In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. JULIAN MICAH BULLARD, Defendant and Appellant,	)	Case No. S239488 (4th Crim. E065918) (Sup.Ct.No. FVI11200894)

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF SAN BERNARDINO COUNTY
THE HONORABLE JOHN P. VANDER FEER, JUDGE

PETITIONER AND APPELLANT'S REPLY BRIEF

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By appointment of the Supreme Court

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Plaintiff and Respondent,	)	
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v.	)	(4th Crim. B263164)
	)	
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INTRODUCTION

Respondent characterizes the issue in this case as a "narrow one." (R.B. p. 15.) To respondent, the issue is only whether the doctrine of absurd consequences requires the holding of *People v. Page* (2017) 3 Cal.5th 1175 be extended to those class of defendants who took a vehicle without the intent to permanently deprive. (R.B. p. 15.) As to this very narrow question, respondent immediately acknowledges that "the absurd consequences doctrine requires extending Proposition 47 to those convicted of section 10851 for *taking* a vehicle *without* the intent to permanently deprive the owner of possession. There appears to be no reasonable basis for refusing to extend Proposition 47's misdemeanor sentencing provisions to section 10851 convictions of that kind."[1] (R.B. p. 9.)

Assuming this Court accepts respondent's concession, the only point of contention remaining is whether the doctrine of absurd consequences and/or the equal protection clause also compels the conclusion that Proposition 47 should be applied to Vehicle Code section 10851 convictions based solely on *driving*, as petitioner contends in his opening brief on the merits.[2] This broader issue is extremely important in light of

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[1]Under the facts as described in the Court of Appeal's opinion (Slip Opn. p. 2) and the least adjudicated elements doctrine, Bullard's conviction must be deemed to be for the unlawful taking of a vehicle without the intent to permanently deprive his girlfriend of possession thereof. In light of respondent's concession, such a conviction must now be a misdemeanor because the Court of Appeal found the value of the vehicle to be $950 or less.

[2]Unless otherwise indicated, all section references are to the Vehicle Code.

how respondent distinguishes between driving and taking offenses in its section 10851 matrix. (R.B. p. 16.) While trying to appear reasonable and magnanimous by conceding that the holding in *Page* should also apply to those who took a vehicle without the intent to permanently deprive, respondent is, at the same time, offering a method of classifying section 10851 offenses that makes most violations driving offenses as opposed to taking offenses. The People giveth, the People taketh away. In response to this thinly veiled attempt to minimize the impact of the opinion in *Page,* petitioner urges this Court to consider the broader issue and, ultimately, hold that all section 10851 offenses are theft-based offenses for the purposes of Proposition 47 – as they all involve depriving the owner of his vehicle without his consent.

ARGUMENT

I.

THE DOCTRINE OF ABSURD CONSEQUENCES PRECLUDES PUNISHING A CONVICTION FOR TAKING A VEHICLE WORTH LESS THAN $950, WITHOUT THE INTENT TO PERMANENTLY DEPRIVE THE OWNER OF POSSESSION, AS A FELONY.

Respondent narrowly construes the issue before this Court as to whether the holding in *People v. Page* must be extended to those convicted of violating Vehicle Code section 10851, subdivision (a) for taking a vehicle without the intent to permanently deprive the owner of possession thereof. To respondent, the Court is not asking at all about those convicted of merely driving the vehicle under section 10851, subdivision (a). (R.B. pp. 13 - 16.) As to respondent's narrow construction of the question posed by the Court, the parties are in agreement. The parties "can think of no plausible reason for treating section 10851 convictions for taking a vehicle without the intent to permanently deprive the owner of possession more harshly than those for taking a vehicle with the intent to permanently deprive the owner of possession." (R.B. p. 16.) As such, the doctrine of absurd consequences requires that convictions for taking a vehicle without the intent to permanently deprive be treated the same way this Court treated those convicted of taking a vehicle with the intent to permanently deprive in *People v. Page.* Specifically, if a defendant took a vehicle worth $950 or less, his conviction must be reduced to a misdemeanor under Proposition 47 regardless of whether he took the vehicle with the intent to permanently deprive or not.

In this case, Bullard clearly took the vehicle, without the intent to permanently deprive his girlfriend of her vehicle, when he took the car keys from her purse without asking. Since Bullard pled guilty to the unlawful taking **or** driving of a vehicle (R.B. p. 35), he now falls within that second category of section 10851 offenders to which respondent concedes Proposition 47 applies. (R.B. pp. 15 - 16.) As such, regardless of whether Proposition 47 applies to driving-based offenses, or whether this Court even decides if Proposition 47 applies to driving offenses in the instant appeal, Bullard is entitled to have his conviction reduced to a misdemeanor because the Court of Appeal has already found the value of the vehicle is $950 or less.[3]

[3]The applicable remedy is discussed in detail in section IV.

II.

THE ABSURD CONSEQUENCES DOCTRINE REQUIRES THAT ALL CONVICTIONS SUFFERED UNDER VEHICLE CODE SECTION 10851, SUBDIVISION (A) BE DEEMED PROPOSITION 47 ELIGIBLE, UNDER *PEOPLE V. PAGE,* PROVIDED THE VALUE OF THE VEHICLE INVOLVED WAS $950 OR LESS.

While respondent concedes that the absurd consequences doctrines requires that Proposition 47 be extended to those convicted of violating Vehicle Code section 10851, subdivision (a) for taking the vehicle without the intent to permanently deprive, respondent does not believe the doctrine further requires that the amelioratory benefits of the proposition be extended to those convictions based solely on driving the vehicle. To respondent, "[t]here is nothing absurd or irrational about punishing the act of driving a vehicle without the owner's consent more harshly than the taking that same car." (R.B. p. 17.)

Respondent then proceeds to define section 10851 offenses in a manner in which virtually all crimes committed under this section could be characterized as driving offenses. In not so subtle fashion, respondent is attempting to negate the impact of his concession by writing out virtually everyone to whom the holding in *People v. Page,* extended or not, might apply. As Dr. Leonard McCoy once cautioned, "Beware of Romulans bearing gifts."[4] In other words, petitioner urges this Court not to blindly accept the People's characterization of section 10851 offenses simply because respondent

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[4]Star Trek II - The Wrath Of Kahn

conceded the narrow version of the issue raised by this Court.

A. Respondent's Two-By-Two Matrix.

Legal arguments aside, Bullard finds respondent's two-by-two matrix (R.B. p. 16), as to the four ways a defendant can violate Health and Safety Code section 10851, subdivision (a), extremely helpful for analytical purposes and will use it for discussion purposes in this reply brief. As the court in *People v. Van Orden* (2017) 9 Cal.App.5th 1277 described, there are four ways of violating section 10851, subdivision (a): (A)(1) the unlawful taking of a vehicle with the intent to permanently deprive the owner of possession (the situation in *People v. Page*); (A)(2) the unlawful taking of the vehicle without the intent to permanently deprive (the factual situation in the instant case); (B)(1) driving the vehicle with the intent to permanently deprive (post theft driving); and (B)(2) driving the vehicle without the intent to permanently deprive (joyriding).[5] (*Id.*, at pp. 1283, 1285.) To respondent, the holding in *People v. Page* and the doctrine of absurd consequences only require that the provisions of Proposition 47 apply to those defendants who fall within categories A1 and A2; i.e., those who took the vehicle with or without the intent to permanently deprive.

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[5]The letter represents the horizontal axis in respondent's matrix; i.e., taking versus driving. The number represent the vertical axis; i.e., with intent versus without intent to permanently deprive.

The remaining issue this Court needs to consider is whether the doctrine of absurd consequences and/or the equal protection clause requires that those falling in categories B1 and B2 be afforded the amelioratory benefits of Proposition 47 as well. Obviously, since respondent has conceded that there is no reason to treat those who take without the intent to permanently deprive harsher than those who take with the intent to permanently deprive, respondent must necessarily also concede that there would be no reason to treat those who drove without intent to permanently deprive more harsher than those who did intend to permanently deprive. As such, the Court's holding as to category B1 defendants would necessarily apply to B2 defendants as well.

B. It Is Absurd To Treat Those Who Merely Joyride Or Drive A Vehicle After It Is Stolen More Harshly Than Those Who Actually Stole The Vehicle.

According to respondent, there is legal justification for treating those who merely joyride or drive the vehicle after it is stolen more harshly than those who actually stole the vehicle. Bullard is perplexed by respondent's distinction between the two broad categories of offenses, particularly between "joyriding" and taking a vehicle without intent to permanently deprive. As defined by this Court, joyriding occurs when a person drives a vehicle "'with the intent only to temporarily deprive its owner of possession.'" (*People v. Garza* (2005) 35 Cal.4th 866, 876.) How is that any different from taking a vehicle without the intent to permanently deprive the owner of possession? How exactly does one take a vehicle without intent to permanently deprive without actually driving it?

If "joyriding" is excluded from A2 of respondent's matrix, Bullard is unsure what would be included in quadrant three of the matrix.[6] Aside from a prank pulled by a tow truck driver, Bullard can envision no of accomplishing the crime of taking without the intent to permanently deprive without driving the vehicle. As such, it is Bullard's position that if A2 and B2 do not describe the exact same offense, there is at least a great deal of overlap in the two offenses.

Similarly, there is a significant degree of overlap between those offenses which fall in category A1 and those which fall in category B1. The unlawful theft of a vehicle with the intent to permanently deprive the owner of possession thereof and the post theft driving of the vehicle with the same intent seem to be part and parcel of the same crime. Again, it is very difficult to steal a vehicle without ever driving it. Certainly, there are rare situations where a vehicle is stolen using a tow truck. And, of course, one could be guilty of aiding and abetting the theft of a vehicle without ever actually driving it, but the instances where a vehicle is taken without anyone ever driving it are extremely few and far between. As such, desperate punishment between those who are convicted of taking a vehicle and those who are convicted of merely driving the vehicle is wholly arbitrary and simply cannot be justified.

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[6]Causing virtually all temporary takings to fall within the joyriding (B2) quadrant appears to be respondent's intentional means of negating the impact of this Court's holding in *Page* and respondent's concession in this case.

Proposition 47's distinction between section 10851 driving convictions and taking convictions is not "entirely sensible[,]" as respondent maintains (R.B. p. 19); it is absurd. Respondent argues that since driving a stolen vehicle is inherently dangerous because it leads to high speed chases and other crimes, including violent ones, the voters could have purposefully intended to treat those who unlawfully take a car different than those who unlawfully drive one. (R.B. pp. 18 - 19.) To begin with, the failure of the drafters of Proposition 47 to specifically deal with Vehicle Code section 10851 is at least some evidence that the voters had no intent at all to distinguish between the various ways of violating section 10851.

Furthermore, it is patently absurd to believe those convicted of the unlawful driving of a vehicle are inherently more dangerous than those who are convicted of unlawfully taking a vehicle. As respondent points out in his brief, which type of section 10851 offense the defendant is convicted of often depends on how the prosecutor charges the case and not the actual facts of the offense. (R.B. pp. 19 - 20.) Certainly, someone who is merely "joyriding" (charged under either A2 or B2) is far less likely to commit a serious or violent felony offense than a car thief.[7] Yet, respondent argues that it is in the

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[7]Respondent cites *People v. Linares* (2003) 105 Cal.App.4th 1196, 1197-1198 for the proposition that people have used their own cars to try to murder other people. While this is no doubt true, Bullard fails to see the relevance of the fact that a person used his own vehicle to try to kill someone. If Linares had been joyriding in someone else's vehicle and then tried to kill someone with that vehicle, that would be relevant to the Court's present inquiry.

prosecutor's discretion whether to charge the thief who drove the car that he stole with either a misdemeanor or felony. Under such discretion, there will be those who stole and drove the car that will be charged with a misdemeanor and those who were merely joyriding that will be charged with felonies. Surely, this is not what the voters intended when they passed Proposition 47, which was designed to keep non-serious, non-violent offenders out of state prison. Under section 10851, what could be less serious, less violent, then someone who joyrides in a vehicle without the intent to permanently deprive the owner of possession?

C. To Avoid The Anomalous Result Respondent Believes Adopting Bullard's Position Would Cause, Respondent's Section 10851 Matrix Should Be Discarded For Purposes Of Proposition 47.

Respondent asserts that adopting Bullard's broader "argument would produce an anomalous result of its own. It would inevitably draw the courts into the debate over which crimes should be punished as misdemeanors, and which should be punished as felonies." (R.B. p. 23.) In response, Bullard argues that respondent's matrix is arbitrary and should be completely discarded, at least for Proposition 47 purposes. The history of Vehicle Code section 10851 aside, there is no legitimate reason to treat those who drove the vehicle they stole differently from those who did not drive the stolen car. And there is certainly no legitimate reason to treat those who took a vehicle without the intent to permanently deprive the owner of possession differently from those who were joyriding in the vehicle without the intent to permanently deprive, as they committed a

factually indistinct crime.

By treating every type of section 10851, subdivision (a) offense the same way, the Court avoids the problem of how to determine which crimes are wobblers and which are straight misdemeanors. The basis for that determination was made by the voters who passed Proposition 47 – if the value of the vehicle is $950 or less, it is a misdemeanor regardless of whether the defendant took or drove the vehicle, and regardless of the intent with which he did so. (If the value is over $950, then the offense is a wobbler.) Making all violations of section 10851 misdemeanors if the vehicle involved was worth $950 not only furthers the stated purpose of Proposition 47, it also makes administration of a heretofore confusing statute rather straightforward – at least in terms of the application of the amelioratory benefits of Proposition 47.

D. Including All Types Of Violations Of Vehicle Code Section 10851, Subdivision (a) Would Be Consistent With This Court's Approach In People v. Romanowski.

Respondent argues that this Court has acknowledged similar distinctions for purposes of Proposition 47 that lead to no more absurd results than argued by Bullard in this case. (R.B. pp. 24 - 25.) Respondent cited several cases for this proposition but, failed to site the most relevant decision from this Court - *People v. Romanowski.*

In *Romanowski,* respondent argued that the provisions of Proposition 47 did not apply to Penal Code section 484e, subdivision (d) because that Code section did not "define a 'theft' crime[.]" According to respondent in *Romanowski,* section 484e,

subdivision (d) "is violated when someone acquires or retains possession of access card account information issued to another person[.]" (*People v. Romanowski* (2017) 2 Cal.5th 903, 912.) In the reply brief, respondent reiterated "that the statute 'proscribes the acquisition or retention of access card information with the intent to use it fraudulently, which is different from a proscription against obtaining any property by theft.'" (*Ibid.*) This Court found that respondent's argument "glossed over" one crucial element of the statute. A conviction under section 484e, subdivision (d) "requires acquir[ing] or retain[ing] possession of access card account information with respect to an access card validly issued to another person, *without the cardholder's or issuer's consent.*" (*Ibid.* [citation omitted].) According to this Court, the "without consent" requirement of the statute "confirms that theft of access card information is a 'theft' crime in the way the Penal Code defines 'theft.'" (*Ibid.*)

Similarly, Vehicle Code section 10851, subdivision (a) also uses the "without the owner's consent" language. Specifically, the section provides in relevant part: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle . . ." (Veh. Code, § 10851, subd. (a).) As this Court found in *Romanowski*, the "without consent" requirement found in section 10851 makes the offense a theft offense. And, this is true no matter what the defendant specifically did or what conduct the prosecutor chose to charge in the

information. Just as the unlawful retention of access card information is always a theft offense for purposes of Proposition 47, so too is the unlawful driving of a vehicle always a theft offense.

E. Petitioner Only Cited The Three Opinions Respondent Now Challenges For The General Principles Of The Absurd Consequences Doctrine.

In his opening brief, Bullard cited *Younger v. Superior Court* (1978) 21 Cal.3d 102; *People v. Pieters* (1991) 52 Cal.3d 894; and *Brown v. Superior Court* (1984) 37 Cal.3d 477, for the general proposition that the doctrine of absurd consequences precluded treating alternative types of violations of section 10851, subdivision (a) differently under Proposition 47. Respondent argues that Bullard's reliance on these three cases is misplaced. It is respondent who is mistaken.

To begin with, this Court asked the parties to brief whether the doctrine of absurd consequences requires the result for which petitioner now argues and these cases are seminal opinions issued by the Court on this doctrine. As such, they are clearly relevant – at least in establishing the context in which the doctrine has been applied in the past. Indeed, Bullard cited them for no other purpose than laying the foundation for his absurd consequences argument. Admittedly, none of the three cases are directly on point. Indeed, given how infrequently the doctrine is invoked, it comes as no surprise that there is no case directly on point. As illustrated by these three cases, the lack of authority directly on point has not precluded this Court from relying on the doctrine to avoid or

correct an absurd consequence when they do arise. Bullard implores this Court to do so again in this case.

F. Treating Joyriding And Vehicle Theft The Same Furthers The Express Purposes Of Proposition 47.

Respondent argues that drawing the distinction made in the matrix between driving and taking offenses "effectuates the electorate's intent in adopting proposition 47." (R.B. p. 28.) Respondent is again mistaken. Respondent repeats an argument similar to one made in *Romanowski*, that the unlawful driving of a vehicle is not a theft based offense. As discussed above, section 10851 uses the same "without consent" language used in Penal Code section 484e, subdivision (d) and this Court found that such language indicated that all violations of section 484e, subdivision (d) were theft based offenses. Just as it was irrelevant in *Romanowski* whether the defendant violated section 484e, subdivision (d) by stealing or merely unlawfully retaining the access card information, so too should it be irrelevant whether the defendant violates section 10851, subdivision (a) by taking the vehicle without the owner's consent or driving the vehicle without the owner's consent. At its core, both types of offenses are theft based offenses, as they involved depriving the owner of his vehicle without his consent.

Contrary to respondent's argument (R.B. pp. 28 - 29), the fact that the ballot materials emphasized that Proposition 47's misdemeanor sentencing provisions were limited to "nonserious, nonviolent crimes like petty theft and drug possession[]" (Prop.

47, as approved by voters, Gen. Elec. (Nov. 4, 2014) § 3(3)), does not preclude finding that the unlawful driving of a vehicle is included with the provisions of Proposition 47. The unlawful driving of a vehicle is a non-serious, non-violent offense and it is similar to petty theft in that an element of the offense is that the defendant deprive the owner of possession of his vehicle without consent. As such, just as it was entirely consistent with the voter's materials to hold that unlawful retention of an access card constituted a theft for purposes of Proposition 47, so too is it entirely consistent to find that driving a vehicle without the owner's consent constitutes a theft based offense.

G. Conclusion.

"'It 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 [the voters] did not intend.' [Citations.] Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'" (*People v. Pieters, supra,* 52 Cal.3d at pp. 898 - 899, citing *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) This Court has also held that courts may look to "the ballot summary and arguments" as well as "the preamble to the initiative" to discern its intended purpose. (*In re Lance W.* (1985) 37 Cal.3d 873, 890 & fn. 10.)

As has been repeatedly quoted, the primary purpose of Proposition 47 is to "ensure that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from

this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment." (Voter Information Guide, Gen. Elec., supra, text of Prop. 47, § 2, p. 70.) Clearly, "[o]ne of Proposition 47's primary purposes is to reduce the number of nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative." (*Harris v. Superior Court* (2016) 1 Cal.5th 984, 992.)

To achieve this goal, Proposition 47 directs "that the text of the initiative 'shall be broadly construed to accomplish its purposes' and 'shall be liberally construed to effectuate its purposes.'" (*People v. Romanowski, supra,* 2 Cal.5th at p. 909, quoting Voter Information Guide, supra, text of Prop. 47, §§ 15, 18, p. 74.) Certainly, downgrading the punishment for all violations of Vehicle Code section 10851, subdivision (a) "no doubt serves Proposition 47's purposes of '[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes.'" (*People v. Romanowski, supra*, 2 Cal.5th at p. 909, quoting Voter Information Guide, supra, text of Prop. 47, § 3.)

Conversely, treating those who were merely joyriding more harshly than those who took the vehicle with the intent to permanently deprive is both counter intuitive and runs afoul of the primary objectives of Proposition 47 – to save money by keeping non-serious, non-violent offenders out of State prison. (See *Harris v. Superior Court, supra*, 1 Cal.5th at p. 992.) Since courts should adopt a statutory construction that most

closely comports with the apparent intent of the voters, with a view toward promoting the general purpose of the initiative (*People v. Rubalcava* (2000) 23 Cal.4th 322, 332; *People v. Jackson* (1985) 37 Cal.3d 826, 838), this Court should extend the holding of *People v. Page* to include all defendants convicted under Vehicle Code section 10851, subdivision (a) or Penal Code section 666.5, subdivision (a). (See e.g., *Younger v. Superior Court, supra*, 21 Cal.3d at pp. 113 - 114; *People v. Pieters, supra*, 52 Cal.3d at p. 902.)

Simply put, the doctrine of absurd consequences, as well as the clearly enunciated goals of Proposition 47, require that all convictions suffered under Vehicle Code section 10851, subdivision (a) should be treated as misdemeanors if the vehicle is worth $950 or less.

III.

THE EQUAL PROTECTION CLAUSE ALSO REQUIRES THAT PETITIONER'S CONVICTION FOR THE UNLAWFUL DRIVING OF A MOTOR VEHICLE UNDER VEHICLE CODE SECTION 10851 BE TREATED THE SAME WAY AS A CONVICTION FOR THE UNLAWFUL TAKING OF A VEHICLE IS NOW TREATED UNDER *PEOPLE V. PAGE.*

Contrary to respondent's argument (R.B. pp. 31 - 33), the equal protection clause of the Fourteenth Amendment, as well as of that found in Article I, section 7 of the California Constitution, also mandates that the ameliorative provisions of Proposition 47 be available to all those convicted of violating Vehicle Code section 10851, subdivision (a) by taking and/or driving a vehicle worth $950 or less. Under this Court's holding in *People v. Page, supra,* 3 Cal.5th 1175, the protections and relief of Penal Code sections 490.2 and 1170.18 are afforded to those who were convicted of stealing a motor vehicle valued at $950 or less under Vehicle Code section 10851. The equal protection clauses of both the State and Federal Constitution require those same protections and relief be afforded to one who is merely convicted of either the unlawful driving of a vehicle or the taking a vehicle without the intent to permanently deprive the owner of possession thereof.

A. 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.) Thus, in order to prevail on an equal protection claim, Bullard must first show that the "state has adopted a classification that affects two or more similarly situated groups in an unequal manner." (*People v. Morales* (2016) 63 Cal.4th 399, 408.)

Under this Court's holding in *People v. Page,* had Bullard clearly stolen his girlfriend's vehicle he would unequivocally be entitled to have his Vehicle Code section 10851 conviction reduced to a misdemeanor. Because of the distinctions drawn by this Court in *People v. Page,* however, Bullard is presently not entitled to relief for his conviction for merely driving or taking his girlfriend's car without the intent to permanently deprive her of possession thereof. Hence, even though he violated the same Code section as someone convicted of stealing a vehicle, petitioner may not presently be entitled to have his conviction reduced to a misdemeanor under Proposition 47 because he arguably did not steal the car. (*People v. Page, supra,* 3 Cal.5th at p. 1183.)

B. 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* (2006) 37 Cal.4th 1185, 1200.) Respondent argues that there is no fundamental interest involved in this case and, therefore, only rational basis

review applies. (R.B. p. 32.) Petitioner disagrees.

As Bullard argued in his opening brief on the merits, punishing differently those who drive a vehicle without consent from those who take a vehicle without consent implicates the right to liberty and personal liberty is certainly a fundamental interest. 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 [strict scrutiny applies to legislative scheme which punish juvenile offenders more harshly than adult offenders for the same offense]; 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 [a 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].)

Before the passage of Proposition 47, a conviction suffered under Vehicle Code section 10851, subdivision (a) could be sentenced as a misdemeanor or a felony – at the sentencing court's discretion. The offense was a wobbler regardless of the defendant's intent or the value of the vehicle involved. After the passage of Proposition 47 and this Court's decision in *People v. Page,* only defendants who took a vehicle valued at $950 or less, with the intent to permanently deprive the owner of possession, could petition to have their convictions reduced to misdemeanors. Defendants who merely drove, or even took the vehicle without the intent to permanently deprive the

owner of possession, were still left at the mercy of the sentencing judge. As a result, some defendants convicted of a less culpable act are still subject to felony sentences while all those convicted of the more culpable act of stealing the vehicle are not.

The difference between the two broad types of section 10851 offenders (A1 and A2 versus B1 and B2 in respondent's matrix) also determines whether the convicted defendant continues to suffer the stigma (i.e., the difficulty in securing employment or housing) and loss of Constitutional rights (i.e., the right to vote) associated with only 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 [147 L.Ed 2d 435, 120 S.Ct. 2348].)[8] The denial of actual freedom, coupled with the loss of significant Constitutional rights, because a conviction is classified as a felony instead of a misdemeanor, demand that any law which creates such disparate treatment be subject to strict scrutiny. (*People v. Olivas, supra,* 17 Cal.3d at p.

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[8]Under *Apprendi v. New Jersey*, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory minimum must be submitted to a jury and proved beyond a reasonable doubt." (*Id.,* at p. 490.) As such, if driving offenses are wobblers under section 10851, subdivision (a) but taking offenses are straight misdemeanors if the value of the vehicle is $950, then juries must potentially have to make two special findings. First, the jury must make a finding as to the value of the vehicle involved. If the jury finds that the vehicle was worth $950 or less, it would then have to find whether the defendant personally drove the vehicle.

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"[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 [90 L.Ed.2d 260, 106 S.Ct. 1842].) Because respondent argues that strict scrutiny does not apply, the People have not asserted any compelling interest which constitutionally justifies the disparate treatment between these two broad types of section 10851 offenders. Nor have they shown that the law accomplishes that compelling state interest in the least restrictive means possible. As a result, the mandates of the equal protection clause require this Court to treat all section 10851 offenders in the same fashion.

C. There Is No Rational Basis For Disparate Treatment.

Respondent maintains that the appropriate level of scrutiny is only the rational basis test. (R.B. pp. 31 - 32.) Assuming, without conceding, that respondent is correct, the instant unequal treatment still fails to pass Constitutional muster, as the distinction no longer serves a rationale purpose. Under rational based scrutiny, 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* (1999) 21 Cal.4th 628, 648 - 649 [emphasis in original, internal quotations and citations omitted].) If the Court has to invent a conceivable justification, then the justification necessarily fails.

As argued in the section II, the distinction between those who took the vehicle without the intent to permanently deprive and those who were merely joyriding is irrational and has no basis in fact. One simply cannot joyride without also taking the vehicle without the intent to permanently deprive. Likewise, one would be hard pressed to formulate a hypothetical, based in reality, whereby someone takes a vehicle without the intent to permanently deprive and does not also drive the car. Since it is next to impossible to commit a A2 offense without committing a B2 offense, and vice versa, there can be no rational basis for treating the two offenses differently for purposes of punishment.

In addition, because any violation of Vehicle Code section 10851, subdivision (a) necessarily requires that the perpetrator take and/or drive the vehicle without the owner's consent, all crimes under this section are properly viewed has theft-based crimes. Factually, one cannot drive a vehicle without the consent of the owner and not also take the car. As discussed above, the "without consent" language in section 10851, like the similar language in Penal Code section 484e, subdivision (d), makes any violation of the section a theft offense - at least for purposes of Proposition 47. As such, there can be no rational basis for treating one type of section 10851 offense more harshly

than another.

Respondent again argues that the fact that driving a vehicle is an inherently dangerous activity justifies treating those convicted of unlawfully driving a vehicle more harshly than those who merely took the vehicle. (R.B. p. 33.) In practical application, this argument is nonsense. Except in very rare situations, those who unlawfully take a vehicle also have to drive that vehicle, or aid and abet, or conspire with someone else who must drive the vehicle. A vehicle that is not moved cannot be stolen. As such, an offense committed under section 10851, subdivision (a) almost always involves the driving of the vehicle. For this reason, those charged with driving the vehicle did not commit a crime any more inherently dangerous than those charged with taking the vehicle. Furthermore, if the defendant committed other felonies while driving the vehicle, such as reckless driving, evading police or even murder, he can be convicted under the other Code sections which have been enacted to punish such offenses. Hence, the irrational distinction between driving and taking a vehicle simply has no legitimate deterrent or punishment purpose.

Finally, the disparate treatment that has resulted from this Court's decision in *People v. Page* does not further Proposition 47's stated goal of saving precious State resources for our schools and victim's programs by reducing the prison population through the reclassification of non-serious, non-violent felonies to misdemeanors. (See *Harris v. Superior Court, supra,* 1 Cal.5th at p. 992; Voter Information Guide, Gen. Elec.,

supra, text of Prop. 47, § 2, p. 70.) As stated previously, downgrading the punishment for all violations of Vehicle Code section 10851, subdivision (a) "no doubt serves Proposition 47's purposes of '[r]equir[ing] misdemeanors instead of felonies for nonserious, nonviolent crimes.'" (*People v. Romanowski, supra,* 2 Cal.5th at p. 909, quoting Voter Information Guide, supra, text of Prop. 47, § 3.)

In sum, there simply is no rational basis to discriminate in favor of vehicle thieves and against those who, like Bullard, may have merely driven the vehicle without permission. Nor is there any rational basis to treat those convicted of driving a vehicle with the intent to permanently deprive the owner of possession more harshly than those convicted of taking a vehicle with the intent to permanently deprive. As such, even under the more deferential standard of scrutiny, the unequal treatment of these two types of section 10851 offenders, at least under the provisions of Proposition 47, violates the equal protection clauses of both the State and Federal Constitutions.

IV.

IN LIGHT OF RESPONDENT'S CONCESSION AND THE LEAST ADJUDICATED ELEMENTS TEST, BULLARD IS ENTITLED TO HAVE HIS PROPOSITION 47 PETITION GRANTED WITHOUT REMAND FOR AN EVIDENTIARY HEARING.

Bullard requested this Court remand the matter to the Superior Court for a hearing on his petition before learning that the People concede that those who merely took the vehicle without the intent to permanently deprive the owner of possession should be treated the same as those who took the vehicle with the intent to permanently deprive. In light of respondent's concession (R.B. pp. 16 - 17), Bullard asserts a remand for an evidentiary hearing is no longer necessary. Bullard clearly took the vehicle with the intent to only temporarily deprive his girlfriend of her car and the Court of Appeal has already found that the value of the vehicle was only $500. (Slip Opn. p. 2.) As such, in light of respondent's concession, there is no longer a factual issue to resolve on remand.

Respondent argues, however, that a remand is still necessary because (a) Bullard must prove his offense was for taking and not driving the vehicle and (b) he must prove the value of the vehicle was $950 or less.[9] (R.B. pp. 34 - 35.) First, respondent again draws the distinction between taking a vehicle without intent to permanently deprive and driving a vehicle without intent to permanently deprive (joyriding). And, again, Bullard asserts there is no factual distinction between the two

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[9]That respondent believes a remand is necessary so that Bullard can prove that he took the vehicle, as opposed to drove the vehicle, further illustrates his veiled attempt to characterize virtually all section 10851 crimes as driving offenses and, thereby, negate most of the impact of this Court's decision in *Page*.

offenses. The only distinction is made by the prosecutor in his or her charging decision. Here, the prosecutor charged Bullard with both driving and taking the vehicle. (R.B. p. 34.) As respondent points out, however, Bullard only pled guilty to "taking or driving a vehicle either temporary [sic] or permanently." (R.B. p. 35) Since the nature of a section 10851 offense is solely determined by how the prosecutor decides to charge the offense, there is no way for Bullard to prove, at this point, that he only took the vehicle.

Under *People v. Guerrero* (1988) 44 Cal.3d 343, however, Bullard has nothing to prove. (*Id.,* at pp. 355 - 356.) "[W]hen the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable[.]" (*Id.,* at p. 355; see also *People v. Rodriguez* (1998) 17 Cal.4th 253, 261 - 262 [an abstract of judgment proves nothing more than the least adjudicated elements of the offense].) Under the least adjudicated elements doctrine, Bullard is only guilty of taking the vehicle and the People cannot prove otherwise, as they allowed him to plead to taking **or** driving the vehicle either temporarily **or** permanently.[10] (R.B. pp. 34 - 35.)

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[10]Even if this Court does not accept respondent's concession that those who take the car without the intent to permanently deprive the owner of possession are only guilty of a misdemeanor, Bullard is still entitled to have his conviction reduced. Under the least adjudicated elements test, Bullard pled guilty to taking the vehicle with the intent to permanently deprive – for, under *People v. Page,* the least adjudicated elements of a section 10851, subdivision (a) offense are now taking the vehicle with the intent to permanently deprive. Hence, regardless of this Court's decision on the issue it asked the parties to brief, Bullard is entitled to have his conviction reduced to a misdemeanor under the authority of *People v. Page* and *People v. Guerrero.*

Second, the Court of Appeal has already found that the value of the 1993 Lincoln Towncar, which had 260,000 miles on it, was only $500. (Slip Opn. p. 2.) Hence, the evidence already establishes that the value of the vehicle was $950 or less. As such, there is also no need to remand the matter to determine the value of the vehicle.

In short, the only reason to remand the instant matter is so the Superior Court can resentence Bullard to a misdemeanor.

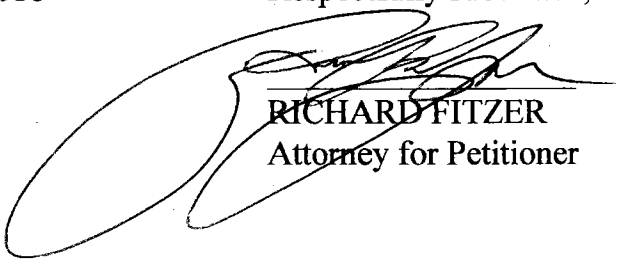
CONCLUSION

For the foregoing reasons, petitioner Julian Bullard accepts the People's concession that the holding of *People v. Page* must also apply to those who were convicted of merely taking the vehicle without the intent to permanently deprive the owner of possession thereof. Nevertheless, Bullard still respectfully requests this Court to find that **all** convictions suffered under Vehicle Code section 10851, subdivision (a), where the vehicle in question was worth $950 or less, are subject to the ameliorative provisions of Proposition 47.

Regardless of this Court's decision on the question it asked the parties to brief, Bullard is entitled to have his conviction reduced to a misdemeanor under the authority of *People v. Page* and the least adjudicated elements test of *People v. Guerrero.*

DATED: July 11, 2018

Respectfully submitted,



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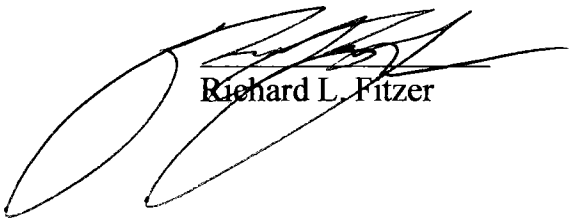
WORD COUNT CERTIFICATION

People v. Julian Micah Bullard

Supreme Court No. S239488

I, Richard Fitzer, certify that this brief was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 6,869 words.



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PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in Los Angeles County with my business address as stated above. I am not a party to this case. On July 11, 2018, I served the **appellant's reply brief,** a copy of which is attached, by mailing a copy to each addressee named below by regular United States mail at Long Beach, California.

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I declare under penalty of perjury that the foregoing is true and correct. Executed July 11, 2018 at Long Beach, California.

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