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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 Appellant.	

REPLY 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

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INTRODUCTION

This reply brief on the merits is limited to answering the few contentions raised in respondent's answer brief on the merits ("ABM") upon which further discussion may be helpful to the court. Appellant believes those points not specifically addressed in this reply brief on the merits were adequately discussed in his opening brief on the merits, and appellant intends no waiver of the issues raised in that brief by not expressly reiterating those arguments herein.

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. *"Expressio unius"* does not apply.

Respondent invokes the "well-established statutory interpretation canon *expressio unius est exclusio alterius*" ("*expressio unius*") -- the inclusion of one thing in a statute indicates exclusion of another thing not expressed in the statute -- as demonstrating the drafters of Proposition 47 clearly intended that Vehicle Code section 10851 be excluded from its provisions. (ABM 8, 10.) However, as respondent recognizes (ABM 8, 10), the United States Supreme Court repeatedly has held "the canon *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." (*Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168.)

Penal Code section 1170.18[1] amended sections 459.5, 473, 476a, 490.2, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377. The former statutes relate in some fashion to theft offenses, while the latter statutes proscribe the possession of miscellaneous drugs. Clearly, the entirety of these specific offenses are not of an "associated group or series," and therefore the doctrine of *expressio unius* does not literally apply. (*Barnhart v. Peabody Coal Co.*, *supra*, 537 U.S. at p. 168.)

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

Rather, section 1170.18 clearly was intended to reduce certain nonviolent theft and drug offenses to misdemeanors, and in this context it is not unreasonable to assume the vehicle theft offense described in Vehicle Code section 10851 inadvertently was overlooked by the drafters, buried as it is in a voluminous number of statutes generally governing licensing, traffic safety, and driving-related matters. (See Veh. Code, §§ 1-42277.)

Nor is respondent's *expressio unius* argument advanced by reliance on this court's opinion in *People v. Guzman* (2005) 35 Cal.4th 577 (*Guzman*). (ABM 10-11.) In *Guzman*, the statute in question applied to a single denominated group -- defendants who committed only nonviolent drug possession offenses -- so this court was able to apply the *expressio unius* doctrine to exclude a single group not specified in the statute, i.e., defendants who committed nonviolent drug possession offenses while on probation for committing non-nonviolent drug possession offenses. (*Id.*, 35 Cal.4th at p. 588.) In other words, *Guzman* involved a simple either-or situation: a person either had committed only a nonviolent drug possession offense or he had not. Because the question at issue here involves myriad qualifying statutes rather than only two disparate groups of potential subjects, *Guzman* provides little guidance.

More important, section 1170.18 *does* expressly include section 490.2, which expressly states: *"Notwithstanding Section 487 or any other provision of law defining grand theft*, obtaining *any* property by theft where the value of the . . . 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.) "When the Legislature intends for

a statute to prevail over all contrary law, it typically signals this intent by using phrases like 'notwithstanding any other law' or 'notwithstanding other provisions of law.'" (*In re Greg F.* (2012) 55 Cal.4th 393, 406.) Section 490.2, which does contain this expansive phrase, is listed among the statutes eligible for resentencing and prevails over any prior, or contrary law. (*Ibid.*)

Rather than amend section 487 individually, and the myriad other theft statutes distributed throughout the various code sections, section 490.2 is a catch-all statute which amends all theft crimes to comport with the new law. The voters could have amended section 487 individually as they individually amended the Health and Safety Code sections and sections 473, 476a, 496, et alia. Given the variety and number of theft-related statutes, however, this would have been unduly burdensome. For example, sections 487a to 487j describe theft offenses not individually listed in section 1170.18, yet these statutes assign varying punishments, varying threshold amounts (including $250 and $400 threshold limits) and involve varying types of property. Similarly, sections 484, 484.1, 484b to 484j, 485, 490.5, and 497 all describe theft offenses not expressly listed in the statute. Rather than specify every individual offense, section 490.2 amends them all to misdemeanors when the value does not exceed $950. There would be no other reason to add section 490.2 to the Penal Code if that were not the purpose.

Thus, given the omission of myriad other theft offenses not individually listed, the issue is not whether an offense is expressly listed, but whether it falls within the meaning of section 490.2. As this court has

recognized, "[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.) And as section 490.2 specifically states, "obtaining *any* property by theft where the value of the . . . 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.)

Moreover, "[t]he enacting body is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted. [Citation.] This principle applies to legislation enacted by initiative." (*People v. Weidert* (1985) 39 Cal.3d 836, 844; see also *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1048; *People v. Brimmer* (2014) 230 Cal.App.4th 782, 795-796.) Therefore, the electorate must be assumed to have known that this court construed the taking of an automobile with the intent to permanently deprive the owner under Vehicle Code section 10851 to qualify as a theft offense (*People v. Garza*, *supra*, 35 Cal.4th at p. 881), and thus would have assumed the taking of an auto worth less than $950 henceforth would qualify as a misdemeanor under Proposition 47.

Respondent claims: "[a]ppellant cannot petition for relief under section 490.2 even if he could show that his particular criminal conduct falls within the language of section 490.2. The Court of Appeal in this case correctly noted that section 1170.18 provides a relief mechanism for a person 'who would have been guilty of a misdemeanor' if Proposition 47

had been in effect at the time of the offense; however, Proposition 47 left intact the language of Vehicle Code section 10851, a wobbler offense. (*Page*, *supra*, slip op. at p. 4.) Thus, appellant cannot demonstrate that he *necessarily* would have been guilty of a misdemeanor, as required under section 1170.18, if the Act had been in effect at the time of his offense since Vehicle Code section 10851 still allows for felony convictions of appellant's conduct. (*Ibid.*)" (ABM 19, italics in original.) But this is circular reasoning. If, as this court has concluded, a taking with intent permanently to deprive under Vehicle Code section 10851 is a theft offense, and any theft of property worth less than $950 qualifies as a misdemeanor under section 490.2, a person convicted of taking a vehicle worth less than $950 under Vehicle Code section 10851 necessarily *would* have been guilty of a misdemeanor if section 1170.18 was in effect at the time.

B. **Auto theft is not sufficiently distinguishable from taking an auto so as to warrant disparate treatment.**

Respondent further claims it is not absurd that the electorate reduced theft of an auto worth less than $950 to a misdemeanor while exempting Vehicle Code section 10851 violations from that ameliorative effect because "[d]riving a stolen vehicle may be a very dangerous activity," potentially causing a "public hazard." (ABM 21.) This is so, claims respondent, because "persons who drive stolen vehicles typically do so openly and on public roads. When discovered by law enforcement, it is not uncommon that they subsequently flee the scene, placing everyone on the public streets in danger." (*Ibid.*) While this may be true as a generalization, it absolutely applies with equal force to those who steal autos within the scope of section 487. For example, in the very case most relied upon by

respondent, *People v. Howard* (2005) 34 Cal.4th 1129 (ABM 21-22), the defendant admitted stealing a Chevrolet Tahoe, in which he later fled from pursuing police officers and crashed into another vehicle, killing the driver and seriously injuring the passenger, for which he was charged with murder and recklessly evading a police officer.[2] (*Id.* at pp. 1132-1133.)

Conversely, argues respondent, "stealing a vehicle may not be inherently dangerous because a person may simply steal a vehicle by means other than driving it away."[3] (ABM 22.) But by the same token, *taking* a vehicle may not be inherently dangerous because a person simply might drive the vehicle in a completely safe manner, observe traffic signals, yield to pedestrians, et cetera, yet be pulled over by a police officer, e.g., for an expired registration tag or a broken taillight, or simply because the vehicle had been reported stolen. To the best of appellant's knowledge, *no* court has ever held a violation of Vehicle Code section 10851 is an inherently dangerous offense (and, in fact, in *People v. Howard*, *supra*, 34 Cal.4th 1129, this court even concluded the crime of driving with a willful or

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2. The issue in another case respondent cites for this proposition, *People v. Renteria* (2008) 165 Cal.App.4th 1108, 1112 (ABM 21), was whether the state had jurisdiction to prosecute an offense committed on federal property, where the offender's offenses were described only as "auto taking and felony evasion of a peace officer" under Vehicle Code section 2800.2. And in the third case cited, *People v. Vang* (2001) 87 Cal.App.4th 554, the defendants were charged under Vehicle Code section 10851 only because, unlike in appellant's case, there apparently was insufficient evidence proving the murder suspects also were those who stole the vehicle. (*Id.* at pp. 557-558.)

3. It is noteworthy that respondent had to go back to 1936 to find a case supporting this proposition. (ABM 22, citing *People v. Cuevas* (1936) 18 Cal.App.2d 151, 153.)

wanton disregard for the safety of persons or property while fleeing from a pursuing police officer is *not* an inherently dangerous felony).

Respondent further observes that unlike section 487, subdivision (d)(1) (automobile theft), a violation of Vehicle Code section 10851 encompasses unlawfully taking an ambulance or "distinctly marked vehicle of a law enforcement agency or fire department" knowing that the vehicle "is on an emergency call." (ABM 22.) While this may be true, appellant cannot conceive of any possible situation in which a defendant could demonstrate the value of an operable ambulance or law enforcement agency vehicle actively responding to an emergency call was less than $950. Therefore, it is a virtual certainty that anyone convicted of stealing an ambulance or police vehicle in the midst of an emergency call would not qualify for reduction of the offense to a misdemeanor under section 1170.18 and 490.2.

C. Appellant should not be precluded from demonstrating he qualifies for resentencing under sections 1170.18 and 490.2.

Respondent states, "Even if this Court were to conclude that the Act impliedly applies to violations of Vehicle Code section 10851 convictions through its enactment of section 490.2, the superior court properly denied appellant's petition under section 1170.18 because he failed to show that he qualified for resentencing." (ABM 27.) Appellant does not disagree with this statement, but this is not the end of the inquiry.

Appellant submitted a Proposition 47 "motion" to modify his sentence on or about November 20, 2014. (CT 35-38.) The court summarily denied his motion on December 26, 2014, finding he did not satisfy the criteria in section 1170.18 and therefore was not eligible for

resentencing. (CT 39; RT 25.)

On August 11, 2015, some eight months later, Division One of the Fourth District Court of Appeal filed its opinion in *People v. Sherow* (2015) 239 Cal.App.4th 875 (*Sherow*) (cited by respondent at ABM 28), which "allocate[d] the initial burden of proof to the petitioner to establish the facts, upon which his or her eligibility is based." (*Id.* at p. 880.) However, the Court of Appeal affirmed the denial of the defendant's petition for resentencing "without prejudice to subsequent consideration of a properly filed petition." (*Id.* at p. 881.) Similarly, in *People v. Perkins* (2016) 244 Cal.App.4th 129 (*Perkins*), cited by respondent (ABM 28), Division Two of the Fourth District Court of Appeal affirmed the order denying the defendant's Proposition 47 petition for resentencing of his conviction for receipt of stolen property "without prejudice to consideration of a subsequent petition that supplies evidence of his eligibility." (*Id.* at p. 142.) And in *People v. Rivas-Colon* (2015) 241 Cal.App.4th 444 (*Rivas-Colon*), also cited by respondent (ABM 28), the parties stipulated at the change-of-plea hearing that the value of merchandise stolen was $1,437.74, so the Court of Appeal had no problem concluding the defendant was precluded from Proposition 47 relief. (*Id.* at pp. 449-450.)

In appellant's case, the superior court denied his Proposition 47 petition several months before the courts in *Sherow* and *Perkins* allocated to the petitioner the burden of demonstrating his or her eligibility for Proposition 47 relief. And unlike the defendant in *Rivas-Colon*, the record in appellant's case lacked any information whatsoever regarding the value of the stolen vehicle. Thus, in the event this court concludes a conviction

for stealing a vehicle worth less than $950 in violation of Vehicle Code section 10851 qualifies for reduction to a misdemeanor, appellant would not be prevented from filing a new petition before November 5, 2017 (§ 1170.18, subd. (j)) in order to demonstrate he qualifies for resentencing. Respondent's inference that appellant, once denied, should forever be precluded from making the necessary showing (ABM 29) is not supported by current interpretations of section 1170.18.

CONCLUSION

For the reasons stated above, as well as those stated in his opening brief on the merits, 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: June 6, 2016

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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 Reply Brief on the Merits contains 2,571 words.

Executed this 6th day of June 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 REPLY 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:

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I further declare that I electronically served from my electronic service address of *jeffskross@earthlink.net* the same Reply 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 6th day of June 2016 at Sebastopol, California.

JEFFREY S. KROSS