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IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

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

SUPPLEMENTAL 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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SUPPLEMENTAL BRIEF ON THE MERITS

INTRODUCTION

Pursuant to Rule 8.520(d), California Rules of Court[1], appellant Timothy Page submits this supplemental brief in order to discuss several cases in which opinions supporting his argument that Proposition 47 applies to vehicle theft convictions under Vehicle Code section 10851, subdivision (a) were published after he filed his opening and reply briefs on the merits.

1. Further references to Rules are to the California Rules of Court.

ARGUMENT

Insofar As Vehicle Code Section 10851, Subdivision (a) Describes A Theft Offense, And Because The Voters Of California Would Have Understood It As Such, A Conviction For Vehicle Theft Charged Under Vehicle Code Section 10851, Subdivision (a) Is Eligible For Reduction To A Misdemeanor If The Value Of The Vehicle Did Not Exceed $950.

A. *People v. Van Orden*, formerly at (2017) 9 Cal.App.5th 1277, review granted June 14, 2017, S241574 (*Van Orden*).[2]

Vehicle Code section 10851, subdivision (a) [hereafter "section 10851(a)"] provides, as relevant here, "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, whether with or without intent to steal the vehicle, ... is guilty of a public offense."

On page 13 of his opening brief, and page 8 of his reply brief on the merits, appellant highlighted this Court's statement in *People v. Garza* (2005) 35 Cal.4th 866 (*Garza*), that "[i]f the [section 10851(a)] conviction is for the *taking* of the vehicle, with the intent to permanently deprive the owner of possession, then it is a theft conviction ...." (*Id.* at p. 881, emphasis in original.) *Garza* also observed that "[o]n the other hand, unlawful *driving* of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete (for convenience, we will refer to

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2. This Court granted review in *Van Orden* pursuant to Rule 8.512(d)(2) and deferred further action pending consideration and disposition of the same issue in this matter. Appellant discusses *Van Orden* pursuant to Rule 8.1115(e)(1), which provides in relevant part: "Pending review and filing of the Supreme Court's opinion, ..., a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only."

this as posttheft driving)." (*Id.* at p. 871, emphasis in original.)

In *Van Orden*, Division Two of the Fourth District Court of Appeal -- the same division of the same district that decided appellant's case -- applied *Garza*'s "parsing of section 10851 theft and driving violations" to the interplay between Proposition 47 (specifically Penal Code section 490.2[3]) and section 10851(a). (*Van Orden*, 9 Cal.App.5th at p. 1285.) Parsing section 10851(a), *Van Orden* identified four distinct varieties of offenses falling along a spectrum encompassed by the statute: (1) "pure theft," which occurs when a defendant unlawfully takes a vehicle, without actually driving it, with the intent to permanently deprive the owner of possession; (2) "driving theft," defined as theft accomplished by driving the vehicle away from the owner's possession; (3) "posttheft driving," that is, driving that occurs or continues after the theft is complete; and (4) "pure driving, commonly known as joyriding," in which the person drives the vehicle with the intent only to temporarily deprive its owner of possession. (*Id.*, 9 Cal.App.5th at pp. 1285-1286.)

Van Orden concluded the first two categories -- pure theft and driving theft -- qualified as theft crimes, and therefore are eligible for reduction to a misdemeanor (assuming the vehicle's value did not exceed $950), whereas the latter two categories -- posttheft driving and pure driving -- qualified as driving crimes, and therefore fell outside the purview of Proposition 47. (*Id.*, 9 Cal.App.5th at p. 1286.)

Van Orden then applied the "substantial break" test, first announced

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3. Except for the above referenced "section 10851(a)," further statutory references are to the Penal Code unless otherwise indicated.

in *People v. Kehoe* (1949) 33 Cal.2d 711, 715 and subsequently applied in *People v. Malamut* (1971) 16 Cal.App.3d 237, 242 and *People v. Strong* (1994) 30 Cal.App.4th 366, 375, to determine whether a section 10851(a) offense properly would be classified a driving theft or posttheft driving crime. (*Van Orden*, 9 Cal.App.5th at pp. 1286-1287.) Under the "substantial break" test, a court examines the amount of time, if any, between the taking of the vehicle and the subsequent driving of the vehicle.[4] (*Ibid.*)

Because section 490.2 "expanded the offense of petty theft by defining it as 'obtaining *any* property *by theft* where the value of the ... personal property taken does not exceed nine hundred fifty dollars ($950)' (§ 490.2, subd. (a), italics added)" (*Van Orden*, 9 Cal.App.5th at p. 1288), the court concluded that "after the passage of Proposition 47, an offender who obtains a car valued at less than $950 by theft must be charged with petty theft and may not be charged as a felon under any other criminal provision." (*Ibid.*) Therefore, because the prosecution would have been required to charge that theft offense as a misdemeanor had Proposition 47 been in effect at the time, the defendant was entitled under the petitioning process enacted in section 1170.18 to seek reduction of the offense to a

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4. The sparse factual record in appellant's case indicates that on June 8, 2012, appellant took and drove a Toyota Camry automobile without the consent of its owner (§ 10851(a)), then evaded a police officer by driving the car with wanton disregard for the safety of other persons and property (Veh. Code, § 2800.2, subd. (a)), and finally resisted an officer by means of force and violence (§ 69). Applying the "substantial break" test to these facts, appellant's offense would be characterized as a "driving theft" crime, and therefore eligible for reduction to a misdemeanor if the Camry's value did not exceed $950.

misdemeanor. (*Id.* at p. 1289.)

After effectively dissecting and dismantling countervailing arguments propounded in *People v. Johnston* (2016) 247 Cal.App.4th 252, review granted July 13, 2016, S235041, and *People v. Sauceda* (2016) 3 Cal.App.5th 635, review granted November 30, 2016, S237975, (*Van Orden*, 9 Cal.App.5th at pp. 1289-1294), *Van Orden* finally relied upon the voter's evident intent in approving Proposition 47, citing this Court's decision in *People v. Rizo* (2000) 22 Cal.4th 681, 685 [when the language of an initiative is ambiguous, courts may look to "'other indicia of the voters' intent'" to determine the initiative's meaning].) (*Van Orden*, 9 Cal.App.5th at p. 1294.) The court thus concluded:

> No one disagrees Proposition 47 was intended to prohibit prosecutors from charging low-value car thefts as felony Penal Code section 487, subdivision (d)(1) violations. Interpreting Proposition 47 to exclude section 10851 creates an end run around this prohibition. It allows prosecutors to simply choose to charge low-value car thieves as felons under section 10851 instead of as misdemeanants. Such an outcome contravenes the voters' clear intent to reduce prison spending and redirect the savings to community-based programs by lessening the punishment for low-value car thefts to misdemeanors. Our understanding of the interplay between section 10851 and section 490.2 advances that intent.

(*Van Orden*, 9 Cal.App.5th at p. 1295.)

B. ***People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*).**

In *Romanowski*, filed four days after the *Van Orden* opinion, this Court similarly relied to a large extent on the voters' presumed understanding of the initiative's intended purpose, and concluded Proposition 47 applied to theft of access card account information (§ 484e, subd. (d)). (*Romanowski*, 2 Cal.5th at pp. 907-910.) *Romanowski* was unequivocal: "What section 490.2 indicates is that after the passage of

Proposition 47, 'obtaining any property by theft' constitutes petty theft if the stolen property is worth less than $ 950." (*Id.* at p. 908.) *Romanowski* continued: "[W]e know that the voters who approved Proposition 47 had their sights on definitions of grand theft other than the [three specified] categories in section 487[5], since section 490.2 refers to '[s]ection 487 *or any other provision of law defining grand theft.*' (§ 490.2, subd. (a), italics added.) For these other forms of grand theft too, Proposition 47 establishes that 'obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft.' (§ 490.2, subd. (a).)" (*Ibid.*) After observing that section 484e is one of those "other provisions," the Court further observed:

> Section 484e also resides in part 1, title 13, chapter 5 of the Penal Code, which is titled "Larceny." In just about every way available, the Legislature made clear that theft of access card information is a theft crime. Nothing in the text of the initiative suggested that the voters were implicitly leaving this form of theft out when they used the phrases "any other provision of law defining grand theft" and "obtaining any property by theft." (§ 490.2, subd. (a).) We deny a phrase like "any other provision of law" its proper impact if we expect a penal statute -- whether enacted by the Legislature or the electorate -- to further enumerate every provision of the Penal Code to which it is relevant. And we generally presume that the electorate is aware of existing laws. (*In re Lance W.* (1985) 37 Cal.3d 873, 890 & fn. 10, ...)

(*Romanowski*, 2 Cal.5th at pp. 908-909.)

Proposition 47's Legislative Analyst explained that under then-

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5. "[S]ection 487 set out three categories of theft that were charged as grand theft solely because of the property involved -- theft of guns, theft of cars, and theft of property from the victim's person. (See § 487, subds. (c)-(d).)" (*Romanowski*, 2 Cal.5th at p. 908.)

current law, "'theft of property worth $950 or less' could be 'charged as grand theft' 'if the crime involves the theft of certain property (*such as cars*).' (Voter Information Guide, [Gen. Elec. (Nov. 4, 2014)] analysis of Prop. 47 by Legis. Analyst, p. 35.)" (*Romanowski*, 2 Cal.5th at p. 910, emphasis added.) Presuming, as we must, the existence of an informed electorate (*In re Lance W.*, *supra*, 37 Cal.3d at p. 890 & fn. 10; *Romanowski* at p. 909), a voter examining the Vehicle Code for guidance as to the potential scope of Proposition 47 would discover that section 10851(a) is included in Chapter 4 ("Theft and Injury of Vehicles"), which is contained in Division 4 of the Vehicle Code ("SPECIAL ANTITHEFT LAWS"). It therefore would be natural for an electorate "aware of existing laws" (*Romanowski* at p. 909) to assume a low-value violation of section 10851(a) would be included within Proposition 47's promise that "'such crimes would no longer be charged as grand theft *solely because of the type of property* involved.' ([Voter Information Guide, *supra*, analysis of Prop. 47 by Legis. Analyst, p. 35], italics added.)" (*Romanowski* at p. 910.)[6]

One of the stated purposes of Proposition 47 was to "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession." (Voter Information Guide, *supra*, text of Prop. 47, § 3, p. 70.) As *Romanowski* stated, there can be "no reason to assume that reasonable voters seeking to anticipate the consequences of enacting Proposition 47 would have concluded that theft of access card

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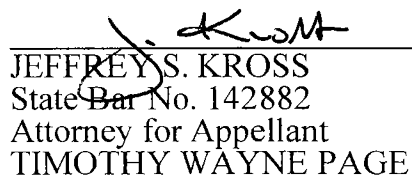
6. By the same token, an electorate "aware of existing laws" would be presumed to know that in *Garza*, this Court defined the taking of a vehicle with the intent to permanently deprive the owner of his or her property as a theft offense. (*Id.*, 35 Cal.4th at p. 881.)

information worth less than $ 950 is a serious or violent crime exempt from Proposition 47's reach. (See *In re Lance W.*, 37 Cal.3d at p. 890 & fn. 10 [looking to 'the ballot summary and arguments' as well as 'the preamble to the initiative' to discern an initiative's intended purpose].)" (*Romanowski*, 2 Cal.5th at p. 909.) That rationale is no less compelling when applied to the non-violent theft of an inexpensive vehicle. "To the contrary: Proposition 47 directed that the text of the initiative 'shall be broadly construed to accomplish its purposes' and 'shall be liberally construed to effectuate its purposes.' (Voter Information Guide, supra, text of Prop. 47, § § 15, 18, p. 74.)" (*Ibid.*; see also *People v. Gonzalez* (2017) 2 Cal.5th 858, 870 [considering entering a bank to cash a stolen check for less than $950 shoplifting rather than burglary is consistent with the electorate's stated reason for enacting Proposition 47, i.e., reducing "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"].) Including the theft of a vehicle worth less than $950 charged under section 10851(a) as a misdemeanor would best effectuate the electorate's stated purpose in enacting Proposition 47.

CONCLUSION

For the reasons stated above, as well as those stated in his opening and reply briefs on the merits, a defendant convicted of felony taking a vehicle under section 10851(a) should be deemed eligible to have that conviction reduced to a misdemeanor pursuant to section 1170.18, assuming the value of the vehicle does not exceed $950.

Dated: August 9, 2017



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WORD COUNT CERTIFICATION

Pursuant to Rule 8.520(d)(2), 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 Supplemental Brief on the Merits contains 2,325 words.

Executed this 9th day of August 2017 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 SUPPLEMENTAL 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 Supplemental Brief on the Merits on this date to the following entities: Christen Somerville, Deputy Attorney General at *Christen.Somerville@doj.ca.gov*; Office of the Attorney General at *SDAG.Docketing@doj.ca.gov*; and Appellate Defenders, Inc. at *eservice-court@adi-sandiego.com*.

Executed this 10th day of August 2017 at Sebastopol, California.

JEFFREY S. KROSS