBM 12-13.) Appellant's analysis focuses on only one aspect of the electorate's intent—the intent to require misdemeanor sentencing for some nonserious, nonviolent crimes. He ignores another important aspect of the electorate's intent—protection of public safety. It is not arbitrary to exclude noncommercial areas with heightened expectations of privacy and security from the definition of "commercial establishments" given the greater degree of danger to personal safety posed by entries into the former. The heightened degree of danger is not akin to the danger posed by crimes the electorate identified as nonserious, nonviolent crimes in the same vein as petty theft.

E. Assuming the Private Offices Here Were "Commercial Establishments," They Were Not "Open"

Even if this Court concludes that the private offices entered in this case were "commercial establishments," appellant is not entitled to relief. Although the People did not raise this argument below, we may raise it for the first time here because it presents a pure question of law, and resentencing petitioner for offenses ineligible for Proposition 47 relief would constitute imposition of an unauthorized sentence. (Cf. *People v. Smith* (2001) 24 Cal.4th 849, 852 [challenges to unauthorized sentences involving pure questions of law are reviewable on appeal despite not being raised in the trial court]; *In re Ricky H.* (1981) 30 Cal.3d 176, 190-191 [ordering correction of deficiencies in the trial court's dispositional order not raised by either party because "[a]uthority exists for an appellate court to correct a sentence that is not authorized by law whenever the error comes to the attention of the court . . ."].)

For an entry into a commercial establishment to constitute shoplifting under section 459.5, subdivision (a), the entry must occur "while that establishment is *open* during regular business hours." (Italics added.) "Any other entry into a commercial establishment with intent to commit larceny is burglary." (*Ibid.*) The offices in this case were not "open" at the time of the entries. The phrase "during regular business hours" qualifying the term "open" indicates that the establishment must be ready to do business with invitees before entry into that establishment can constitute shoplifting. (*Prunty*, *supra*, 62 Cal.4th at p. 73 [the meaning of a word may be determined by reference to the whole clause in which it is used]; *Drennan*, *supra*, 84 Cal.App.4th at p. 1355 [same].) The private offices were not ready to do business with invitees who entered the gas station and convenience stores because they were off limits to those invitees.

Accordingly, even if the private offices were "commercial establishments," the entries into the offices were burglary.

II. EVEN IF THE PRIVATE OFFICES WERE COMMERCIAL ESTABLISHMENTS OPEN DURING REGULAR BUSINESS HOURS, THE CAUSE SHOULD BE REMANDED FOR FURTHER PROCEEDINGS

The People did not raise the following argument in the trial court or in the Court of Appeal. However, like the preceding argument, it is properly raised here for the first time before this Court to avoid an unauthorized sentence. (Cf. *Smith*, *supra*, 24 Cal.4th at p. 852; *Ricky H.*, *supra*, 30 Cal.3d at pp. 190-191.)

Assuming that appellant entered commercial establishments open during regular business hours, he is still not entitled to have the three convictions involving theft of property worth less than $950 automatically reduced to misdemeanors. That is true for two reasons.

First, the trial court denied appellant's petition on the alternative ground that he *intended* to steal more than $950 during the commission of each offense. (CT 13.) Based on its finding that appellant did not enter a "commercial establishment," the Court of Appeal found no need to address the issue of the value of the property appellant intended to take. (Typed Opn. at p. 6.) Nevertheless, the appellate court remarked in passing that the trial court's finding was not supported by the evidence because "[t]he most that can be said about Colbert's intent is that he and his accomplice intended to take whatever they could, of whatever value, from the offices they entered." (Typed Opn. at pp. 6-77.) That cursory observation was dictum and should not be regarded as part of the decision. (*People v. Squier* (1993) 15 Cal.App.4th 235, 240.) Hence, if appellant "enter[ed] a commercial establishment . . . open during regular business hours" within the meaning of section 459.5, subdivision (a), the Court should remand for the Court of Appeal to subject the value of the property appellant intended

to steal to closer scrutiny. (*People v. Thomas* (2012) 53 Cal.4th 1276, 1289 [remanding case to the Court of Appeal for consideration of remaining claims the Court of Appeal did not address]; see also *People v. Trice* (1977) 75 Cal.App.3d 984, 986 ["One rationale for characterizing a statement not necessary to a decision as dictum is the fact that the court did not have to confront the effect of such a statement"].)

Second, appellant petitioned to have only two out of his four burglary convictions designated as misdemeanors. (CT 7.) Appellant was required to file an application for Proposition 47 relief for each offense he sought to have reduced. (§ 1170.18, subd. (f); *People v. Shabazz* (2015) 237 Cal.App.4th 303, 314.) The sparse petition did not specify even which two counts he sought to have reduced. (CT 7-9.) For all the record shows, one of those counts might have been the burglary in which he stole $3,000, an offense that does not satisfy the criteria for relief because the value of the property taken exceeds $950. (§ 459.5, subd. (a).) Appellant had the burden of demonstrating eligibility for Proposition 47 relief in the trial court as to each of the offenses specified in the application. (*Sherow, supra*, 239 Cal.App.4th at p. 880.) It is also appellant's burden on appeal to provide an adequate record that demonstrates the trial court erred in denying the application. (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549; *People v. Malabag* (1997) 51 Cal.App.4th 1419, 1427.) Appellant sought relief for only two convictions and failed to establish that neither of those convictions pertains to the burglary involving the theft of $3,000.

Under these circumstances, only one conviction involving theft of property worth less than $950, at most, may be reduced to misdemeanor shoplifting if it otherwise falls within the scope of section 459.5. Should this Court conclude appellant entered "commercial establishments" that were "open during regular business hours" and should the Court of Appeal then determine that the value of the property appellant intended to steal did

not exceed $950, the lower court will further need to determine which burglary conviction should be reduced to shoplifting.

CONCLUSION

Accordingly, the judgment should be affirmed.

Dated: May 18, 2017

Respectfully submitted,

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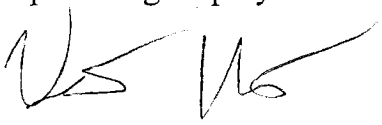

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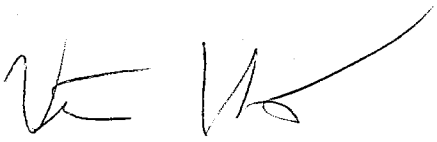
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 10,037 words.

Dated: May 18, 2017

XAVIER BECERRA
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Colbert**
No.: **S238954**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 18, 2017, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 18, 2017, at San Francisco, California.

E. Rios
Declarant

E. Rios
Signature

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