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SUMMARIES

Copyrights

Remastered sound recordings presumptively lacked originality necessary to support copyright protection (Linn, J.)

**ABS Entertainment, Inc. v. CBS Corporation**

9th Cir.; August 20, 2018; 16-55917

The court of appeals reversed a district court judgment. The court held that a remastered sound recording distinctly identifiable solely by the changes incident to the change in medium generally does not exhibit the minimum level of originality to be copyrightable.

ABS Entertainment, Inc. owned and held copyrights in music recorded prior to 1972. As digital formats replaced analog ones, ABS hired remastering engineers to remaster the pre-1972 sound recordings onto digital formats. In 2015, ABS filed a putative class action against CBS Corporation, alleging that its unauthorized transmission and distribution of the remastered sound recordings violated California Civil Code §980(a)(2), which protects the property rights of an author of a sound recording fixed prior to February 15, 1972.

The district court granted summary judgment in favor of CBS, finding no genuine issue of material fact that the remastering created original derivative works protected by federal copyright law.

The court of appeal reversed, holding that the district court erred in finding no genuine issues of fact as to whether the remastered recordings were original works. A remastered sound recording is not eligible for independent copyright protection as a derivative work unless its essential character and identity reflect a level of independent sound recording authorship that makes it a variation distinguishable from the underlying work. The mere translation of a work from an analog to a digital medium generally does not exhibit the minimum level of originality necessary to support copyright protection. Here, there was no dispute that all of the sounds contained in the remastered sound recordings—the vocals, instruments, inflection, dynamics, rhythms, and sequences—were initially fixed in a studio before 1972. There was also no dispute that the remastering engineers did not add or remove any sounds and did not edit or resequence the fixed performances. For these reasons, the remasters presumptively lacked the originality necessary to support copyright protection as derivative works. The district court further abused its discretion in excluding the testimony of ABS’ expert, in excluding third-party evidence of CBS’s performance of ABS’s sound recordings in California, and in denying class certification based on local court rules inconsistent with the Federal Rules of Civil Procedure.

Criminal Appeals

**Rule 58 separate document requirement applies to §2255 proceedings (per curiam)**

**Kingsbury v. United States**

9th Cir.; August 21, 2018; 16-56789

The court of appeals granted in part a request for a certificate of appealability. The court held that because Fed. R. Civ. P. 58’s separate document requirement applies to the denial of motions under 28 U.S.C. §2255, the district court’s failure to file a separate document tolled the 60-day time limit on the filing of an appeal for an additional 150 days, rendering the underlying appeal timely.

After pleading guilty to various charges and being sentenced, Wesley Kingsbury moved under §2255 seeking to vacate his guilty plea and sentence. The district court denied the motion, but did not enter judgment in a separate document.

Kingsbury filed a notice of appeal and request for a certificate of appealability 64 days after the district court denied his §2255 motion. The court of appeals ordered briefing on the issue of whether Kingsbury’s appeal was timely.

The court found jurisdiction and granted in part Kingsbury’s request for a certificate of appealability, holding that his appeal was timely. Under Rule 58(a), an order that is dispositive of the proceedings is usually insufficient to enter judgment. Instead, judgment must generally be expressly entered in a “separate document.” If a separate document is required, and one is not filed, judgment is entered automatically 150 days after the court enters an order disposing of a case. The court joined the majority of its sister circuits in holding that Rule 58’s separate document requirement applies to §2255 proceedings. Because the district court here failed to file a separate document entering judgment when it denied Kingsbury’s §2255 motion, the clock did not start on his 60-day time to appeal until judgment was automatically entered 150 days after the filing of the order, giving Kingsbury a total 210 days from the date of filing of the district court’s order in which to file his appeal. His appeal, filed on the 64th day, was thus timely.

Criminal Law

**Evidence insufficient to support denial of Prop 64 petition for dismissal of conviction for cultivation of marijuana (Zelon, J.)**
**People v. Banda**

C.A. 2nd; August 20, 2018; B284725

The Second Appellate District reversed a trial court order and remanded. The court held that the evidence presented at hearing on a petition to dismiss a pre-Proposition 64 conviction for cultivation of marijuana was insufficient to establish petitioner’s ineligibility for dismissal.

In March 2016, Michael Banda pleaded guilty to cultivation of marijuana under Health & Saf. Code, §11358, a felony. In November 2016, the electorate passed Prop 64, which makes legal the cultivation of not more than six marijuana plants and reduces the punishment for cultivation of more than six plants to a misdemeanor. Banda petitioned to dismiss the complaint, or, alternatively, to reduce his conviction to a misdemeanor. At hearing on Banda’s petition, the prosecution introduced Banda’s probation report, to which Banda had stipulated for purposes of sentencing, which stated that police had found 269 marijuana plants at Banda’s residence. On its own motion, the court took judicial notice of the police report in Banda’s case, which reiterated the number of plants found at his residence.

The trial court denied dismissal, but reduced Banda’s conviction to a misdemeanor.

The court of appeal reversed, holding that the trial court erred in not granting dismissal. The evidence at hearing was insufficient to support a finding that Banda had cultivated more than six plants. The sole evidence introduced by the prosecutor was Banda’s probation report, which constituted inadmissible hearsay. Even if deemed admissible, Banda’s stipulation to that report for purposes of sentencing could not be deemed a stipulation to the number of plants involved, which was not at issue in sentencing. The trial court accordingly erred to the extent that it relied on the probation report as substantial evidence of the number of plants. The trial court’s attempt to “fill in the blanks” by taking judicial notice of the arrest report was also error. The court did not indicate it was taking judicial notice of the police report until after it had ruled, depriving Banda of both notice and the opportunity to object. Any reliance on the police report to establish the number of plants was thus also error. Absent any admissible and substantive evidence of the number of plants seized from Banda’s residence, Banda was entitled to dismissal. Justice Wiley dissented, finding that Banda’s stipulation to the truth of the facts included in the probation report rendered it admissible to prove that the number of plants he cultivated was greater than six, rendering him ineligible for dismissal.

**People v. Jackson**

C.A. 1st; August 20, 2018; A151676

The First Appellate District vacated in part a judgment of conviction. In the published portion of its opinion, the court held that where a jury is presented with two alternate theories of defendant’s guilt, one of which is invalid, prejudice must be rebutted. A vehicle owner’s adult daughter borrowed the car with his permission and left it parked at a local CalTrain station, as she often did, with the keys by the front tire. On this occasion, however, she forgot to tell her father that she had left the car there. A witness later saw Julius Jackson loading stolen property into the vehicle outside a warehouse. The witness did not see Jackson drive away. Police later located the vehicle with Jackson sleeping on the front seat and the stolen property in the trunk. A jury found Jackson guilty of, among other things, unlawfully taking or driving a vehicle, in violation of Penal Code §10851(a).

Jackson appealed, arguing his conviction under §10851(a) had to be reversed because there was no evidence that the vehicle was worth more than $950, as required to support a felony conviction based on theft of the vehicle. The People conceded the error, but argued it was harmless because it was “clear beyond a reasonable doubt” that the jury convicted Jackson not of taking the vehicle, but of unlawfully driving it.

The court of appeal vacated the judgment in part, holding that, despite the strong circumstantial evidence that Jackson drove the vehicle, it could not be concluded beyond a reasonable doubt that the jury’s verdict was necessarily based on this theory. Although the prosecutor argued at trial that it could reasonably be inferred that Jackson drove the vehicle away after loading the stolen property, he also referred to a separate theory of guilt, which he sometimes referred to as “taking” and other times referred to as “possessing” the vehicle. The jurors were thus left with two theories, one of which—the taking theory—was legally inadequate. A presumption of prejudice was mandated, and could be rebutted only if the record permitted the conclusion beyond a reasonable doubt that the jury based its verdict on the legally valid theory. That was not the case here. The court vacated Jackson’s conviction under §10851(a) and remanded for further proceedings.

**Criminal Law**

Defendant may be charged with both shoplifting and theft where intent to steal upon entry into store is not clearly established (the court)

**People v. Lopez**

C.A. 5th; July 27, 2018; F074581
The Fifth Appellate District affirmed a judgment of conviction. The court held that a defendant may be charged with both shoplifting and theft where the element of intent to commit larceny upon entry into an establishment is in question.

Anthony Lopez was observed in a Walmart store placing various items in a Walmart shopping bag in a shopping cart. He left the store without paying for the items and was arrested. The value of the items was less than $500. Lopez admitted to police that he had taken the items, denied having any intent to steal when he entered the store, claiming to have formed the intent to steal once inside. Lopez was charged with both shoplifting under Penal Code §459.5(a) and petty theft with a prior. A jury found him guilty of the petty theft charge only.

Lopez appealed, arguing that the plain language of §459.5(a) required the People to charge him with shoplifting only, and barred his also being charged with petty theft. He argued that counsel was ineffective for failing to challenge the petty theft charge.

The court of appeal affirmed, holding that, under the circumstances presented here, Lopez was properly charged with both shoplifting and petty theft. Section 459.5(b) states: “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.” Section 459.5(a), in turn, defines shoplifting as “entering a commercial establishment with intent to commit larceny…” The court concluded that where, as here, the element of intent is absent or in question, §459.5(b) does not apply, and the prosecution may exercise its discretion to charge the defendant with both shoplifting and a theft offense. Finding otherwise would lead to the absurd result that criminal conduct would go unpunished because a prosecutor was restricted to charging only shoplifting when an element of that offense potentially could not be proven. That cannot have been the electorate’s intent. Defense counsel was accordingly not remiss for failing to challenge the petty theft charge.

The court of appeals affirmed a district order. The court held that an individual lacks a reasonable expectation of privacy in a house that a no-contact order bars him from entering.

Gerald Schram was a suspect in a bank robbery. A records check revealed a no-contact order prohibiting Schram from contacting his girlfriend, Zona Satterfield. Having nowhere else to look, detectives began their search for Schram at Satterfield’s house. The detectives entered the house without a warrant, found Schram inside, and arrested him. Schram was indicted for bank robbery. He moved to suppress evidence seized during a search of Satterfield’s home following his arrest.

The district court denied the motion to suppress.

The court of appeals affirmed, holding that Schram had no reasonable expectation of privacy in a residence he was legally barred from entering. An individual has a “legitimate expectation of privacy” if he or she demonstrates a subjective expectation of privacy in the place being searched, and this subjective expectation is one “that society accepts as objectively reasonable.” Here, Schram’s expectation of privacy in Satterfield’s house could not be deemed reasonable, even if she gave him permission to enter. Like a burglar, trespasser, or squatter, an individual violating a court no-contact order is on property that the law prevents him from entering. Such an individual lacks a legitimate expectation of privacy in that place and may not challenge its search on Fourth Amendment grounds.

Employment Litigation

Employer’s request for waiver of undertaking required for appeal of Labor Commissioner decision must be timely filed (Bruiniers, J.)

Burkes v. Robertson
C.A. 1st; August 20, 2018; A150249

The First Appellate District affirmed a judgment. The court held that an employer’s request for a waiver of the requirement to file an undertaking upon appeal of an adverse decision by the Labor Commissioner must be filed with the trial court no later than the deadline for filing the appeal.

Larry Burkes filed a claim with the Labor Commissioner, alleging employer Damon Robertson’s nonpayment of wages. The commissioner issued an award in favor of Burkes. Robertson filed a timely notice of appeal from that decision, but failed to post the undertaking required under Labor Code §98.2(b) within the time provided. Robertson subsequently requested a waiver of the undertaking requirement, claiming indigency.

The trial court dismissed Robertson’s appeal, finding that his failure to request a waiver prior to the deadline for filing his §98.2 notice of appeal deprived it of jurisdiction to consider the request.

The court of appeal affirmed, holding that the trial court properly dismissed Robertson’s appeal. An employer’s right to appeal a decision of the commissioner is conditioned on the employer’s posting of an undertaking in the amount of

Criminal Law

No reasonable expectation of privacy in residence to which no-contact order bars entry (Owens, J.)

United States v. Schram
9th Cir.; August 21, 2018; 17-30055

The court of appeals affirmed a district order. The court held that an individual lacks a reasonable expectation of privacy in a house that a no-contact order bars him from entering.

Gerald Schram was a suspect in a bank robbery. A records check revealed a no-contact order prohibiting Schram from
the challenged award. The purpose of the requirement is to discourage employers from hiding assets in order to avoid enforcement of a judgment. Section 98.2 thus requires that the undertaking be posted no later than the deadline for filing the notice of appeal. Requiring that an employer’s request to waive the undertaking be filed within the same timeframe does not impermissibly burden or bar appeal by indigent employers. The indigent employer is required only to meet the same deadline that is imposed for non-indigent employers. Providing a general exception for employers alleging indigency would completely defeat the purpose of the §98.2(b) undertaking requirement and subvert the protections that the statutory requirements are intended to afford wage claimants. The trial court accordingly properly dismissed Robertson’s appeal for failure to timely file his waiver request.

Family Law

Abuse suffered by older sibling warranted exercise of dependency jurisdiction over younger sibling (McConnell, P.J.)

In re D.B.

C.A. 4th; August 20, 2018; D073807

The Fourth Appellate District affirmed dependency court orders. The court held that the dependency court properly exercised jurisdiction over a minor child based on the egregious abuse suffered by his older brother at the hands of their parents.

The San Diego County Health and Human Services Agency initiated dependency proceedings as to six-year old Jordan and two-year old D.B. based on the serious injuries suffered by Jordan as a result of the parents’ routine practice of hitting him with a belt as punishment.

The dependency court declared both boys dependents of the court and removed them from their parents’ custody, finding jurisdiction as to D.B. based on the abuse of Jordan.

The court of appeal affirmed, holding that the dependency court properly considered the totality of D.B.’s circumstances in finding jurisdiction. Welfare & Inst. Code §300(j) provides that any child may come within the jurisdiction of the dependency court if “the child’s sibling has been abused or neglected…and there is a substantial risk that the child will be abused or neglected.” In finding jurisdiction under §300(j), the dependency court must consider “the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.” Although the dependency court here found emotional abuse of D.B., it did not limit itself to that finding. The court explicitly considered D.B.’s age and gender, the mental condition of the parents, their questionable credibility, and the reason they gave for Jordan’s most recent beating—that he ate four doughnuts without permission. The court explicitly found that Jordan’s physical abuse was “very, very serious” and that this finding alone would support jurisdiction on behalf of D.B. under §300(j). Further, substantial evidence supported the dependency court’s findings. The boys’ mother told their social worker that she and her husband did not see “beating kids as an issue.” The boys father testified that he did not know any other way to deal with Jordan’s challenging, disruptive, and defiant behaviors. Finally, the social worker noted that D.B. was on the verge of “the terrible two’s,” presenting challenges that the parents might well be unable to handle without resorting to physically discipline. Ample evidence supported the dependency court’s finding that D.B. was a child described by §300(j).
ABS ENTERTAINMENT, INC., an Arkansas corporation; BARNABY RECORDS, INC., a New York corporation; BRUNSWICK RECORD CORPORATION, a New York corporation; MALACO INC., a Mississippi corporation, each individually and on behalf of all others similarly situated., Plaintiffs-Appellants,

v.

CBS CORPORATION, a Delaware corporation; CBS RADIO, INC., a Delaware corporation; DOES, 1 through 10, Defendants-Appellees.

No. 16-55917
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:15-cv-06257-PA-AGR
Appeal from the United States District Court for the Central District of California
Percy Anderson, District Judge, Presiding
Argued and Submitted November 9, 2017
Pasadena, California
Filed August 20, 2018

Opinion by Judge Linn

* The Honorable Richard Linn, United States Circuit Judge for the U.S. Court of Appeals for the Federal Circuit, sitting by designation.

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OPINION

LINN, Circuit Judge:

Appellants ABS Entertainment, Inc., Barnaby Records, Inc., Brunswick Record Corp. and Malaco, Inc. (collectively, “ABS”) appeal from the grant of summary judgment by the Central District of California in favor of CBS Corporation and CBS Radio, Inc. (collectively, “CBS”), holding that CBS did not violate any state law copyrights possessed by ABS in sound recordings originally fixed before 1972. ABS also appeals from the district court’s striking of its class action certification, and certain evidentiary rulings.

We conclude that the district court erred in finding a lack of a genuine issue of material fact about the copyright eligibility of remastered sound recordings distributed by CBS and improperly concluded that ABS’s state copyright interest in pre-1972 sound recordings embodied in the remastered sound recordings was preempted. We also conclude that the district court abused its discretion by excluding the testimony of ABS’s expert Paul Geluso, excluding the Triton Reports as evidence of CBS’s performance of ABS’s sound recordings in California, and granting partial summary judgment of no infringement with respect to the samples contained in those reports. Finally, we conclude that the district court’s strict application of its local rules with respect to the timeliness of ABS’s motion for class action certification was inconsistent with the Federal Rules of Civil Procedure and was thus an abuse of discretion.

For the reasons set forth below, we reverse the grant of summary judgment and the striking of class certification, and remand for further proceedings consistent with this opinion.

I

In 1971, Congress passed the Sound Recording Act. This Act for the first time created federal copyright protection for
certain sound recordings. Under that law, sound recordings fixed after February 15, 1972 were made subject to a compulsory license regime for performance via digital transmission and were excused from infringement for performance via terrestrial radio. 17 U.S.C. §§ 114, 301(c).

Congress reserved governance of sound recordings fixed before 1972 to state statutory law and common law and excluded such sound recordings from federal copyright protection until 2067. 17 U.S.C. § 301(c) (“With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067 . . . . [N]o sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.”).

ABS owns sound recordings embodying musical performances initially fixed in analog format prior to February 15, 1972 (“pre-1972 sound recordings”). As digital formats replaced analog ones, ABS hired remastering engineers to remaster the pre-1972 sound recordings onto digital formats (“remastered sound recordings”). In doing so, ABS determined to optimize the recordings for the new digital format using standard, technical processes to create accurate reproductions of its original pre-1972 analog recordings and did not set out to create any new and different sound recordings. ABS contends that this resulted in a change in quality but not a substantial difference in the identity or essential character of the sound recordings themselves. ABS argues that injecting a substantial difference in the digital remasters from their analog originals would have diminished the value of the remastered sound recordings, contrary to ABS’s objective in seeking to fully exploit its intellectual property in those sound recordings.

ABS did not enter copies of the contracts between ABS and the remastering engineers into the record, but both parties agree that ABS authorized the creation of the remastered sound recordings at issue here. There is no dispute that the remastered sound recordings contain only the sounds (i.e. the vocals and instruments) originally performed and fixed in the studio before 1972 and contained in the pre-1972 sound recordings, and that no sounds were removed or rearranged from the original fixed version. ABS agrees that the remastered sound recordings are not identical to the pre-1972 sound recordings, but contends that any differences were trivial and of no copyrightable consequence.

CBS delivers music content through terrestrial radio and digital streaming, including 18 music stations in California that are themselves streamed over the internet in “simulcast.”

On August 17, 2015, ABS filed a putative class action against CBS in the Central District of California, alleging that CBS’s transmission and distribution of the remastered sound recordings violated California state law—specifically, California Civil Code § 980(a)(2) (protecting the property rights of an author of a sound recording fixed prior to February 15, 1972); misappropriation and conversion; and unfair competition, under California Business and Professions Code § 17200.

On November 17, 2015, the district court denied a joint stipulation to extend the 90-day deadline for filing a motion for class action certification to allow for class certification discovery, explaining that there was “no show of cause, let alone good cause.” On November 19, 2015, the expiration date of the local rule’s 90-day deadline for filing of class certification, the court denied without explanation another joint stipulation to extend the filing date. That same day, ABS timely filed a motion for class certification. On November 25, 2015, the district court struck the motion for class certification because it set a hearing date for the motion beyond the 35-day period after service of process as required by the court’s standing orders and it did not include a statement pursuant to Local Rule 7-3 that a “conference of counsel” took place prior to the filing of the motion. The court then struck ABS’s class allegations as untimely filed under Local Rule 23-3.

CBS thereafter filed a motion for summary judgment, arguing that there was no genuine issue of material fact that the remastered sound recordings were authorized original derivative works, subject only to federal copyright law. In support of its motion, CBS submitted declarations from music engineers, including from Durand R. Begault, attesting that the remastering process involved originality and aesthetic judgment. In response, ABS submitted expert declarations of its own, including from Paul Geluso, who testified that the pre-1972 and remastered recordings “embodied” the same performance based on waveform, spectral, and critical listening analysis.

The district court decided two important evidentiary issues and granted summary judgment to CBS. The district
The district court also concluded that, because the remastered sound recordings, created after 1972, were original and authorized, the remastered sound recordings were exclusively governed by federal copyright law. Therefore, the district court held, CBS had the right to perform the remastered sound recordings by complying with the statutory compulsory license obligations and taking advantage of the terrestrial radio performance safe harbor under 17 U.S.C. § 114. The district court assumed that because the right to perform the remastered sound recordings had been secured, CBS’s performance of the remastered sound recordings could not infringe the pre-1972 sound recordings.

The district court also held, in the alternative, that CBS was entitled to partial summary judgment of non-infringement with respect to 126 of the 174 representative remastered sound recordings because ABS failed to provide evidence of CBS’s performance of those sound recordings. The evidence presented with respect to the 174 samples breaks down as follows. Sixty samples were contained in CBS’s internal digital audio library, Radio 2.0, which tracks broadcast or transmission via CBS’s internet-only radio stations. The parties agree that for 48 of these, ABS presented evidence of CBS’s broadcast or transmission of sound recordings embodying the same performances as ABS’s pre-1972 sound recordings. The parties also agree that nine sound recordings were not infringing because CBS’s records show that it broadcast versions based on different performances than the pre-1972 sound recordings. Three of these sound recordings were not reviewed by the parties’ experts. An additional 40 samples were contained exclusively in the Triton Reports, which are created by a third-party company to track “simulcasts”—live internet streams—of CBS’s radio broadcasts across the United States. The parties do not discuss on appeal the evidence available with respect to the remaining 74 sound recordings.

The district court concluded that the Triton Reports were hearsay and did not fall within the business records exception because “Plaintiff’s have failed to establish any one of the requirements necessary for them to be admitted under the business records exceptions.” The district court thus concluded that ABS had failed to raise a genuine issue of material fact as to CBS’s transmission or broadcast in California of all but the 48 samples both parties agree CBS transmitted.

ABS appealed each of the adverse rulings.

III

We review the district court’s grant of summary judgment de novo, asking whether the moving party has met its burden to prove the absence of genuine issues of material fact. U.S. Auto Parts Net., Inc. v. Parts Geek, LLC, 692 F.3d 1009, 1014 (9th Cir. 2012). A genuine issue of material fact exists if, drawing all inferences in favor of the non-moving party, a reasonable jury could find in favor of the non-moving party. Id. Whether a work is protected by copyright law is a mixed question of law and fact, which we review de novo. Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1073 (9th Cir. 2000). We review the district court’s evidentiary rulings for an abuse of discretion. Fonseca v. Sysco Food Servs. Of Ariz., Inc., 374 F.3d 840, 845 (9th Cir. 2004).

IV

We begin with the district court’s determination that “there is no genuine dispute of material fact that CBS performed a post-1972 version of Plaintiffs’ pre-1972 Sound Recordings which contained federally-copyrightable original expression added during the remastering process.”

A

The constitutional purpose of copyright law is “to promote the Progress of Science and the useful Arts” by securing to “authors the right to their original expression, but encourage[ing] others to build freely upon the ideas and information conveyed by a work.” Feist Pubs., Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991). “The sine qua non of copyright is originality.” Id. at 345. “Original, as the term
is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity.” Id. A product of independent creation is distinguished from a copy in that it contains something which “owes its origin” to the independent creator. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884). A copy, on the other hand, is not a separate work, but a mere representation or duplication of a prior creative expression.3

A “derivative work” is defined in the Copyright Act as a work “based upon one or more preexisting works” that “recast[s], transform[s], or adapt[s]” a preexisting work and “consist[s] of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship.” 17 U.S.C. § 101. A derivative work is copyrightable when it meets two criteria: (1) “the original aspects of a derivative work must be more than trivial,” and (2) “the original aspects of a derivative work must reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.” U.S. Auto Parts, 692 F.3d at 910 (citing Durham Indus. v. Tomy Corp., 630 F.2d 905, 909 (2d Cir. 1980)). This is known as the Durham test. Both prongs arise out of Copyright’s basic focus on originality. The first prong asks “whether the derivative work is original to the author and non-trivial” and the second prong ensures that the derivative work author does not hinder the original copyright owner’s ability to exercise all of its rights. Id. at 1017.

Because derivative works do not start from scratch, courts have endeavored to determine the kinds of contributions in the derivative work that qualify as original. In most circumstances, derivative works contain obvious creative contributions and so are easily recognizable as distinct from the underlying work. The casting, lighting, cinematography, props, editing, acting, and directing required to craft a movie from a screenplay, for example, easily render the movie distinct from the screenplay. Likewise, the authors of most sound recordings that use a sample of another sound recording to create distinct derivative works do so by adding new vocals, instruments, and edits to the underlying sample. Where the alleged derivative work, however, is intended as, and is in fact, a direct representation of the original work, the contributions of the derivative work author are harder to identify.

This court applied the two-part Durham test in Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211 (9th Cir. 1997). In that case, Entertainment Research Group (“ERG”) made three-dimensional inflatable costumes based on copyrighted characters like “Toucan Sam” and “Cap’n Crunch.” Id. at 1217–18. In relevant part, the court, in applying the originality prong, concluded that the costume-maker’s contributions—including the change in format from 2D to 3D; changes in the proportion of textures, facial features and facial expressions; and the changes attendant to the functional addition of movement—were insufficient to render the costumes copyright eligible as derivative works. Id. at 1223.

The court first discounted the changes occasioned by technical, functional, and utilitarian concerns, such as the differences in proportion (necessitated by the requirement that a human body must fit within the costume) and texture (necessitated by the material choice), because copyright in a sculptural work is limited to its form and cannot extend to its mechanical or utilitarian aspects under 17 U.S.C. § 101. Id. at 1221. The remaining changes in the facial expressions were also deemed insufficient to support a derivative work copyright, because “no reasonable trier of fact would see anything but a direct replica of the underlying characters.” Id. at 1224. “Viewing the three-dimensional costumes and the two-dimensional drawings upon which they are based, it is immediately apparent that the costumes are not exact replicas of the two-dimensional drawings.” Id. at 1223. These identifiable changes “themselves reflect[] no independent creation, no distinguishable variation from preexisting works, nothing recognizably the author’s own contribution that sets [ERG’s costumes] apart from the prototypical [characters]” the costumes represented. Id. at 1223 (quoting Durham, 630 F.2d at 910). In other words, the costumes did not constitute new works, despite the independent decision-making involved in their creation. Id. at 1224 (holding that the different facial expressions, proportions, and functional capabilities were “clearly not the defining aspect[s] of the costumes” when viewed “in the context of the overall costume” and, thus, were not considered distinguishable variations capable of supporting independent copyright protection). The court then went on to apply the second prong of Durham, noting that because of the similarity between ERG’s costumes and the underlying characters, granting a derivative work copyright in the costumes would improperly give ERG “a de facto monopoly on all inflatable costumes depicting the copyrighted characters also in ERG’s costumes.” Id.

The Tenth Circuit similarly held that a digital work must be more than a copy of an underlying analog work to support copyright as a derivative work. In Meshwerks, Inc. v. Toyota Motor Sales U.S.A., 528 F.3d 1258 (10th Cir. 2008), the Tenth Circuit considered the copyright eligibility of Meshwerks’ digital wire frame models used as skeletons for the interactive display of Toyota’s vehicle designs online and in advertising. Id. at 1260. Meshwerks measured Toyota’s vehicles with an articulated arm tethered to a computer and mapped the results onto a computerized grid using model-

3. The Copyright Act defines “Copies” as “material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 101. “Phonorecords” are “material objects in which sounds, other than phonorecords, in which a work is first fixed.” 17 U.S.C. § 101.
ing software; connected the measured points to create a wire frame; and manually adjusted about ninety-percent of the data points to make the models more closely resemble the vehicles. Id. at 1260–61. The Tenth Circuit drew a sharp distinction between copies and original works, explaining that copies cannot qualify for copyright protection “since obviously a copier is not a creator, much less an ‘independent’ creator.” Id. at 1267 (citing Patry on Copyright § 3:28). The wire frames were copies, according to the court, because they “depict nothing more than unadorned Toyota vehicles—the car as car,” the visual designs of “which do not owe their origins to Meshwerks.” Id. at 1265, 1268.

Meshwerks relied on three important doctrines in coming to that conclusion. First, as in Entertainment Research Group, the mere act of translating the derivative work into a different medium did not confer a distinct identity on the derivative work. Id. at 1267 (“[T]he fact that a work in one medium has been copied from a work in another medium does not render it any the less a ‘copy,’” (citing 2 Nimmer on Copyright § 8.01[B])); id. (noting that although the wire models did not “recreate Toyota vehicles outright—steel, rubber, and all,” “what Meshwerks accomplished was a peculiar kind of copying”). Second, the court analyzed originality by comparing the start and end products—the underlying vehicle designs and the wire models—not the process used to get from one to the other. Id. at 1268 (“[I]n assessing the originality of a work for which copyright protection is sought, we look only at the final product, not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability.”). Finally, the court considered Toyota’s intent in authorizing Meshwerks to create an accurate representation of Toyota’s vehicles, not something new and different: “If an artist affirmatively sets out to be unoriginal—to make a copy of someone else’s creation, rather than to create an original work—it is far more likely that the resultant product will, in fact, be unoriginal.” Id.

The Second Circuit considered the originality needed to justify copyright protection for a derivative work in L. Batlin & Son, Inc. v. Snyder: 536 F.2d 486 (2d Cir. 1976). In that case, appellant Snyder obtained a copyright registration for a plastic version of a cast metal Uncle Sam bank that had previously entered the public domain. Snyder made several changes in the plastic version: he made it shorter “in order to fit into the required price range and quality and quantity of material to be used;” changed the proportions of Uncle Sam’s face, bag, hat, and eagle; changed the textures of several components; created a single-piece mold incorporating the umbrella instead of the two-piece mold of the metal bank; and replaced the arrows in the eagle’s talons with leaves, because “the arrows did not reproduce well in plastic on a smaller size.” Id. at 488–89.

Even though the plastic bank was not identical to the metal original, the Second Circuit held that the changes did not amount to a distinguishable variation in the identity or essential character of the original work. Id. at 491. The transfer of the expression from the underlying cast iron Uncle Sam to a plastic version, despite overcoming technical challenges and, arguably, improving the original in terms of lowering the price, did not result in a copyrightable derivative work, because the changes did not constitute the “substantial variation” necessary to support copyright. Instead, they were merely the “trivial” results of the “translation to a different medium.” Id. The plastic bank was not a new work—it did not embody “the author’s tangible expression of his ideas,” id. at 492 (quoting Mazer v. Stein, 347 U.S. 201, 214 (1954)), and was thus a mere copy of the underlying work.

The Copyright Office guidance provided in Circular 56 reflects that a similar analysis applies specifically to derivative sound recordings. In relevant part, Circular 56 explains the following about derivative sound recordings:

A derivative sound recording is an audio recording that incorporates preexisting sounds, such as sounds that were previously registered or published or sounds that were fixed before February 15, 1972. The preexisting recorded sounds must be rearranged, remixed, or otherwise altered in sequence or character, or the recording must contain additional new sounds. The new or revised sounds must contain at least a minimum amount of original sound recording authorship.

Examples of derivative sound recordings include:

- A mashup comprising tracks and sounds from multiple sources.
- Additional tracks added to a previously published album.

Mechanical changes or processes, such as a change in format, declicking, or noise reduction, generally do not contain enough original authorship to warrant registration.

4. The public domain metal bank comprised: “Uncle Sam, dressed in his usual stove pipe hat, blue full dress coat, starred vest and red and white striped trousers, and leaning on his umbrella, stands on a four- or five-inch wide base, on which sits his carpetbag. A coin may be placed in Uncle Sam’s extended hand. When a lever is pressed, the arm lowers, and the coin falls into the bag, while Uncle Sam’s whiskers move up and down. The base has an embossed American eagle on it with the words ‘Uncle Sam’ on streamers above it, as well as the word ‘Bank’ on each side.” 536 F.2d at 488.

5. Circulars provide Copyright Office guidance on various issues. We may rely on them as persuasive but not binding authority. See Kitchens of Sara Lee, Inc. v. Nifty Foods Corp., 266 F.2d 541, 544 (2d Cir. 1959) (citing Copyright Office publication); In re World Aux. Power Co., 303 F.3d 1120, 1131 n.73 (9th Cir. 2002) (citing Circular 4).
For copyright protection. Such a work lacks originality. This presumption may, of course, be overcome, by showing that the work contains independent creative content, recognizable contributions of sound recording authorship or variations in defining aspects that give a derivative sound recording a new and different essential character and identity.

A number of practical considerations, including but not limited to the considerations that follow, inform a determination of the essential character and identity of a remastered sound recording. First, the mere translation of a work from an analog to a digital medium to take advantage of technological improvements does not itself transform the essential character and identity of the underlying work. See *Meshwerks*, 528 F.3d at 1267 (“[W]e hold, as many before us have already suggested, that standing alone, ‘[t]he fact that a work in one medium has been copied from a work in another medium does not render it any the less a ‘copy’’” (citing 2 Nimmer on Copyright § 8.01[B]); *L. Batlin*, 536 F.2d at 489 (holding that changes in the plastic bank, such as the “functional one of making a more suitable (and probably less expensive) figure in the plastic medium” and the aesthetic decision to replace the arrows with feathers because arrows did not reproduce well in plastic, were not original); *Entm’t Res. Grp.*, 122 F.3d at 1221, 1223 (with respect to sculptural works, explaining that “any aspects of ERG’s costumes that are purely functional, utilitarian or mechanical will not be given any copyright protection” and agreeing “with the district court’s conclusion that the differences in form, texture and proportionality that ERG points to as nontrivial differences all stemmed from functional considerations”). See also *Durham*, 630 F.2d at 913 (“[C]opyright protection extends only to the artistic aspects, but not the mechanical or utilitarian features, of a protected work.”). Such functionally driven decision-making does not demonstrate the kind of originality with which copyright is exclusively concerned.

Second, a remastering engineer’s objective “to make a copy of someone else’s creation, rather than to create an original work,” *Meshwerks*, 528 F.3d at 1268, even if that task seeks to improve quality, brightness or crispness of sound, is persuasive evidence that the final product likely contains little more than a trivial contribution and does not, in fact, result in an original work. See *Entm’t Res. Grp.*, 122 F.3d at 1223 (“ERG’s customers—the companies—wanted costumes replicating their characters. Thus, because ERG followed detailed instructions from its customers regarding exactly how they wanted the costumes to appear, it cannot be said that ERG’s artistic contributions were more than merely trivial contributions.”).

Finally, the process used to create the derivative work is seldom informative of originality in the copyright sense. *Meshwerks*, 528 F.3d at 1268. The remastering engineer’s application of “intensive, skillful, and even creative labor … does not guarantee its copyrightability.” *Id.*; see also *L. Batlin*, 536 F.2d at 491 (“Nor can the requirement of originality be satisfied simply by the demonstration of ‘physical skill’
or ‘special training.’”) In Meshwerks, the exercise of independent technical and aesthetic judgment in adjusting the wire-frames did not result in a copyright eligible work, as those efforts were directed wholly to more effectively representing the underlying works, not to changing or adding to those works. 528 F.3d at 1268.

B

In this case, the district court determined that “at least some perceptible changes were made to Plaintiff’s Pre-1972 Sound Recordings” and that these changes were not merely “mechanical” or “trivial.” Therefore, the district court held, there was no genuine dispute of material fact that the remastered works performed by CBS were “sufficiently original[].” Id. at 12. This conclusion was legal error.

In Entertainment Research Group, for example, the costumes were clearly distinguishable from the underlying characters. We nevertheless held that the costume-makers’ contributions were not original because the costumes would not be identified as distinguishable variations; i.e., the essential character and identity of each were not changed. Entertainment Research Group, 122 F.3d at 1223–24 (“Viewing the three-dimensional costumes and the two-dimensional drawings upon which they are based, it is immediately apparent that the costumes are not exact replicas of the two-dimensional drawings,” but there was no originality because “no reasonable trier of fact would see anything but a direct replica of the underlying characters.”); see also Meshwerks, 528 F.3d at 1267 (holding that the derivative digital wire frame models were “a peculiar kind of copy” of Toyota vehicles, although the wire models did not “recreate Toyota vehicles outright—steel, rubber, and all”); Durham, 630 F.2d at 909 (“The three Tomy figures are instantly identifiable as embodiments of the Disney characters in yet another form: Mickey, Donald and Pluto are now represented as small, plastic, wind-up toys,” although the underlying Disney characters did not include the wind-up mechanism in the derivative toys.).

Here, there is no dispute that all of the sounds contained in the remastered sound recordings—the vocals, instruments, inflection, dynamics, rhythms, and sequences—were initially fixed in a studio before 1972. There is also no dispute that the remastering engineers did not add or remove any sounds and did not edit or resequence the fixed performances. For these reasons, the remasters presumptively lacked the originality necessary to support copyright protection as derivative works.

The district court, in ruling otherwise and concluding that no genuine issues of material fact exist on the originality of the digital remasters, applied an incorrect test. In doing so, the district court placed critical reliance on the testimony of CBS’s expert, Begault. Begault explained that the digitally perceptible changes to “timbre, spatial imagery, sound balance, and loudness range” that he identified in the remastered sound recordings were measures of sound quality. Such technical improvements associated with the translation of the analog pre-1972 sound recordings into a digital medium, however, do not support a finding of originality. See L. Ballin, 536 F.2d at 489 (rejecting changes made for the “functional” purpose “of making a more suitable (and probably less expensive) figure in the plastic medium”); Entertainment Research Group, 122 F.3d at 1223 (discounting differences in form, texture and proportionality arising out of the need to create space for a human to fit into a 3-D costume); Meshwerks, 528 F.3d at 1267 (holding that the technical adjustments of data points to more accurately reflect Toyota vehicles in a digital medium did not constitute the kind of contribution to qualify for copyright).

The purpose and effect of the remastering here was similarly a technical improvement. In its brief to this court, CBS explained that the reason for the remastering was to overcome the technical limitations of vinyl using the “nearly unlimited” sound range that CDs could reproduce. William Inglot, a remastering engineer responsible for some of the remastered sound recordings here and one of CBS’s witnesses, testified that his goal was to do a “good job,” to “do a better version of maybe what the production process was at that time because you have a little more control than maybe they had,” by “taking advantage of the technology.”

Begault analyzed the differences between the pre-1972 sound recordings and the remastered sound recordings using sensitive digital analysis and concluded that the remastered sound recordings would be different if there was any difference in any of the four analyzed characteristics. But Begault nowhere analyzed whether the changes he identified reflected any original sound recording authorship that might have changed the essential character and identity of the resulting sound recordings. The technical changes as measured by sensitive digital analysis does not necessarily result in a change in the essential character and identity of the work in question. ABS’s expert, Geluso, aptly explained this shortcoming of Begault’s analysis: “I believe that two sound recordings would have to be nearly identical to pass all four of [Begault’s] tests. For example, Begault set a standard of 1 dB of loudness differential for two recordings as his passing mark. This is unreasonably extreme. In my experience, 1dB of dynamic range compression is barely audible and will most likely go undetected by a listener.” Geluso also explained that the spectral balance of a sound recording can be adjusted on most consumer listening equipment, and the loudness can be adjusted on most consumer software used to create and edit music. It is unlikely that such changes—

7. Title 17, Section 114(b) explains that the exclusive right of a copyright holder in a sound recording “is limited to the right to prepare a derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or otherwise altered in sequence or quality.” (emphasis added). We read “quality” in § 114 to be referring to character and identity rather than a measure of improvement. See Quality, Miriam-Webster (July 19, 2018), https://www.merriam-webster.com/dictionary/quality.
even if made with more technical expertise by a remastering engineer and fixed in a sound recording—would amount to a change in the essential character and identity of the sound recording.

The district court excluded several paragraphs of Geluso’s declaration as unscientific, based on unreliable methodology, lacking adequate foundation as expert testimony, unnecessary and irrelevant. The district court found Geluso’s critical listening methods to be unscientific, and “unexplained in Mr. Geluso’s declaration.” But in his declaration, Geluso cited an FBI report on forensic sound recording analysis that held out critical listening as an essential component of forensic audio analysis. Also, despite Geluso’s testimony that he critically listened to all of the recordings he examined, the district court found fatally deficient the fact that Geluso limited his waveform and spectral analysis to the first five seconds of each recording. While the shortness of the technical analysis impacts the weight of that testimony, there is no reason to question the science behind or the methodology of such testing for whatever it may show. And the district court failed to explain why five seconds of waveform analysis was insufficient to determine whether the pre-1972 and remastered sound recordings embodied the same performances. Moreover, Geluso’s testimony, offered in rebuttal to the testimony of CBS’s expert, Begualt, addressed the nature and extent of the differences between the original analog recordings and the digitally remastered sound recordings and was thus directly relevant to the issue of originality before the court. The district court also found deficient the fact that Geluso excluded from his report a phase inversion test from the first test he attempted. But that is not an adequate basis to exclude Geluso’s testimony. That test merely identifies the fact of difference—something that ABS and Geluso do not contest exists between the pre-1972 and remastered sound recordings. The district court’s exclusion of Geluso’s testimony was an abuse of discretion, and his testimony should be considered in full by the district court on remand.

The district court also erred in failing to consider ABS’s objective in creating the digital remasters. ABS hired recording engineers to create digitally remastered sound recordings of the pre-1972 sound recordings in order to allow for digital distribution and compilation albums and to take advantage of the improvements enabled by digital technology, not to introduce any substantive changes. As one ABS representative explained: “we understood as the technology increased, as things went from LP and cassette to CD [that the recordings would be re-mastered] … in such a way that they could be CD’s made out of them. They had to go digital. We knew they were going to have to be converted analog to digital.” Plaintiff Brunswick’s representative agreed, stating that “in order to release recordings in a digital format that they would in fact be remastered.” And Inglot testified that his goal was to “do a better version of maybe what the production process was at that time because you have a little more control than maybe they had” by “taking advantage of the technology.”

Another declaration submitted by Plaintiffs averred that they “never would have permitted a Licensee to make any substantial or non-trivial changes to the sound of the Recordings when creating a remastered copy.” Nothing in the record suggests that ABS set out to make any substantive changes or distinguishable variations that would give the digital remasters a different essential character or identity, to add any original sound recording authorship or to do anything other than make accurate copies in digital format of the original analog sound recordings.

Notwithstanding the above, CBS argues that all that is needed to support copyright is “more than a merely trivial variation,” Schrock v. Learning Curve Int’l, Inc., 586 F.3d 513, 521 (7th Cir. 2009), and that this is the test mandated by U.S. Auto Parts and properly adopted by the district court. CBS argues that it met its burden when it pointed out deficiencies in ABS’s claims, and that ABS failed to provide significant probative evidence that the differences between the pre-1972 and the remastered sound recordings were mechanical, trivial, or insufficiently original.

CBS is correct that the threshold of creativity for copyright eligibility often is characterized as minimal, and that the courts police the amount of creativity only within the “narrowest and most obvious limits.” Bleistein, 188 U.S. at 251; 1 Nimmer on Copyright § 2.01[B][1] (2018). But that relatively low bar does not eliminate the fundamental requirement of originality that is the touchstone of copyright protection. Here, the district court’s identification of “perceptible changes” between the recordings in characteristics relating to “quality” did not ensure that the remastered versions contained anything of consequence owing its origin to the remastering engineers. As discussed above, a derivative sound recording that merely exhibits perceptible changes does not necessarily exhibit a change to the essential character and identity of the work or reflect the addition of even a minimal amount of sound recording authorship or originality. See also 1 Nimmer on Copyright § 3.03 (2018) (“Any variation will not suffice, but one that is sufficient to render the derivative work distinguishable from its prior work in any meaningful manner will be sufficient.”).

CBS also argues that “copyrightability is [] purpose-agnostic,” and that the creation of a derivative work for “the purpose of migrating expression from one format to another” is a proper copyrightable purpose, relying on New York Times Co. v. Tasini, 533 U.S. 483 (2001). CBS is incorrect. In Tasini, freelance article authors authorized the inclusion of their articles into a newspaper, a collective work. The authors sued when their articles were included in an electronic database of newspapers in a form excised from the newspaper of which they were a part. Id. at 491. The Supreme Court concluded that the authors maintained their copyright in the articles, and that the electronic database infringed the authors’ copyright in their articles. Id. at 503–04. Tasini does not say that a mere migration of a work into a new medium justifies an independent copyright.
Finally, CBS argues that the district court was correct to rely on *Maljack Prods., Inc. v. UAV Corp.*, 964 F. Supp. 1416 (C.D. Cal. 1997), aff’d sub nom. *Batjac Prods. Inc. v. Good Times Home Video Corp.*, 160 F.3d 1223 (9th Cir. 1998) to support its understanding that changes in equalization and quality in a sound recording support a derivative work copyright. In *Maljack*, the derivative work was a “panned and scanned” adaptation of a movie and its soundtrack. 964 F. Supp. at 1418. The enhancements to the public domain soundtrack there included “edit[ing] the motion picture’s monoaural soundtrack by remixing, resequencing, sweetening, equalizing, balancing, and stereozizing it, and also add[ing] entirely new sound material.” *Id.* Here the remastering process did not include remixing or stereozizing. The changes in the soundtrack in *Maljack* accompanied and had to track the changes to the visual changes resulting from the pan-and-scan film reformatting, which resulted in a cut of 44% of the film. *Id.* at 1427. Also, the soundtrack accompanying the pan-and-scan version was independently registered by the copyright office as a derivative work, creating a presumption of copyright validity that the court found was not overcome. *Id.* at 1428. None of these circumstances are present here. To the extent that *Maljack* held that the “noticeable improvement [in quality] over the public domain version” could create copyright eligibility, we do not consider that aspect of *Maljack* persuasive. See *id.*

We therefore conclude that a derivative sound recording distinctly identifiable solely by the changes incident to the change in medium generally does not exhibit the minimum level of originality to be copyrightable. In this case, the district court did not analyze whether the changes in quality identified by Begault were anything other than merely incidental to the transfer from the analog to the digital medium.

Nothing in this opinion should be construed to question or limit the creative contributions of the recording engineers and/or record producers responsible for the recording session that led to the initial fixation of the sound recording. The initial producer/engineer’s role is often to work in collaboration with the performing artists to make many of the creative decisions that define the overall sound of the recording as fixed, including such things as microphone choice, microphone placement, setting sound levels, equipment used, processing filters employed, tapes selected, session structure, and other similar decisions analogous to the creative choices of photographers that courts have consistently held to be original. See *United States Copyright Office and Sound Recordings as Works Made for Hire: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 2nd Sess. (2000) (statement of Marybeth Peters, Register of Copyrights) (“The copyrightable elements in a sound recording will usually, though not always, involve ‘authorship’ both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.”); cf. *Burrow-Giles*, 111 U.S. at 60 (holding that photographs are copyrightable to the extent of the photographer’s decisions with respect to costume, accessories, pose of subjects, light and shade and evoking the desired expression).

The role of remastering engineers, however, is usually very different from the role of the studio engineers. Studio engineers’ decisions almost always contribute to the essential character and identity contained in the original sound recording. By contrast, the remastering engineer’s role is ordinarily to preserve and protect the essential character and identity of the original sound recording, and to present that original sound recording in the best light possible by taking advantage of technological improvements. For example, Ingolt testified that his goal was to “do a better version of maybe what the production process was at that time because you have a little more control than maybe they had” by “taking advantage of the technology.” Although we do not hold that a remastered sound recording cannot be eligible for a derivative work copyright, a digitally remastered sound recording made as a copy of the original analog sound recording will rarely exhibit the necessary originality to qualify for independent copyright protection.

C

The second prong of the *U.S. Auto Parts/Durham* test requires that a copyright-eligible derivative work must “reflect the degree to which it relies on preexisting material and must not in any way affect the scope of any copyright protection in that preexisting material.” *U.S. Auto Parts*, 692 F.3d at 1016. This prong ensures that a derivative work author—even one who contributes the requisite amount of creative authorship under the first prong—does not “prevent the owner of the preexisting work from exercising some of its rights under copyright law.” *Id.* at 1017. This prong protects the author’s right to authorize later derivative works without concern for aggressive enforcement against those later derivative works by the earlier derivative work copyright holder. In *Entertainment Research Group*, for example, we explained that “if ERG had copyrights for its costumes, any future licensee who was hired to manufacture costumes depicting these characters would likely face a strong copyright infringement suit from ERG.” 122 F.3d at 1224; see also *U.S. Auto Parts*, 692 F.3d at 1020 (applying the second prong of the *Durham* test and concluding in that case, copyright in a derivative work would not circumscribe rights of the copyright holder in the underlying work).

The district court’s failure to fully consider this second prong here was legal error. See *Entm’t Res. Grp.*, 122 F.3d at 1219 (adopting the *Durham* test over the previously applicable *Doran* test that looked only at substantial difference between the derivative and underlying work, “because the *Doran* test completely fails to take into account the rights of the holder of the copyright for the underlying work,” and therefore “should not be applied to determine the copyright-
ability of a derivative work that is based on a preexisting work that is itself copyrighted.”). Moreover, applying that prong, there is at least a genuine issue of material fact whether granting copyright protection for the remastered sound recordings here would undermine ABS’s rights in the pre-1972 sound recordings to authorize additional derivative works. Were ABS intent on granting an authorization to create an intentionally derivative work, for example by authorizing use of the underlying works as samples or remixes, those authorized works would be at high risk of infringement suits from the remastered sound recording copyright holders. This risk would, in effect, grant the remastered sound recording copyright holder a “de facto monopoly” on derivative works. See id. at 1224. Indeed, in this case, where the underlying and derivative works are both sound recordings with few, if any, readily discernable differences, and the derivative work is the only one available in the vastly more accessible and marketable digital medium, the danger that the copyright holder of the derivative work could bring suit against a potential licensee of the underlying work is particularly acute.

If, on remand, the factfinder concludes that any or all of the remastered sound recordings here do manifest a change sufficient to create a derivative, copyrightable work, the factfinder should also consider the effect of recognizing a copyright in the remastered sound recording on ABS’s ability to exercise whatever copyrights it may possess in the pre-1972 sound recording.

For the above reasons, we conclude that the district court erred in holding that there were no genuine issues of material fact that the remastered sound recordings used by CBS were independently copyright eligible. We therefore reverse the grant of summary judgment to CBS as to that issue.

D

The parties here dispute whether ABS authorized the remastering engineer to create derivative works, whether such permission was necessary, and which party bears the burden to show such authorization (or lack thereof). This issue arises, of course, only if the remastered recordings were derivative works. As we have determined that CBS was not entitled to summary judgment on that question, we address the authorization issue for guidance on remand.

The owner of a copyright has the exclusive right to prepare derivative works, 17 U.S.C. § 106(2), and to grant or withhold authorization to create such derivative works. Schrock, 586 F.3d at 522–23. In Schrock, photographer Schrock was hired by Learning Curve to photograph Thomas the Tank Engine. Id. at 515. Learning Curve and HIT Entertainment, the Thomas the Tank Engine copyright holder, used Schrock’s photographs for several years. Id. When Learning Curve stopped hiring Schrock as a photographer, he registered his photographs and sued Learning Curve and HIT for infringement. Id. Like here, it was undisputed that Schrock had permission to make the photographs. But Learning Curve argued that the photographer also needed Learning Curve’s permission to copyright the photographs. Id. The district court granted summary judgment to Learning Curve, concluding that the photographs were derivative works, and that although Schrock had permission to make the photographs, he did not have permission to copyright them. Id. The Seventh Circuit reversed, stating: “As long as he was authorized to make the photos (he was), he owned the copyright in the photos to the extent of their incremental original expression.” Id. We agree with that holding. The Seventh Circuit also explained that although this was the default rule, parties could alter this rule by contract. Id. at 525–24. Because the license agreements among the parties were not entered into the record, the Seventh Circuit remanded to the district court to determine whether the parties altered the default rule by contract. Id. at 525.

It is undisputed here that the remastering engineers were authorized to do exactly what they did. On remand, if the authorization issue is raised in a further summary judgment motion or at trial, the district court should give ABS the opportunity to produce copies of its license agreements and should determine whether any such agreements altered the default rule on authorization.

V

The district court, in granting summary judgment also held that ABS’s state law claims to copyright in the pre-1972 sound recordings, as embodied in the remastered sound recordings, were preempted by federal copyright law. This holding was error. This issue arises only if the remastered recordings are ultimately determined to be authorized derivative works. Again, we decide the issue for guidance as the case proceeds.

Prior to 1971, sound recordings were protected solely under state copyright laws. In 1971, Congress enacted the 1971 Sound Recording Act, which, for the first time, created federal rights in sound recordings distinct from the rights in the musical compositions embodied therein and from state rights in sound recordings. That Act reserved to state law the protection of sound recordings “fixed before February 15, 1972.” 17 U.S.C. § 301(c). We here address another issue of first impression: whether the creation of an authorized digital remastering of pre-1972 analog sound recordings that qualify as copyrightable derivative works brings the remastered sound recording exclusively under the ambit of federal law.

ABS argues that its state law copyrights in the pre-1972 sound recordings survived intact in the remastered sound recordings because they are distinct rights from whatever rights inhere in the remaster, and because 17 U.S.C. §§ 301(c) and 103(b) preclude Federal preemption or interference in the state law copyrights. CBS has a dramatically different view. CBS argues that by authorizing the creation of the remastered sound recordings, ABS brought its rights in the pre-1972 sound recordings embodied therein wholly within the gamut of the comprehensive Federal Copyright scheme, which does
not tolerate the reservation of any State law rights in works governed by federal copyright law.

CBS’s position is directly contrary to both established precedent and the statutory scheme. Under long-standing principles of copyright law, rights in an underlying work and derivative work are distinct, and the holder of a copyright in an underlying work retains that right in the content of the derivative work sourced from the underlying work. *Stewart v. Abend*, 495 U.S. 207, 223 (1990) (“[T]he element [of a derivative work] drawn from the pre-existing work remains on grant from the owner of a pre-existing work. So long as the pre-existing work remains out of the public domain, its use is infringing if one who employs the work does not have a valid license or assignment for use of the pre-existing work.” (internal citations omitted)); *Russell v. Price*, 612 F.2d 1123, 1128 (9th Cir. 1979) (“[E]stablished doctrine prevents unauthorized copying or other infringing use of the underlying work or any part of the work contained in the derivative product so long as the underlying work itself remains copyrighted.”); *Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 20 (2nd Cir. 1976) (“[C]opyright in the underlying script survives intact despite the incorporation of that work into a derivative work.”). Section 103(b) makes this principle explicit.8 *Stewart*, 495 U.S. at 224 (explaining that 17 U.S.C. § 103(b) “made explicit” that the “full force of the copyright in the preexisting work is preserved despite incorporation into the derivative work”).

CBS is incorrect that “the only sound recordings CBS broadcast were the remastered sound recordings, which were created long after 1972.” The broadcast of the remastered sound recording also broadcast the pre-1972 sound recording therein embodied, just as it also broadcast the underlying musical composition. Regardless of the remastering engineers’ alterations, the sounds fixed in the remastered sound recording include those performed and fixed before 1972. See 17 U.S.C. § 101 (“Sound recordings’ are works that result from the fixation of a series of musical, spoken or other sounds.”).

CBS argues that *Stewart* is inappposite because that case stands solely for the proposition that authorization is required for the derivative work author to retain control over the entire work, and its holding is limited to the unique situation where the authorization to use the underlying work in the derivative work was withdrawn. *Stewart* is not so limited. Although the case arose under the particular circumstance of a reversion of the renewal interest to the copyright in the underlying work, *Stewart* was unequivocal that “the element [of the derivative work] drawn from the pre-existing work remains on grant from the owner of the pre-existing work” and that “[s]o long as the pre-existing work remains out of the public domain, its use is infringing if one who employs the work does not have a valid license or assignment for use of the pre-existing work.” 495 U.S. at 223. Whether the derivative work author has a valid license or assignment does not impact whether distribution, for example, of the derivative work requires a license from the underlying sound recording author—it does.9 Thus, it is well-established that, where the underlying work remains protected by copyright, copying of the derivative work remains an infringement of the underlying work. *See Stewart v. Abend*, 495 U.S. at 223–24 (explaining that 17 U.S.C. § 103(b) “made explicit” that the “full force of the copyright in the preexisting work is preserved despite incorporation into the derivative work” (citing 17 U.S.C. § 7 (1976))); *DC Comics v. Tottle*, 802 F.3d 1012, 1023 (9th Cir. 2015); *Gilliam*, 538 F.2d at 20; *Russell*, 612 F.2d at 1128. Therefore, if the remastered sound recordings are ultimately determined to be authorized derivative works, federal law would govern only the additional expression in the remastered sound recordings. Adopting CBS’s view to the contrary would have the unmistakable effect of restricting ABS’s rights in the pre-1972 sound recordings, because ABS would no longer have the exclusive right to authorize: the reproduction of remastered sound recording works in phonorecords, the preparation of further derivative works (from the remastered sound recording), the distribution of phonorecords of the remastered sound recording, or the public performance by digital audio transmission of the remastered sound recordings. *See* 17 U.S.C. § 106.

Moreover, under CBS’s theory, a pre-1972 sound recording authorized for inclusion in a compilation album, would be wholly governed by federal copyright law. Presumably, an authorization to distribute from the compilation author would satisfy a distributor’s obligations wholly, without regard to the state law copyright in the individual songs. That result cannot be correct.

Neither CBS nor amici point to any authority for the proposition that the grant of an authorization to create a derivative work is indivisible from the grant of other rights and thus necessarily also grants the derivative work author sole and complete control over the exclusive rights of the derivative work. Authors of distinct components of a derivative work regularly maintain their exclusive rights independently; for example, both the author of a musical composition and a sound recording author maintain their exclusive rights in their components of the sound recording.

CBS insists that if the author of a work protected only under state law authorizes its inclusion into a federally copyrightd work, then federal law must govern the entire work via preemption, and that state law rights in the derivative work are thereby extinguished. In support of its position, CBS points to a series of cases in which courts have held that state law rights were preempted by federal law governance of

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8. 17 U.S.C. § 103(b) states: “The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.”

9. Unless, of course, the license from the original owner includes a right to license the underlying work.

The Copyright Act includes an express preemption provision: “On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship … are governed exclusively by this title.” 17 U.S.C. § 301(a). The rights asserted by ABS in the remastered sound recordings unquestionably meet the criteria of § 301(a). However, that provision is subject to an express exclusion for state law rights inhering in a pre-1972 sound recording:

> With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

17 U.S.C. § 301(c). This provision explicitly precludes federal preemption of state law rights in pre-1972 sound recordings like those at issue here. Absent federal copyright protection for the remastered sound recordings, distributors like CBS would still require ABS’s authorization to distribute any remastered derivative sound recordings under whatever state law copyrights ABS might possess in the underlying recordings. Under CBS’s understanding of the federal copyright law, it would not need ABS’s authorization, because it is enough to have the authorization via compulsory license from the author of the remastered sound recording; under CBS’s understanding, at least one of the rights or remedies under the common law or statutes of California are annulled or limited by the copyright law. Thus, CBS’s reading of the law cannot be correct.

None of the cases CBS cites implicate the preemption exclusion in § 301(c), because the underlying works in those cases were not pre-1972 sound recordings. The only case to even address that exemption is *James v. Delilah Films, Inc.* ("*Delilah Films*"), 544 N.Y.S.2d 447 (Sup. Ct. 1989). There, plaintiffs, a “girl group,” asserted various state law claims against documentary film makers who used video clips showing Plaintiffs, using a lip-synched soundtrack recorded before 1972. *Id.* at 449. The New York Superior Court held that the underlying works were audio-visual works because the sounds could not be “separated from the visual portion, merely to accommodate plaintiffs’ assertion that they are entitled to an exemption based on 17 U.S.C. § 301(c).” *Id.* at 449–50; see also *id.* at 450 (explaining that the nature of plaintiffs’ actions was “to recover for the performance, distribution or display of plaintiffs’ performances” (internal quotation marks omitted)). Therefore, the court held, plaintiffs’ claims were preempted under § 301(a). The work here, by contrast, falls squarely within the exception in § 301(c).

CBS also cites to the broad statement in *Shoptalk* that “a single work cannot be protected from copying under both federal and state law at the same time.” 168 F.3d at 591 (quoting *Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broadcasting Sys., Inc.*, 672 F.2d 1095, 1101 n.13 (2d Cir. 1982)). *Shoptalk* and *Roy Export* were both discussing the incompatibility of protecting “published” works under federal copyright law and “unpublished” works under state law, which are generally mutually exclusive categories (except for allowable alternatives to publication, such as registration and deposit, *Roy Export*, 672 F.2d at 1101 n.13). Although there are only rare situations in which a work would be protected by both federal and state law, nothing prevents this from occurring. Thus, in *Lone Ranger Television v. Program Radio Corp.*, we held that an unauthorized copy of a sound recording of a radio play infringed both the federal copyright law in the underlying script and state conversion law. 740 F.2d 718, 721 (9th Cir. 1984). CBS next argues that maintaining state sound recording copyright in derivative works would frustrate the goal of the safe harbor provision, 17 U.S.C. § 114(f)(4)(B): “Any person who wishes to perform a sound recording publicly by means of a transmission eligible for statutory licensing … may do so without infringing the exclusive right of the copyright owner of the sound recording [by paying a set royalty fee],” CBS argues that § 114 was intended to make post-1972 sound recordings subject to a compulsory license, and that maintaining state copyrights in the underlying pre-1972 sound recordings would require parties to individually negotiate

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10. Whether California copyright law or common law protects the public performance right of sound recordings is currently an open question we previously certified to the California Supreme Court. *Flo & Eddie, Inc. v. Pandora Media, Inc.*, 851 F.3d 950, 957 (9th Cir. 2017).
with pre-1972 copyright holders for the right to play post-1972 sound recordings. In other words, the § 114 “safe harbor” would not be safe anymore. CBS draws a comparison between the § 114 safe harbor and the Digital Millennium Copyright Act’s (“DMCA”) safe harbor provision, 17 U.S.C. § 512, which absolves digital service providers from liability for copyright infringement under certain conditions, and, according to the Second Circuit, also covers pre-1972 sound recordings. Capitol Records, LLC v. Vimeo, LLC, (“Vimeo”), 826 F.3d 78, 90 (2d Cir. 2016) (holding that § 512 provided a safe harbor from infringement for digital service providers even as to pre-1972 sound-recordings, because a contrary ruling—limiting the functioning of the safe harbor only to federally protected content—would “defeat the very purpose Congress sought to achieve in passing the statute.”).

The DMCA safe harbor provision provides that “[a] service provider shall not be liable for monetary relief … for infringement of copyright.” 17 U.S.C. § 512(c). That language, unlike § 114, does not limit the safe harbor to infringements of federal copyright. See Vimeo, 826 F.3d at 89 (“A literal and natural reading of the text of § 512(c) leads to the conclusion that its use of the phrase “infringement of copyright” does include infringement of state laws of copyright.”). By contrast, § 114 offers only a safe harbor for infringement of federal copyright law. Id. (distinguishing § 512(c) safe harbor from § 114 safe harbor on this basis); 17 U.S.C. § 114(d)(1) (“The performance of a sound recording publicly by means of a digital audio transmission, other than as a part of an interactive service, is not an infringement of section 106(6)” (emphasis added)). Moreover, policy favors the distinction between the DMCA safe harbor and § 114. Section 512 is directed to the protection of internet service providers who would otherwise be liable for infringing material of which they are unaware, and who would otherwise suffer enormous liability. See Vimeo, 826 F.3d at 92. Here, broadcasters who would be taking advantage of the § 114 safe harbor are aware of the particular songs they are broadcasting and must already ensure that they pay the proper royalties for any original post-1972 sound recording material and any musical compositions incorporated therein. The additional expense of tracking down incorporated pre-1972 sound recordings, particularly in a case where the alleged derivative works are mere remasters of the underlying pre-1972 sound recordings, is not similarly burdensome. Finally, the DMCA safe harbor only limits the liability of internet service providers; it does not exclude liability for infringing acts by the party posting the content. CBS’s theory here, in contrast, would render the authors of pre-1972 sound recordings embodied in remastered sound recordings that qualify as derivative works uncompensated and without control of distribution of their creative product.

VI

We next address whether the district court abused its discretion in excluding the Triton Reports as evidence under the business records exception. Business records may be admitted under Fed. R. Evidence 803(6) when:

(A) the record was made at or near the time by—or from information transmitted by— someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business…

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, … and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Fed. R. Evidence 803(6).

ABS argues that the district court abused its discretion in rejecting the Triton Reports because those reports fit squarely within the business records hearsay exception. CBS argues that Mr. Neiman, a CBS employee relied upon by ABS to provide the foundation for the business records exception, did not know how the Triton Reports were made or maintained, see NLRB v. First Termite Control Co., 646 F.2d 424, 427 (9th Cir. 1981), and was not a Triton employee.

We conclude that Mr. Neiman was qualified to establish the foundation for the business records exception, and that the district court abused its discretion in excluding the Triton Reports. The business records exception only requires “someone with knowledge” about the record-keeping, not necessarily an employee of the business or someone with knowledge of how the reports were made or maintained. See FDIC v. Staudinger, 797 F.2d 908, 910 (10th Cir. 1986). Mr. Neiman testified that Triton was hired by CBS to create the reports, and that CBS sent those reports to Sound Exchange to determine artist royalties.

We agree with ABS that First Termite Control is inapposite here. First Termite Control held that business records, to be admissible under the business records exception, must be supported by testimony of a witness knowledgeable about the creation and maintenance of those records. 646 F.2d at 417. But in that case, the accuracy of the records was contested. Here, CBS itself relied on the reports to establish its royalty payments to Sound Exchange in the ordinary course of business. The accuracy of the records is not in question. In a similar situation, we have held that third party reports of this kind fall within the business records exception. See United States v. Childs, 5 F.3d 1328, 1334 and n.3 (9th Cir. 1993) (distinguishing First Termite Control due to reliance on third party reports by company challenging their admissibility).
CBS has presented no evidence or argument showing that the Triton Reports were unreliable or inaccurate.

The district court also held that, if it were to consider the Triton Reports, it would nevertheless conclude that the listing of a name and song title in the Triton Reports was legally insufficient to create a genuine issue of material fact “absent the comparative analysis” to show that the performed sound recordings were not different recordings.

We conclude that the district court here erroneously decided a genuine issue of material fact at summary judgment. We agree with ABS that the Triton Reports contain an album title, and sometimes the company label, and so would be sufficient for a jury to infer that the records CBS performed were the versions captured in Plaintiffs’ pre-1972 sound recordings. The Triton Reports were used by CBS to govern the royalties paid to recording artists via Sound Exchange; CBS has failed to present evidence that these same reports were not sufficient to identify the recording artists or the versions performed. The district court erred in finding the absence of a genuine issue of material fact with respect to the samples listed in the Triton Reports.

VII

Finally, we address the district court’s dismissal of ABS’s class certification motion.

Central District of California Local Rule 23-3 requires Plaintiffs to file a motion for class certification within ninety days after service of the complaint. The parties here twice stipulated to extend the deadline, explaining in the second stipulation that ABS needed more time for class action-focused discovery. The district court denied the first stipulation for failure to show good cause, and denied the second without explanation. The district court did not address the asserted need for pre-certification discovery.

Despite the district court’s rulings, ABS timely filed its motion for class certification on November 19, 2015. The district court struck the motion because of two technical deficiencies: (1) noticing the hearing outside the thirty-five-day period required by the Judge’s Standing Order and (2) not including in the notice of motion a statement that the parties had met and conferred and the date on which such a conference took place, as required by Local Rule 7-3. Having thus stricken the timely motion, the district court then dismissed the motion for class certification for failure to file a timely motion for class certification under Local Rule 23-3.

ABS argues that the district court abused its discretion in striking the timely filed motion as a sanction for what it categorizes as “trivial” omissions in the notice.

Central District of California Local Rule 23-3 sets a strict 90-day time frame from the filing of a complaint to the motion for class action certification. This bright line rule is in direct contrast to the flexibility of the Federal Rule, which calls for a determination on class certification “at an early practicable time after a person sues or is sued as a class representative.” Fed. R. Civ. P. 23(c)(1)(A). That flexible approach makes sense. The class action determination can only be decided after the district court undertakes a “rigorous analysis” of the prerequisites for certification. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350–51 (2011) (quoting Gen. Tele. Co. of SW v. Falcon, 457 U.S. 147, 161 (1982)). To undertake that analysis may require discovery. Kamm v. Cal. City Dev. Co., 509 F.2d 205, 210 (9th Cir.1975) (“The propriety of a class action cannot be determined in some cases without discovery;” “To deny discovery in [such cases] would be an abuse of discretion.”).

The district court’s actions here demonstrate the impracticability of the 90-day limit, particularly in combination with the district court’s summary and unexplained denial of the parties’ joint stipulation to extend the 90-day deadline based on the need for pre-certification discovery. See Barbara J. Rothstein & Thomas E. Willing, Federal Judicial Center, Managing Class Action Litigation: A Pocket Guide for Judges, 9 (3d ed. 2010) (“Considering [Fed. R. Civ. P. 23(c)(1)], you should feel free to ignore local rules calling for specific time limits; such local rules appear to be inconsistent with the federal rules and, as such, obsolese.”); Federal Judicial Center, Manual for Complex Litigation, Fourth § 21.133 (“Some local rules specify a short period within which the plaintiff must file a motion to certify a class action. Such rules, however, may be inconsistent with Rule 23(c)(1)(A)’s emphasis on the parties’ obligation to present the court with sufficient information to support an informed decision on certification. Parties need sufficient time to develop an adequate record.”).

Although the district court’s application and interpretation of its Local Rules is entitled to “a large measure of discretion,” Lance, Inc. v. Dewco Servs., Inc., 422 F.2d 778, 784 (9th Cir. 1970), Local Rules cannot be incompatible with Federal Rules. Fed. R. Civ. P. 83(a)(1). We conclude that the bright-line of Local Rule 23-3 is incompatible with Federal Rule of Civil Procedure 23.

We therefore reverse the district court’s striking of ABS’s certification motion, and remand for consideration of the class action motion on the merits, including reconsideration of whether pre-certification discovery is warranted.

VIII

For the reasons discussed above, we REVERSE the district court’s grant of summary judgment. We also REVERSE the district court’s striking of ABS’s class action motion as untimely, and the exclusion of Geluso’s testimony. We REMAND for further proceedings consistent with this opinion. The district court should consider ABS’s request for continuance of pre-certification discovery, and, if appropriate, the merits of ABS’s class action motion, at an early practicable time.
PER CURIAM:

After pleading guilty to fraud-related charges and being sentenced, Wesley Kingsbury filed a motion under 28 U.S.C. § 2255 seeking to vacate his guilty plea and sentence. The district court denied that motion, but it did not enter judgment in a separate document.

Kingsbury filed a notice of appeal just over two months after the district court denied his § 2255 motion. Whether his notice of appeal was timely, and we accordingly have jurisdiction over his appeal.

I.

Kingsbury pled guilty to one count each of conspiracy to commit health care fraud, conspiracy to obstruct a Medicare audit, and making a materially false statement to law enforcement officers. He was sentenced to 78 months in prison. Kingsbury appealed his convictions and sentence but voluntarily dismissed his appeal before filing an opening brief.

Kingsbury then filed a pro se sworn motion under 28 U.S.C. § 2255, seeking to vacate his conviction and sentence on several grounds, including that his counsel was ineffective and that his guilty plea was not knowing, voluntary, and intelligent. The district court denied the motion and declined to issue a certificate of appealability. But it did not file a document entering judgment separate from its order denying the § 2255 motion. Kingsbury filed a pro se notice of appeal, which also serves as a request for a certificate of appealability, see 9th Cir. R. 22-1(d), 64 days after the district court denied his motion.

Whether the notice of appeal had been filed in time to give us jurisdiction, we appointed counsel and ordered briefing so we could “determine whether entry of a separate judgment is required in section 2255 proceedings and whether this court has jurisdiction over appellant’s request for a certificate of appealability.” Our order recognized that it was “an open question in this Circuit as to whether Fed. R. Civ. P. 58(a) requires the entry of judgment on a separate document when a district court enters an order denying relief in 28 U.S.C. § 2255 proceedings,” that “[o]ther Circuits are split on this issue,” and that “[i]f entry of a separate judgment [were] required, appellant’s notice of appeal was timely.”

II.

Section 2255 proceedings are governed by procedural rules developed by the Supreme Court and adopted by Congress. See generally Rules Governing Section 2255 Proceedings for the United States District Courts. Those rules set the time for the losing party to appeal from the district court’s disposition of § 2255 motions. Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts (“Rule 11”) states that “Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules.” Federal Rule of Appellate Procedure 4(a), in turn, states that a notice of appeal must be filed “within 60 days after entry of the judgment or order appealed from” when the United States is a party, Fed. R. App. P. 4(a)(1)(B), and that a judgment or order is entered for purposes of Rule 4(a) when it is entered in compliance with Rule 58(a) of the Federal Rules of Civil Procedure, Fed. R. App. P. 4(a)(7).1

1. Federal Rule of Appellate Procedure 4 also provides that the entry of judgments or orders must comply with Federal Rule of Civil Procedure 79(a), which, in turn, offers guidance to district court clerks.
Under Rule 58, an order that is dispositive of the proceedings is usually insufficient to enter judgment. Fed. R. Civ. P. 58(a). Instead, judgment must be expressly entered in a "separate document," except when the district court decides certain listed motions—which do not include § 2255 motions.2 Fed. R. Civ. P. 58(a), (c)(2)(A). If a separate document is required, and one is not filed, judgment is entered automatically 150 days after the court enters an order disposing of a case. Fed. R. Civ. P. 58(c)(2)(B).

Integral to the time for appeal in Rule 4, therefore, is the event that starts the time in which a party can appeal—specifically, either the filing of a separate document entering judgment or the passage of 150 days. See United States v. Johnson, 254 F.3d 279, 284 (D.C. Cir. 2001) ("Nothing in the language of Rule 11 . . . suggests that courts should apply Rule 4(a)'s time limit without also applying its criterion for determining when that limit begins to run."). Taken together, these rules suggest that Rule 58's separate document requirement applies to § 2255 proceedings.3

The advisory committee notes accompanying Rule 11 further support this conclusion. Those notes cite United States v. Hayman, 342 U.S. 205 (1952), for the proposition that appeals from orders denying § 2255 motions "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions"—writ actions that are available, for example, to challenge state custody under 28 U.S.C. § 2254 but that have been almost entirely supplanted by the motions mechanism of 28 U.S.C. § 2255 in challenges to federal custody. See Rule 11, advisory committee's note to 1979 amendment (quoting Hayman, 342 U.S. at 209 n.4). Those civil rules applicable to appeals from district courts' resolution of habeas corpus petitions include the separate document requirement of Rule 58. See, e.g., Mitchell v. Idaho, 814 F.2d 1404, 1405–06 (9th Cir. 1987).

Requiring entry of judgment in a separate document under Rule 58 to start the clock on the 60-day time to appeal is also consistent with the rule's goal to demarcate the time to appeal more clearly. See Fed. R. Civ. P. 58, advisory committee's note to 1963 amendment (describing the rule as "eliminat[ing] [prior] uncertainties by requiring that there be a judgment set out on a separate document"). Many defendants—like Kingsbury here—proceed pro se on collateral review and particularly benefit from greater clarity on procedural requirements.4 Cf. Rand v. Rowland, 154 F.3d 952, 958 (9th Cir. 1998) (en banc) (interpreting the Federal Rules of Civil Procedure as mandating notice to pro se prisoner litigants regarding the requirements of the summary judgment rule because that reading “effectuates the purpose of the Federal Rules to eliminate ‘procedural booby traps’ which could prevent ‘unsophisticated litigants from ever having their day in court’” (quoting Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373 (1966))).

The majority of circuits have considered the question agree that Rule 58's separate document requirement applies to § 2255 proceedings. The Third, Fifth, Sixth, Eighth, and D.C. Circuits have all reached this conclusion.5 See Gillis v. United States, 729 F.3d 641, 643 (6th Cir. 2013); Jeffries v. United States, 721 F.3d 1008, 1012–13 (8th Cir. 2013); United States v. Fiorelli, 337 F.3d 282, 285–87 (3d Cir. 2003); Johnson, 254 F.3d at 283–85; Sassoon v. United States, 549 F.2d 983, 984 (5th Cir. 1977).

Only the Second Circuit has held otherwise, grounding its reasoning in the observation that “a motion under § 2255 is a further step in the movant’s criminal case and not a separate civil action.” Williams v. United States, 984 F.2d 28, 30 (2d Cir. 1993) (quoting Rule 11, advisory committee's note to 1979 amendment). It is true that Rule 58 is a civil rule and that § 2255 proceedings have some procedural characteristics that might appear to weigh against application of the civil rules. But given the specific wording of the applicable rules, which indicate that the civil requirements for the time to appeal apply here, we do not need to reach a conclusion about the civil or criminal nature of § 2255 proceedings generally.

We therefore join the majority of our sister circuits in holding that Rule 58's separate document requirement ap-

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4. We recognize that § 2255 motions are similar in some ways to motions under Federal Rule of Civil Procedure 60, and that the time to appeal from the disposition of Rule 60 motions runs from the entry of the order, not from the filing of a separate document entering judgment. See Fed. R. Civ. P. 58(a)(5). But Federal Rule of Civil Procedure 58 lists the five types of orders after which no separate document is required to start the time to appeal. Orders on Rule 60 motions are listed. Orders on § 2255 motions are not. And Rule 11 did not say anything to effectively add them to that list. Holding that motions similar to those listed are included by implication, in the absence of any indication that the list was intended to be non-exclusive, would create exactly the sort of murkiness about the time to appeal that Rule 58 was intended to avoid. See United States v. Indrelunas, 411 U.S. 216, 221–22 (1973) (per curiam) (explaining that "the separate document provision of Rule 58 is . . . a mechanical change that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered" (internal quotation marks and citation omitted)), abrogated in part on other grounds by Bankers Tr. Co. v. Mallis, 435 U.S. 381, 386 n.7 (1978) (per curiam).

5. The Seventh Circuit at one point seemed to have held that Rule 58's separate document requirement applied to § 2255 appeals. See Hope v. United States, 43 F.3d 1140, 1142 & n.1 (7th Cir. 1994); see also Morales v. Bezy, 499 F.3d 668, 671 (7th Cir. 2007). But the Seventh Circuit has since stated that it has not decided the question, notwithstanding Hope. See Laws v. United States, 669 F.3d 864, 866 (7th Cir. 2012).
plies to § 2255 proceedings. If a separate document entering judgment is filed with the order resolving a § 2255 motion, the losing party has 60 days to file a notice of appeal. Otherwise, it has 60 days from when judgment is automatically entered 150 days after the filing of the order, for a total of 210 days.

III.

As described above, the district court did not file a separate document entering judgment under Rule 58 after denying Kingsbury’s § 2255 motion. If a separate document were not required, the notice of appeal Kingsbury filed 64 days after the order denying his § 2255 motion would have been 4 days late, and we would have been deprived of appellate jurisdiction. See Fed R. App. P. 4(a).6

But because Rule 58’s separate document requirement applies, final judgment was entered as of 150 days after the district court denied the § 2255 motion. Fed R. Civ. P. 58(c) (2)(B). Kingsbury filed his notice of appeal during those 150 days, so his notice was timely. See Fed. R. App. P. 4(a)(2) (“A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.”); FirsTier Mortg. Co. v. Inv'rs Mortg. Ins. Co., 498 U.S. 269, 273 (1991) (observing that Federal Rule of Appellate Procedure 4(a) (2) “recognizes that, unlike a tardy notice of appeal, certain premature notices do not prejudice the appellee and that the technical defect of prematurity therefore should not be allowed to extinguish an otherwise proper appeal”).

IV.

For the forgoing reasons, we have jurisdiction over Kingsbury’s appeal.

We GRANT in part Kingsbury’s request for a certificate of appealability and set a briefing schedule in a concurrently filed order.

6. The time to appeal in Rule 4(a) is set by statute. See 28 U.S.C. § 2107(a)–(b). As statutory time limits, Rule 4(a)’s deadlines are jurisdictional. See Bowles v. Russell, 551 U.S. 205, 212–13 (2007). We have held that Rule 4(a)’s deadlines are jurisdictional in § 2255 proceedings. See United States v. Hayat, 710 F.3d 875, 903 (9th Cir. 2013) (holding that we “lack[ed] jurisdiction to review the district court’s dismissal of [a defendant’s] § 2255 motion” when he “did not timely file a notice of appeal”).

Cite as 18 C.D.O.S. 8355

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.
GERALD THOMAS SCHRAM, Defendant-Appellant.

No. 17-30055
United States Court of Appeals for the Ninth Circuit
D.C. No. 1:14-cr-00457-MC-1
Appeal from the United States District Court for the District of Oregon
Michael J. McShane, District Judge, Presiding
Argued and Submitted July 11, 2018
Portland, Oregon
Filed August 21, 2018
Before: Kim McLane Wardlaw and John B. Owens, Circuit Judges, and Joan H. Lefkow,* District Judge.

OPINION

OWENS, Circuit Judge:

Defendant-Appellant Gerald Schram appeals from the denial of his suppression motion. The district court held that Schram could not challenge the search of a residence that a no-contact court order barred him from entering. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.1

I. FACTUAL BACKGROUND

On September 24, 2014, detectives from the Medford Police Department were called to investigate the robbery of a local U.S. Bank branch.2 After interviewing eyewitnesses

1. In a concurrently filed memorandum disposition, we reverse Schram’s conviction for one count of Hobbs Act robbery in violation of 18 U.S.C. § 1951.

2. We rely primarily on the district court’s factual findings, which neither party contests.
and further police work, the detectives had probable cause to believe that Schram was responsible. A records check showed, among other things, that there was a no-contact order prohibiting Schram from contacting his girlfriend, Zona Satterfield.

The detectives began their search for Schram at Satterfield’s residence, as it was the only address the detectives had that was associated with him. Without a warrant (and, for the purposes of this appeal, we assume without Satterfield’s consent), the detectives entered the residence, found Schram inside, and arrested him. They then obtained a search warrant and searched Satterfield’s home.

Schram was later indicted for bank robbery in violation of 18 U.S.C. § 2113(a), and he moved to suppress the evidence obtained in the search. The district court denied the suppression motion, concluding that Schram could not “object to the entry into [Satterfield’s] house” because “[h]e has no expectation of privacy in a residence that he is legally barred from entering.” Schram pled guilty, conditioned on his right to appeal the denial of his suppression motion.

This timely appeal followed.

II. STANDARD OF REVIEW

We review a district court’s denial of a suppression motion de novo and its factual findings for clear error. See United States v. Cunag, 386 F.3d 888, 893 (9th Cir. 2004).

III. DISCUSSION

“Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” Arizona v. Gant, 556 U.S. 352, 358 (2009) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). But “[w]hether a warrant is required is a separate question from the one we address[,] here, which is whether the person claiming a constitutional violation ‘has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge.’” Byrd v. United States, 138 S. Ct. 1518, 1526 (2018) (quoting Rakas v. Illinois, 439 U.S. 128, 133 (1978)). A person may not claim his Fourth Amendment rights have been violated if that person lacks “a legitimate expectation of privacy in the premises’ searched.” Id. (quoting Rakas, 439 U.S. at 143).

Here, we must decide whether a person who is prohibited from entering a residence by a court’s no-contact order still may have a legitimate expectation of privacy that would entitle him to Fourth Amendment protection in that residence. Supreme Court case law, our case law, and the law of other circuits make clear that the answer is no.

An individual has a “legitimate expectation of privacy” if: (1) the individual demonstrates a subjective expectation of privacy in the place being searched, and (2) this subjective expectation is one “that society accepts as objectively reasonable.” California v. Greenwood, 486 U.S. 35, 39 (1988); see also United States v. Struckman, 603 F.3d 731, 746–47 (9th Cir. 2010). In Rakas, the Supreme Court clarified that a privacy interest is not reasonable when one’s presence in a place is “wrongful.” 439 U.S. at 143 n.12. (citation omitted).

By way of example, the Court explained, “[a] burglar plying his trade in a summer cabin during the off season may have a thoroughly justified subjective expectation of privacy [in the cabin],” but lacks a legitimate expectation of privacy because “his expectation is not ‘one that society is prepared to recognize as reasonable.’” Id. (quoting Katz, 389 U.S. at 361 (Harlan, J., concurring)).

Similarly, we have concluded that a defendant may not invoke the Fourth Amendment to challenge a search of land upon which he trespasses, calling this argument “frivolous.” United States v. Hernandez-Gonzalez, 608 F.2d 1240, 1246 (9th Cir. 1979); see also Struckman, 603 F.3d at 747 (“Thus, had [the defendant] been an actual trespasser, he would not be able to claim the protections of the Fourth Amendment with regard to his arrest in the backyard.”). We have also held that once a hotel takes affirmative steps to repossess a room that a patron procured “by criminal fraud and deceit,” the patron lacks a legitimate expectation of privacy in the room and so “does not enjoy the protection afforded by the Fourth Amendment.” Cunag, 386 F.3d at 893–95.

Applying parallel reasoning, the Second Circuit has held that an escaped inmate may not claim a legitimate expectation of privacy in his automobile because the escapee is “no more than a trespasser on society.” United States v. Roy, 734 F.2d 108, 110–12 (2d Cir. 1984); see also United States v. Sanchez, 635 F.2d 47, 64 (2d Cir. 1980) (“[A] mere trespasser has no Fourth Amendment protection in premises he occupies wrongfully.”). Likewise, the First Circuit has concluded that squatters lack a legitimate expectation of privacy to challenge on Fourth Amendment grounds their eviction from government land. Amezquita v. Hernandez-Colon, 518 F.2d 8, 11–12 (1st Cir. 1975) (noting that the plaintiffs “knew they had no colorable claim to occupy the land” and that the commonwealth had twice asked them to depart voluntarily). And in holding that a defendant who fails to pay rent for a private residence may not challenge a search of that property, the Seventh Circuit clearly articulated the principle motivating this line of cases: “individuals who occupy a piece of property unlawfully have no claim under the Fourth Amendment.” United States v. Curlin, 638 F.3d 562, 565–66 (7th Cir. 2011) (collecting cases).

The Third Circuit addressed the question directly before us and relied on these cases to conclude that, “like a trespasser, a squatter, or any individual who occupies a piece of property unlawfully,” an individual whose presence in a home is barred by a court no-contact order lacks “any expectation of privacy” in such place “that society is prepared to recognize as reasonable.” United States v. Cortez-Duatrielle, 743 F.3d 881, 884–85 (3rd Cir. 2014) (alteration in original) (footnotes and citations omitted). In so holding, the Third Circuit rejected the defendant’s contention that the
no-contact order was vitiated by the consent of the person whom the order barred the defendant from contacting. Id. at 884.

Like the defendant in *Cortez-Dutrieville*, Schram argues that Satterfield’s consent to his presence overrode the terms of the no-contact order. He relies on *United States v. Gamez-Orduño*, 235 F.3d 453 (9th Cir. 2000), to argue that a property owner’s invitation grants an individual a legitimate expectation of privacy on a premises, even if the individual is there for illegal purposes. This principle sweeps far broader than the holding of *Gamez-Orduño*. In that case, we held that narcotics smugglers had a legitimate expectation of privacy as overnight guests in a home. Id. at 458–59. But the narcotics smugglers’ criminal conduct was not the act of being on the premises in question: their criminal conduct was narcotics smuggling. Thus while a defendant does not lose his Fourth Amendment rights simply by engaging in illegal acts, a defendant still may lack Fourth Amendment rights to challenge the search of a residence when the law prevents him from being there in the first place. See *United States v. Vega*, 221 F.3d 789, 797 (5th Cir. 2000) (“[T]he burglar’s expectation of privacy loses its legitimacy not because of the wrongfulness of his activity, but because of the wrongfulness of his presence in the place where he purports to have an expectation of privacy.”), abrogated on other grounds, as recognized by *United States v. Aguirre*, 664 F.3d 606, 611 n.13 (5th Cir. 2011).

Schram also argues that the Supreme Court’s recent holding in *Byrd* cautions against drawing a per se rule in this case. In *Byrd*, the Court held that a defendant who had not signed a rental car agreement may still have a legitimate privacy expectation in the rental car to challenge its search. 138 S. Ct. at 1529–30. But in so holding, the Court explicitly left intact its conclusion from *Rakas* that a “car thief would not have a reasonable expectation of privacy in a stolen car,” “[n]o matter the degree of possession and control.” Id. at 1529 (citing *Rakas*, 439 U.S. at 141 n.9). To explain the difference between the defendant in *Byrd* and a car thief, the Court likened a car thief to *Rakas*’s hypothetical “burglar plying his trade in a summer cabin during the off season,” thus reaffirming *Rakas*’s teaching that, like a defendant who may not challenge a search of stolen property, a defendant whose presence on a premises violates the law may not “object to the legality of [the premises’] search.” Id. (quoting *Rakas*, 439 U.S. at 141 n.9).

Like a burglar, trespasser, or squatter, an individual violating a court no-contact order is on property that the law prevents him from entering. We therefore hold that such an individual lacks a legitimate expectation of privacy in that place and may not challenge its search on Fourth Amendment grounds. In doing so, we join not only the Third Circuit, but every other court that has considered the matter. 3

3. See, e.g., *Cortez-Dutrieville*, 743 F.3d at 884–85; *Washington v. St. Albans Police Dep’t*, 30 F. Supp. 2d 455, 457–58 (D. Md. 1998); *Commonwealth v. Morrison*, 710 N.E.2d 584, 586 (Mass. 1999); *State v. Stephenson*, 760 N.W.2d 22, 26–27 (Minn. Ct. App. 2009); see also *United States v. Bey*, 825 F.3d 75, 79 (1st Cir. 2016) (noting that “[s]everal other courts have specifically held that a defendant cannot claim a reasonable expectation of privacy to the interior of a home where the defendant’s very presence is unlawful due to a restraining order,” but declining to reach the issue).

**AFFIRMED.**
California Courts of Appeal

Cite as 18 C.D.O.S. 8358

LARRY BURKES, Plaintiff and Respondent, v. DAMON ROBERTSON, Defendant and Appellant.

No. A150249
In The Court of Appeal of the State of California
First Appellate District
Division Five
(Solano County Super. Ct. No. FCS047326)
Filed August 20, 2018

COUNSEL
Law Offices of Randal M. Barnum, Randal M. Barnum and Carrie E. Croxall for Defendant and Appellant.
M. Colleen Ryan for Plaintiff and Respondent.

OPINION

The Labor Commissioner (Commissioner) issued an award in favor of Larry Burkes, an employee of Damon Robertson (doing business as All Ways Delivery) for unpaid overtime wages, penalties, and interest. Robertson filed a timely pro se notice of appeal in the Solano County Superior Court, but he failed to post a statutorily required undertaking (an appeal bond or cash deposit in the amount of the award) within the time provided. (Lab. Code, § 98.2, subd. (b); hereafter section 98.2(b).) He subsequently requested a waiver of the undertaking requirement, alleging indigency. The trial court found Robertson’s failure to request a waiver prior to the deadline for filing a section 98.2 notice of appeal deprived it of jurisdiction to consider the request. Accordingly, the trial court dismissed the appeal. We agree and affirm.

I. BACKGROUND AND PROCEDURAL HISTORY

Burkes filed a claim against Robertson with the Commissioner’s office alleging he was owed money for straight-time wages, overtime wages, waiting time penalties, and liquidated damages. On June 21, 2016, the Commissioner issued an award in favor of Burkes for unpaid overtime wages, waiting time penalties, liquidated damages, and interest in the total amount of $81,565.34. The Award was served on Robertson by mail on June 22, 2016. Robertson filed a pro se notice appeal in the Solano County Superior Court on July 6, 2016, paying the standard filing fee, but he failed to post an undertaking. The trial court issued an order to show cause as to why Robertson’s appeal should not be dismissed for failure to post the undertaking.

At an August 1, 2016 hearing on the order to show cause, Robertson and his office manager appeared. They advised the court that Robertson had not posted an undertaking because he was financially unable to do so. The court continued the hearing to allow Robertson to consult with an attorney and to make a written request for a waiver of the undertaking requirement.

Robertson appeared by counsel at the continued hearing on August 29, 2016. Counsel filed a written request for waiver of the undertaking, pursuant to Code of Civil Procedure section 995.240, and a response to the order to show cause. Filed concurrently with the written waiver request was Robertson’s declaration that he did not have the financial ability to pay the undertaking and was told by a surety company he lacked sufficient liquid collateral to qualify for an appeal bond.

At the continued hearing, the trial court noted Robertson appeared eligible for a waiver, but questioned whether, under Palagin, supra, 222 Cal.App.4th 124, it had jurisdiction to grant the waiver because it was not requested prior to filing deadline for the section 98.2 appeal. Robertson argued Palagin did not require an undertaking waiver to be sought within the 15-day outer limit for a section 98.2 notice of appeal. He also argued it would be unreasonable to require an indigent employer to seek a court order for a waiver within such a limited period of time.

On October 14, 2016, the court dismissed the appeal. The court found the section 98.2(b) undertaking requirement is mandatory and jurisdictional. The court held it did not have jurisdiction to consider Robertson’s request for waiver because he had not made the request prior to the filing deadline for appeal of the Award. Robertson filed a timely notice of appeal of the trial court’s order.

obtain an administrative hearing (known as a Berman hearing). (Smith v. Rae-Venter Law Group (2002) 29 Cal.4th 345, 350, superseded by statute in other respects.) ” The Berman hearing procedure is designed to provide a speedy, informal, and affordable method of resolving wage claims.” (Murphy v. Kenneth Cole Productions, Inc. (2007) 40 Cal.4th 1094, 1115.)

3. Within 10 days after a party is served with notice of the Commissioner’s order, decision, or award, that party “may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo.” (§ 98.2, subd. (a)) Section 98.2 provides, that “[f]or purposes of computing the 10-day period after service, [s]ection 1013 of the Code of Civil Procedure shall be applicable,” which provides an additional five days for service by mail.

4. Neither Burkes nor the Commissioner initially filed any opposition to Robertson’s opening brief on appeal. Because of the is-
II. DISCUSSION

A. Time Limit for Appeal of Commissioner’s Decision

Sections 98 and 98.1, subdivision (a), confer initial jurisdiction upon the Commissioner to investigate, hear, and determine wage disputes. Within 15 days after the administrative hearing, the Commissioner must file his or her decision and serve a copy on the parties. (§ 98.1, subd. (a).) Within 10 days of service (or 15 days if service is by mail), a party may seek review of the Commissioner’s decision by filing an appeal in the superior court. (§ 98.2, subd. (a).) “[T]imely filing of a notice of appeal forestalls the [C]ommissioner’s decision, terminates his or her jurisdiction, and vests jurisdiction in the superior court to conduct a hearing de novo …” (Murphy v. Kenneth Cole Productions, Inc., supra, 40 Cal.4th at p. 1116 [§ 98.2 proceeding is not a conventional appeal or a review of the Commissioner’s decision—it is a de novo trial of the wage dispute]; § 98.2, subd. (a).) The time for filing a notice of appeal from the Commissioner’s decision is “mandatory and jurisdictional,” and a late filing may not be excused on the grounds of mistake, inadvertence, or excusable neglect. (Pressler v. Donald L. Bren Co. (1982) 32 Cal.3d 831, 837; § 98.1, subd. (a) [failure to file notice within prescribed period “shall result in the decision or award becoming final” (italics added)].) Strict adherence to the statutory time limits serves a long-standing public policy favoring the “‘full and prompt payment of wages due’” in recognition of the average worker’s economic dependence on his or her wages. (Pressler, at p. 837.)

B. Section 98.2(b) Undertaking Requirement

An employer’s right to appeal the Commissioner’s decision is further “conditioned on the necessary requisite that the employer post … [an] undertaking for the amount of the award.” (Williams v. FreedomCard, Inc. (2004) 123 Cal.App.4th 609, 614.) “The undertaking shall consist of an appeal bond issued by a licensed surety or a cash deposit with the court in the amount of the order, decision, or award.” (§ 98.2(b).) “The purpose of this requirement is to discourage employers from filing frivolous appeals and from hiding assets in order to avoid enforcement of the judgment.” (Sonic-Calabasas A, Inc. v. Moreno (2013) 57 Cal.4th 1109, 1129.)

Prior to a 2010 legislative amendment to section 98.2(b) (see Stats. 2010, ch. 102, § 1), the Fourth District Court of Appeal held the undertaking requirement was directory and not jurisdictional. (Progressive Concrete v. Parker (2006) 136 Cal.App.4th 540, 547–548 (Progressive Concrete).) The Progressive Concrete court contrasted the language of section 2673.1, subdivision (g), which deals with claims for unpaid wages in the garment manufacturing industry and adopts the same appeal procedures as section 98.2. Section 2673.1 used different language regarding an appeal bond requirement, providing in relevant part that “[a]s a condition precedent to filing an appeal, the contractor or the guarantor, whichever appeals, shall post a bond with the Commissioner in an amount equal to one and one-half times the amount of the award.” (§ 2673.1, subd. (g), italics added.) The court concluded the Legislature, by using different language in the then-applicable version of section 98.2 (the employer “shall post an undertaking with the reviewing court” (italics added)), did not intend section 98.2(b) to be mandatory and jurisdictional, and—had there been such legislative intent or purpose—the Legislature presumably would have expressly provided for dismissal of the section 98.2 appeal ….” (Progressive Concrete, at p. 548.)

In Palagin, supra, 222 Cal.App.4th 124, we were required to interpret the effect of the 2010 legislative amendment to section 98.2(b), which was enacted, at least in part, in response to the Progressive Concrete decision. (Stats. 2010, ch. 102, § 1; see 3 Witkin, Summary of Cal. Law (11th ed. 2017) Agency and Employment, § 339, p. 439 [(t)he 2010 Legislature abrogated the Progressive Concrete holding”].) The first sentence of section 98.2(b) was amended to read: “As a condition to filing an appeal pursuant to this section, an employer shall first post an undertaking with the reviewing court in the amount of the order, decision, or award.” (Italics added.)

The wage claimant in Palagin sought to dismiss the appeal of a Commissioner’s award for the employer’s failure to post an undertaking by the statutory deadline. (Palagin, supra, 222 Cal.App.4th at p. 126.) Relying on Progressive Concrete, the trial court declined to dismiss the appeal and allowed the employer additional time to post an appeal bond. (Palagin, at p. 127–128.) We noted the 2010 amendment to section 98.2(b) specifically made the undertaking a condition to filing an appeal and required an employer to post that undertaking first with the reviewing court. (Palagin, at p. 134.) Just as section 2673.1 and Progressive Concrete referred to amount owed exceeds the undertaking, is forfeited to the employee.”
a “condition precedent,” we noted the Legislature used the equivalent words “condition” and “first” in amending the statute. We found “[t]he clear implication is that the Legislature intended, by using language nearly identical to that embraced by Progressive Concrete, to make the undertaking requirement ‘mandatory and jurisdictional.’” (Palagin, at p. 134.)

We found the statutory context, statutory purpose, and legislative history made it “clear crystal that the 2010 amendment of section 98.2(b) was to cure the perceived evils wrought by Progressive Concrete, and to accomplish the following purposes: (1) to emphasize that the undertaking was mandatory and that it would have to be filed ‘first,’ as a condition to filing the appeal; (2) to minimize the need for an employee to file a motion to dismiss; (3) to avoid delays in the dismissal of frivolous appeals for which no bond has been posted; and (4) to make sure employers would not have time to ‘hide or transfer assets, resulting in uncollectible judgments.’” (Palagin, supra, 222 Cal.App.4th at p. 136; see Sen. Com. on Labor and Industrial Relations, Analysis of Assem. Bill No. 2772 (2009–2010 Reg. Sess.) as amended Apr. 8, 2010, p. 4.) Therefore, “the undertaking requirement of section 98.2(b) is mandatory and jurisdictional, and that the court has no authority to extend the deadline for posting the undertaking beyond the deadline for filing the notice of appeal.” (Palagin, at p. 140.)

C. Waiver of the Section 98.2(b) Undertaking Requirement

As an initial matter, it is undisputed that a party appealing a decision of the Commissioner is entitled as a matter of due process to seek relief from the section 98.2(b) undertaking requirement. “The right of an indigent civil litigant to proceed in forma pauperis is grounded in a common law right of access to the courts and constitutional principles of due process. [Citations.] ‘[R]estricting an indigent’s access to the courts because of his poverty … contravenes the fundamental notions of equality and fairness which since the earliest days of the common law have found expression in the right to proceed in forma pauperis.’” (Cruz v. Superior Court (2004) 120 Cal.App.4th 175, 185; Williams v. FreedomCard, Inc., supra, 123 Cal.App.4th at p. 613 [party seeking de novo review of Commissioner’s decision may “obtain a court order waiving the requirement of a bond or undertaking on the grounds of both indigency and inability to obtain the necessary bond”].) The primary question presented here is not whether waiver is available for the section 98.2(b) undertaking requirement, but rather when must a waiver request must be made. Robertson argues dismissal of his case for failing to file a waiver request within the time period for filing a notice of appeal is a deprivation of due process. We disagree.

I. Timing of Waiver Request

Robertson contends that neither Palagin nor any other published case addresses the issue of whether section 98.2(b) mandates filing a waiver request before expiration of the time in which to file a notice of appeal. He argues a waiver request is not required, or as a policy matter should not be required, prior to the expiration of the time to file a notice of appeal and that section 98.2(b) is not designed to “bar [a] financially distressed employer’s ability to file an appeal from a … Commissioner’s ruling.”

Burkes responds that section 98.2(b) does not bar appeal by indigent employers, that nonindigent employers must meet the same deadline to actually post an undertaking, and an indigent employer is only required to seek a waiver within the time provided. We agree. To hold otherwise would create two different requirements for employer appeals under section 98.2—an undefined and potentially unlimited time to request an undertaking waiver for employers who assert indigence, regardless of merit, and the statutory deadline to post an undertaking for an employer who is not indigent. Providing a general exception for employers alleging indigence would completely defeat the purpose of the section 98.2(b) undertaking requirement and subvert the protections that the statutory requirements are intended to afford wage claimants.

Robertson contends the abbreviated appellate window available under section 98.2(b) makes it unduly burdensome and “harsh” to require filing a request for waiver within that time, particularly for a small self-represented employer. He suggests it is “difficult, if not impossible, to do within the 10-15 day period to file a notice of appeal” and requiring it would “nullify the purpose of Code of Civil Procedure section 998.240 [sic].” We are not persuaded. The same burdens are imposed uniformly and equally on all appellants, and self-represented parties are “held to the same restrictive procedural rules as an attorney.” (Nwosu v. Uba (2004) 122 Cal.App.4th 1229, 1247.) “A doctrine generally requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation.” (Rappleyea v. Campbell (1994) 8 Cal.4th 975, 985.)

The record here also reflects no impossibility, nor any undue burden. Robertson was advised in the Award itself of the time limits for filing an appeal, and he was further advised of the undertaking requirement “as a condition to filing an appeal” of the Award. He was apparently directly advised by a deputy Labor Commissioner that “in some cases” a judge might waive the undertaking requirement. Although Robertson then timely filed his notice of appeal, he made no effort to seek a waiver of the undertaking requirement until after the order to show cause was issued. The burden imposed to at least seek a waiver is certainly no greater than that required for a nonindigent employer to post an undertaking within the time provided. To seek a waiver, an appellant need only file a motion seeking relief from the undertaking requirement. (See Code Civ. Proc., § 1003 [defining a motion as “[a]n applica-
tion for an order”). A motion is deemed to have been brought before the court when it is served and filed. (Id., § 1005.5.)

2. Sufficiency of Waiver Request

Robertson also argues no published authority discusses the interplay of section 98.2(b) and Code of Civil Procedure section 995.240 for employer indigency waivers. Section 98.2(b) does not specify what criteria to consider in determining whether an employer qualifies for relief from its undertaking requirement. Therefore, we look to the provisions of Code of Civil Procedure section 995.240, which are generally applicable to statutory bonding requirements when a principal is indigent:7 “The court may, in its discretion, waive a provision for a bond in an action or proceeding and make such orders as may be appropriate as if the bond were given, if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties, whether personal or admitted surety insurers. In exercising its discretion the court shall take into consideration all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived.” (Italics added.)

Code of Civil Procedure section 995.240 codifies the common law authority of the courts to exempt an indigent from an undertaking requirement. (Williams v. FreedomCard, Inc., supra, 123 Cal.App.4th at p. 614; Smith v. Adventist Health System/West (2010) 182 Cal.App.4th 729, 740.) A party seeking relief under this statute must make a motion to the trial court and has the burden of proving he was in fact indigent:8 “The court may, in its discretion, waive a provision for a bond in an action or proceeding and make such orders as may be appropriate as if the bond were given, if the court determines that the principal is unable to give the bond because the principal is indigent and is unable to obtain sufficient sureties, whether personal or admitted surety insurers. In exercising its discretion the court shall take into consideration all factors it deems relevant, including but not limited to the character of the action or proceeding, the nature of the beneficiary, whether public or private, and the potential harm to the beneficiary if the provision for the bond is waived.” (Italics added.)

Indigence is only one of several factors Code of Civil Procedure section 995.240 requires the court to consider. The nature of wage claims requires the trial court to also consider section 98.2(b)’s “overriding goal” of ensuring expeditious collection of wages which are due but unpaid (Pressler v. Donald L. Bren Co., supra, 32 Cal.3d at p. 837), as well as the legislative policies of discouraging frivolous appeals for purposes of delay and minimizing the time in which an employer might hide assets. (Palagin, supra, 222 Cal.App.4th at p. 137.) In considering potential harm to the employee beneficiary, the court must keep in mind that “‘[d]elay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to others, and in many cases may make the wage-earner a charge upon the public.’” (Kerr’s Catering Service v. Department of Industrial Relations (1962) 57 Cal.2d 319, 326.) Further, mere inconvenience or hardship alone is not a basis for having an undertaking requirement waived. (Markley v. Superior Court (1992) 5 Cal.App.4th 738, 749.)

Moreover, ample precedent also exists for requiring, as a condition to the grant of in forma pauperis relief, that an applicant “establish to the court’s satisfaction that he is in fact indigent and that his claim or defense is not wholly frivolous.” (Ferguson v. Keays, supra, 4 Cal.3d at p. 658.) It is no deprivation of due process to require an applicant seeking relief from the statutory protection afforded vulnerable employees to demonstrate at least a minimal showing of merit in his appeal. (Cf. Code Civ. Proc., § 391.7 [vexatious litigant statute requiring a preliminary showing of merit]; Bravo v. Ismaj (2002) 99 Cal.App.4th 211, 221–222 [vexatious litigant statutes constitutional and do not deny vexatious litigants access to the courts, but rather “operate[] solely to preclude the initiation of meritless lawsuits”].)

Finally, as observed in Palagin, “even if the jurisdictional undertaking requirement did affect the availability of the trial de novo process for employers, by no means does it deprive the employer of a full and fair opportunity to be heard on the employee’s wage claim. The primary process for deciding wage claims is not the trial de novo reflected in section 98.2, but the administrative procedure reflected in section 98; requiring a timely [undertaking] for a trial de novo does nothing to minimize the employer’s ability to make its case during the administrative process. A jurisdictional undertaking requirement therefore poses no barrier to a fair adjudication of the wage claim, but merely conditions the availability of a further trial de novo process that the Legislature does not have to provide at all.” (Palagin, supra, 222 Cal.App.4th at p. 138.)

7. The Bond and Undertaking Law (Code Civ. Proc., § 995.010 et seq.) applies to any “undertaking executed, filed, posted, furnished, or otherwise given as security pursuant to any statute of this State, except to the extent the statute prescribes a different rule or is inconsistent.” (Id., § 995.020, subd. (a).)

8. Robertson contends the trial court made a finding that he qualified for a waiver. It did not. While noting “it appear[ed]” Robertson qualified for a waiver, the trial court dismissed the appeal on jurisdictional grounds and so had no occasion to make a ruling on this question. Robertson also asserts the facts presented to the court (his declaration) presented “incontrovertible evidence” that he was financially unable to post a cash deposit or to obtain a bond. It is not appropriate for us to make such factual determinations in the first instance, and we decline Robertson’s implicit invitation to do so. As we find the appeal was properly dismissed on jurisdictional grounds, we need not, and do not, decide whether Robertson would have been entitled to a waiver had an application been timely presented.
D. Conclusion

We reiterate our conclusion in Palagin that the plain meaning of the language in section 98.2(b) establishes that the requirement of posting an undertaking by the deadline for a notice of appeal is jurisdictional. (Palagin, supra, 222 Cal.App.4th at p. 132.) The only exception is established by Code of Civil Procedure section 995.240 for relief from undertaking requirements generally, and that application for relief must be made prior to expiration of the time provided for appeal under section 98.2.10

III. DISPOSITION

The judgment dismissing Robertson’s appeal from the Commissioner’s Award is affirmed. Costs on appeal are awarded to the respondent.

BRUINERS, J.

WE CONCUR: SIMONS, Acting P. J., NEEDHAM, J.

10. Of course, a necessary consequence of subsequent denial of an application found by the court to be unmeritorious would be dismissal of the appeal.

Cite as 18 C.D.O.S. 8362

THE PEOPLE, Plaintiff and Respondent, v. JULIUS LEE JACKSON, Defendant and Appellant.

No. A151676
In The Court of Appeal of the State of California First Appellate District Division One (San Mateo County Super. Ct. No. 16-NF-011306-A)
Filed August 20, 2018

CERTIFIED FOR PARTIAL PUBLICATION* 

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A., C., and D.

COUNSEL

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Counsel for Plaintiff and Respondent: Xavier Becerra; Attorney General, Gerald A. Engler; Chief Assistant Attorney General, Jeffrey M. Laurence; Senior Assistant Attorney General, Eric D. Share; Supervising Deputy Attorney General, Leif M. Dautch; Deputy Attorney General

OPINION

Defendant Julius Jackson stole chairs from a home-staging business, and the police soon found him with the chairs in a stolen vehicle. A jury convicted him of felony counts of unlawfully taking or driving a vehicle and second degree robbery. The trial court sentenced him to 12 years in prison, composed of two five-year terms for prior felony convictions, a two-year term for robbery, and a concurrent two-year term for unlawfully taking or driving a vehicle.

On appeal, Jackson raises several claims, including that his conviction for unlawfully taking or driving a vehicle under Vehicle Code section 10851, subdivision (a) (section 10851(a)) must be reversed because the vehicle’s value was not proven. In the published portion of this decision, we agree. Under People v. Page (2017) 3 Cal.5th 1175 (Page), which was not decided until after the trial in this case, a defendant cannot be convicted of a felony violation of section 10851(a) based on the theft of a vehicle unless the vehicle is worth more than $950. Since the jury here was not so in-
structed, it could have relied on a legally invalid theory to convict Jackson.

The presumption of prejudice that arises with this type of instructional error was not overcome. Although there was strong evidence that Jackson unlawfully drove a vehicle, which could have supported the felony conviction without regard to the vehicle’s value, we cannot conclude beyond a reasonable doubt that the jury unanimously relied on this theory. (See People v. Chiu (2014) 59 Cal.4th 155, 167 (Chiu.).) Accordingly, we must reverse the conviction, and on remand the People will have the choice of either accepting the conviction’s reduction to a misdemeanor or retrying the charge as a felony. We reject Jackson’s remaining claims and otherwise affirm his convictions.

I. FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of September 12, 2016, an employee of the home-staging business carried four wicker chairs from the company’s San Mateo warehouse to a delivery van parked nearby on the street. Realizing that he had forgotten his keys, he left the chairs on the sidewalk by the van and began walking back to the warehouse. He saw a man he later identified as Jackson approaching down the street, which prompted him to return to the van without retrieving his keys.1 The employee then saw Jackson putting the chairs in a Toyota Land Cruiser.

The employee approached Jackson and told him that the chairs belonged to the home-staging business “[a]nd that if he was taking them, he was stealing them.” Jackson “got upset” and turned toward the employee, giving him an “angry” look. At trial, the employee demonstrated the movements Jackson then made. As described for the record, to demonstrate these movements the employee “stood up, clenched his fists, raised them slightly above waist level or belt level and then brought them down, both down in a quick gesture towards the ground.” The employee said that Jackson also puffed out his chest. Jackson then said, “Fuck,” but the employee was unsure if the curse was directed at him.

The employee testified that Jackson’s movements and curse made him feel “afraid,” and he confirmed that he was “afraid that [Jackson] was going to hurt [him] if [he] tried to get the chairs back.” The employee explained he wanted to avoid a fight with Jackson because he had an injured shoulder. Instead of trying to reclaim the chairs, the employee used his cell phone to take photographs of Jackson, which were admitted at trial, before returning to the warehouse to seek help.

The theft of the chairs and a description of the Land Cruiser, including its license-plate number, were quickly reported to the San Mateo police. The police contacted the Land Cruiser’s registered owner, who lived in San Mateo. Until hearing from the police, the owner did not realize that the Land Cruiser was missing. Although the vehicle was normally parked down the street from the owner’s home, the owner’s adult daughter, who lived in San Francisco, often used the Land Cruiser when she was visiting. About a week earlier, she parked it at the San Mateo CalTrain station and left the keys by the front tire, as she had done before. She usually told her father when she parked the Land Cruiser there, but she forgot to tell him on this occasion.

Within hours of talking to the Land Cruiser’s owner, the police located the vehicle parked in San Mateo. Jackson was sleeping inside a sleeping bag in the front passenger’s seat. After verifying the vehicle was still reported stolen, the police removed Jackson and handcuffed him. The wicker chairs were in the trunk, and the Land Cruiser’s keys and registration were in Jackson’s pocket. The owner and his daughter testified that they did not give Jackson permission to use the vehicle.

Jackson was charged with felony counts of unlawfully taking or driving a vehicle, second degree robbery, and receiving a stolen vehicle.2 The jury convicted him of unlawfully taking or driving a vehicle and robbery. It did not return a verdict on the charge of receiving a stolen vehicle, however, having been instructed not to reach that charge if it found Jackson guilty of unlawfully taking or driving a vehicle.

The trial court found true allegations that Jackson had two prior serious-felony convictions, one in 1989 for robbery and one in 1997 for assault with a deadly weapon.3 After granting his Romero4 motion as to the strike findings under section 1170.12, subdivision (c)(1), the court sentenced him to 12 years in prison, composed of a term of two years for the robbery, a concurrent term of two years for the unlawful taking or driving of a vehicle, and two consecutive five-year terms under section 667, subdivision (a) for the prior convictions.

II. DISCUSSION

[ PART II.A, See FOOTNOTE*, Ante ]

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2. The charges were brought under section 10851(a) (unlawfully taking or driving vehicle) and Penal Code sections 212.5, subdivision (c) (robbery) and 496d, subdivision (a) (receiving stolen vehicle). All further statutory references are to the Penal Code unless otherwise noted.

3. Although Jackson thus had two prior convictions for violent or serious felonies, or strikes, in addition to the strike for the robbery conviction in this case, the prosecution elected to treat him as a two-strikes offender instead of a three-strikes offender.

B. Jackson’s Felony Conviction for Unlawfully Taking or Driving a Vehicle Cannot Stand.

As we have said, Jackson claims that his conviction for unlawfully taking or driving a vehicle under section 10851(a) must be reversed because no evidence of the Land Cruiser’s value was introduced, as required to support a felony conviction for theft of the vehicle under Page. The Attorney General concedes that the jury instruction on the charge improperly failed to inform the jury that it needed to find the vehicle was worth more than $950 to support a felony conviction based on theft of the vehicle. He argues that the error was harmless, however, because “it is clear beyond a reasonable doubt” that the jury convicted Jackson of unlawfully driving the vehicle. We cannot agree. Despite the strong circumstantial evidence that Jackson drove the Land Cruiser, we are unable to conclude beyond a reasonable doubt that the verdict was necessarily based on this theory. (See Chiu, supra, 59 Cal.4th at p. 167.)

1. Additional facts.

Count two of the information charged that, “[o]n or about September 12, 2016, . . . the crime of Driving Or Taking A Vehicle Without Consent in violation of [section 10851(a)], a Felony, was committed in that [Jackson] did drive a vehicle, [the Land Cruiser], without the consent of the owner, . . . and with the intent to deprive the owner of title and/or possession of the vehicle.” The verdict form ultimately returned on this count stated that Jackson was guilty of “of the crime of Unlawfully Taking or Driving a Vehicle, in violation of [section 10851(a)], a felony, as alleged in Count 2 of the Information filed herein.” (Boldface omitted.)

The jury was instructed under CALCRIM No. 1820 that to prove Jackson guilty of violating section 10851(a), the prosecution was required to establish that “1. The defendant took or drove someone else’s vehicle without the owner’s consent; [¶] AND [¶] 2. When the defendant did so, he intended to deprive the owner of possession or ownership of the vehicle for any period of time.” No unanimity instruction was given.

In closing argument, the prosecutor concentrated on the driving theory of guilt for the section 10851(a) charge, arguing that even though the employee had not explicitly testified that Jackson drove the Land Cruiser, the only reasonable inference was that Jackson drove the vehicle away after stealing the chairs. But the prosecutor also referred in his closing statement to a separate theory of guilt, which he sometimes referred to as “taking” and other times referred to as “possessing” the vehicle.

In explaining that Jackson could not “be found guilty of both” the section 10851(a) charge and the charge of receiving a stolen vehicle under section 496d, the prosecutor stated, “So even though it’s basically the same conduct and they are related, driving the car or having possession of the car versus receiving it, the law says you can’t be guilty of both taking something and then receiving it. . . . [¶] So there might be a lack of proof as to the taking or the possession of the vehicle. If that’s the case—I’m not saying there is, but I’m saying if there was, then you would sign the not guilty for [the section 10851(a) charge] and then move on to [the section 496d charge].”

And in addressing the elements of the section 10851(a) charge, the prosecutor stated, “Count 2, again this is CALCRIM [No.] 1820. It’s the unlawful taking or driving—there is that word again, ‘or’—of a vehicle. And then there is the Vehicle Code section which relates to what you see on the verdict form. [¶] So defendant took or drove the . . . vehicle without consent, and when he took it, he intended to deprive [the owner] of possession or ownership for any period of time. So it’s not like he was just taking it briefly and you are going to give it back or something. Has to be you are going to actually take it and not give it back.”

In urging that circumstantial evidence was sufficient to support a conviction, the prosecutor also said, “Common sense tells you that of course [Jackson] had possession of the vehicle and of course he also drove it. Remember, it has to be one or the other. [¶] Clearly, he possessed it. . . . [¶] . . . [¶] It’s [also] pretty clear that he drove the car away. That’s one of the . . . ways to prove it. The other way is the possession of the stolen car.”

Finally, in addressing the section 496d charge, the prosecutor said, “Remember I said before you can’t be guilty of two different crimes if you steal something, take it and receive it. If for some reason you say, hey, [the prosecutor] did not prove Count 2 that [Jackson] either possessed or drove the stolen vehicle or that he didn’t know it was stolen, if you think that’s lacking, then you would sign that not guilty verdict form for Count 2 and then you move on to Count 3.”

2. Discussion.

A violation of section 10851(a) is a “wobbler” offense that may be punished as either a misdemeanor or a felony. (Page, supra, 3 Cal.5th at p. 1181.) Under that provision, “[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent to either permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle . . . , is guilty of a public offense.” (§ 10851(a).) “[S]ection 10851(a) ‘proscribes a wide range of conduct’ ” from stealing a car to joyriding. (People v. Garza (2005) 35 Cal.4th 866, 876 (Garza).) Because the provision “separately prohibits the acts of driving a vehicle and taking a vehicle . . . , a defendant who steals a vehicle and then continues to drive it after the theft is complete commits separate and distinct violations of section 10851(a).” (Id. at p. 880.)

Under Proposition 47 (the “Safe Neighborhoods and Schools Act”), which went into effect before Jackson committed the crime here, “‘an offender who obtains a [vehicle]
This presumption of prejudice is rebutted only if the record permits the conclusion “beyond a reasonable doubt that the jury based its verdict on [a] legally valid theory.”8 (Chiu, supra, 59 Cal.4th at p. 167; see In re Martinez, supra, 3 Cal.5th at p. 1224.) Sometimes, “[o]ther aspects of the verdict . . . [will] leave no reasonable doubt that the jury made the findings necessary under a legally valid theory.” (Martinez, at p. 1226, quoting People v. Chiu (2009) 45 Cal.4th 1172, 1205.) Other times, even if the verdict alone does not establish that the necessary findings were made, the evidence will leave no reasonable doubt that the jury made the necessary findings. Thus, an instruction on a legally invalid theory is also harmless “‘if it is impossible, upon the evidence, to have found what the verdict did find’” without also making the findings necessary under a legally correct theory. (Chiu, at p. 1204.) The Supreme Court has left open the possibility that such error may be deemed harmless for other reasons as well. (Id. at pp. 1204-1205.)

The presumption of prejudice in this case has not been overcome. The Attorney General claims “it is clear beyond a reasonable doubt” that the jury convicted Jackson on a “valid posttheft driving theory” because “[t]he information showed a clear election by the prosecution to proceed on the driving theory.” We are not convinced. True, the information charged Jackson with driving only, and the verdict form stated he was found guilty of the crime as alleged in the information. But CALCRIM No. 1820 allowed the jury to convict on either a taking or driving theory, and the prosecutor did not elect the driving theory in closing argument. (See People v. Melhado (1998) 60 Cal.App.4th 1529, 1539 (“If the prosecution is to communicate an election to the jury, its statement must be made with as much clarity and directness as would a judge in giving instruction”).) Rather, the prosecutor mentioned both a taking theory and a “possessing” theory several times, the latter perhaps referring to the principle that “[m]ere possession of a stolen car under suspicious circumstances is sufficient to sustain a conviction of unlawful taking.”9 (People v. Clifton (1985) 171 Cal.App.3d 195, 200.) Given that both CALCRIM No. 1820 and the prosecutor’s arguments gave the jury the option of convicting Jackson of unlawfully taking the Land Cruiser, the verdict form’s wording does not allow

6. The unlawful taking of vehicle with the intent to deprive the owner of possession only temporarily—i.e., joyriding—is not a theft offense either. (Page, supra, 3 Cal.5th at p. 1183.) For the sake of simplicity, our subsequent discussion omits references to joyriding, because there is no evidence Jackson violated section 10851(a) in that way.

7. Relying on In re D.N. (2018) 19 Cal.App.5th 898, Jackson argues that his challenge can also be framed as a claim of insufficient evidence which, if successful, would bar retrial of the charge. (Id. at pp. 903-904.) We agree with the Gutierrez and Bussey courts that, at least where the evidence would have also permitted conviction on a theory not requiring proof of the vehicle’s value, the issue is properly analyzed as one of instructional error. (Bussey, supra, 24 Cal.App.5th at pp. 1062-1063; Gutierrez, supra, 20 Cal.App.5th at pp. 857-858; compare D.N., at pp. 900-901 [minor charged with “theft of a vehicle” and no evidence of posttheft driving].)

8. The Second District Court of Appeal recently held, as to the principle requiring reversal absent a basis in the record to conclude the jury relied on a legally valid theory, that the “basis exists only when the jury has ‘actually’ relied upon the valid theory [citations]; absent such proof, the conviction must be overturned—even if the evidence supporting the valid theory was overwhelming.” (People v. Aldenat (2018) 20 Cal.App.5th 1149, 1153, review granted July 5, 2018, S248105.) We disagree with any suggestion that a finding of harmlessness requires affirmative proof of the jury’s reliance on a legally valid theory.

9. Possession was also relevant to the section 496d charge. As to that crime, the jury was instructed, “To receive property means to take possession and control of it. Mere presence near or access to the property is not enough.” The prosecutor referred to “possessing” when addressing the section 10851(a) charge, however, so it is less likely he meant to refer to an element of the crime of receiving stolen property.
us to conclude beyond a reasonable doubt that the jury relied on a driving theory.

The omission of a unanimity instruction raises additional doubts about the verdict’s basis. A unanimity instruction is required where “‘one criminal act is charged, but the evidence tends to show the commission of more than one such act’” and the prosecution does not “‘elect the specific act relied upon to prove the charge.’” (People v. Brown (2017) 11 Cal.App.5th 332, 341.) Although Jackson does not argue for reversal based on the omission of such an instruction, the prosecution’s failure to clearly elect between taking and driving leaves the possibility that the jurors did not agree on the same act in returning the conviction. Thus, we cannot find the instructional error harmless unless we can conclude beyond a reasonable doubt that not a single juror relied on taking instead of driving to convict Jackson.10 (See People v. Melhado, supra, 60 Cal.App.4th at p. 1539.) We cannot so conclude.

The Attorney General argues that a taking of the vehicle was “unsupported by any evidence,” but we disagree. While the evidence of driving may have been stronger than the evidence of taking, substantial evidence was introduced to support a conviction for stealing the Land Cruiser, based on Jackson’s possession of it under suspicious circumstances shortly after it was stolen. (See People v. Clifton, supra, 171 Cal.App.3d at pp. 199-200; see also People v. Wissenfeld (1951) 36 Cal.2d 75, 763-764 [sufficient evidence to sustain conviction for theft of car where car found in defendant’s possession 25 days after being stolen].) Nor does the evidence permit us to conclude that no juror could have found that Jackson stole the vehicle without also finding that he engaged in posttheft driving. (See People v. Chun, supra, 45 Cal.4th at p. 1205.) The employee did not testify that he ever saw Jackson drive the Land Cruiser, Jackson was not driving the vehicle when the police discovered him, and there was no other direct evidence of driving that compelled the conclusion that if Jackson stole the vehicle, he also drove it after the theft. In short, we are unable to conclude that the instructional error was harmless.11

We agree with the Attorney General that the appropriate remedy is to remand for the People to elect whether to retry Jackson on a felony charge or accept the conviction’s reduction to a misdemeanor. Therefore, following Bussey and Gutierrez, we will reverse the conviction, vacate the sentence, and remand for the People to make such an election. (Bussey, supra, 24 Cal.App.5th at pp. 1062, 1064; Gutierrez, supra, 20 Cal.App.5th at pp. 858, 863.)

[ PARTS II.C. AND D., See FOOTNOTE*, Ante ]

III. DISPOSITION

The conviction for unlawful taking or driving of a vehicle under section 10851(a) is reversed, the sentence is vacated, and the matter is remanded for further proceedings consistent with this opinion. On remand, the People may elect to accept a reduction of the section 10851(a) conviction to a misdemeanor, in which case the trial court is to resentence Jackson accordingly, or to retry him for a felony violation of section 10851(a). In all other respects, the convictions are affirmed.

Humes, P.J.

We concur: Dondero, J., Banke, J.

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10. Further confusing matters, the jury was improperly instructed under CALCRIM No. 3516 that the section 10851(a) and section 496d charges were “alternative charges” and that if it found Jackson “guilty of one of these charges, [it could not] find him guilty of the other.” In fact, dual convictions under these statutes are barred only when a defendant is convicted of a theft offense under section 10851(a)—i.e., of “taking a car with the intent to permanently deprive the owner of possession.” (Garza, supra, 35 Cal.4th at p. 876; People v. Calistro (2017) 12 Cal.App.5th 387, 401.) But if a defendant is convicted under section 10851(a) for a nontheft offense—either joyriding or posttheft driving—dual convictions are permissible. (Ibid.) Had the jury been correctly instructed on this point, its failure to return a verdict on the section 496d charge would demonstrate it relied on a theft theory to convict Jackson. Because of this instructional error, however, the jury’s treatment of the section 496d charge sheds no light on the basis for the section 10851(a) conviction.

11. We are aware of other decisions that, relying on overwhelming evidence of posttheft driving, found harmless instructional errors related to the principle that a jury cannot convict a defendant of receiving a stolen vehicle if it convicts the defendant of theft of the same vehicle under section 10851(a). (E.g., Garza, supra, 35 Cal.4th at pp. 880-882; People v. Cratty (1999) 77 Cal.App.4th 98, 100-103; People v. Strong (1994) 30 Cal.App.4th 366, 376-376; see also People v. Calistro, supra, 12 Cal.App.5th at pp. 394-396, 402-404.) Although these decisions also involved the issue whether a section 10851(a) conviction was based on taking or driving, they are distinguishable for various reasons, including that the types of errors they addressed do not create a presumption of prejudice.
THE PEOPLE, Plaintiff and Respondent, v. MICHAEL BANDA, Defendant and Appellant.

No. B284725
In The Court of Appeal of the State of California Second Appellate District Division Seven
(Los Angeles County (Super. Ct. No. NA103745) APPEAL from an order of the Superior Court of Los Angeles County, Daniel J. Lowenthal, Judge. Reversed and remanded. Filed August 20, 2018

COUNSEL
Kenneth I. Clayman, Public Defender of Los Angeles County, California, Albert J. Menaster, Nikhil Rammaney, Nick Stewart-Oaten, Deputy Public Defenders, for Defendant and Appellant.

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervision Deputy Attorney General, Blythe J. Leszkay, Deputy Attorney General, for Plaintiff and Respondent.

OPINION
Michael Banda was convicted of a violation of Health and Safety Code, section 11358 in 2016. After the passage of Proposition 64, he petitioned for dismissal of his conviction. The court denied his petition. We now reverse, and remand to the trial court.

FACTUAL BACKGROUND
Michael Banda was arrested on March 8, 2016 when police arrived at a marijuana dispensary. According to the probation report, which was the only description of the events cited to the trial court on the motion, Banda and another man were stopped fleeing the store; when police searched the location, they found processed marijuana in the store and a number of plants under cultivation in an attached room. Although Banda told the police he was engaged in construction at, and resided at, a specified address, the report did not identify that, or any other address, as the address of the dispensary.

Banda was charged on March 10, 2016 with cultivation of marijuana, a felony. (Health & Saf. Code, §11358.) He was sentenced to probation in accordance with the plea agreement on April 8, after the court ordered and received a probation report; counsel submitted to the probation report for that purpose.

A. Banda’s Motion To Dismiss
In November 2016, the electorate passed Proposition 64, the Control, Regulate and Tax Adult Use of Marijuana Act. Among other things, Proposition 64 provided relief to certain persons previously convicted of marijuana related offenses. In July of that year, Banda filed a petition to dismiss the complaint, or to reduce his conviction to a misdemeanor. (§ 11361.8.) The People opposed dismissal, but agreed that reduction to a misdemeanor was warranted.

B. The Evidence Submitted
After Banda petitioned for relief, the People submitted opposition. While conceding that Banda qualified for a reduction of his conviction to a misdemeanor, they argued the court should not dismiss the charge. The sole evidence on which the People relied in their written submission was the probation report; the People neither referred to nor submitted any other evidence to the trial court.

The probation report, prepared after the plea, set out facts in only two paragraphs. Those facts did not link Banda to the dispensary where the plants were found other than by his presence there; he was not reported to be an employee or owner, nor was the address linked to him identified as the address of the dispensary. No indication of the source of the information which included observations by, and statements apparently made by, unnamed officers, was included in the report; in fact, the probation officer specifically stated that neither the defendant nor the investigating officer had provided any information.

The court heard the matter on August 9 and 10, 2017, denying Banda’s request for an evidentiary hearing. The only evidence the People relied on at the hearing was the probation report, as the court acknowledged. Banda objected to the report as containing multiple levels of hearsay, and lacking identification of the source of the information included. Arguing that relevant case law allowed the court to consider reliable hearsay in this proceeding, the People posited that a probation report is always reliable hearsay.

On August 10, the court considered additional case citations submitted by the parties. During that hearing, Banda argued that, at the time he submitted to the probation report

1. All further statutory references, unless otherwise noted, are to the Health & Safety Code.

2. After oral argument and submission of the case, the Attorney General moved to augment the record with the police report. This Court granted the motion to augment on July 23, 2018.

3. In asking the trial court to take judicial notice of the court file, the People referenced only the probation report. In asking this Court before briefing was concluded to augment the record to include that report, the People asserted that the probation report had been “used by the prosecution as the basis for requesting denial of appellant’s motion to dismiss.”
DISCUSSION

A. Proposition 64

Proposition 64 (Ballot Pamp., Gen. Elec. (Nov. 8, 2016) legalizes and regulates nonmedical marijuana. The proposition added various sections to the Health and Safety Code. As relevant to this case, section 11362.1 permits the cultivation of not more than six living marijuana plants (§ 11362.1, subd. (a)(1) & (3)) and reduces the punishment for an adult cultivating more than six plants to a misdemeanor, unless other circumstances, not relevant here, are present. (§ 11358, subds. (c) & (d).)

Proposition 64 also added a provision for relief for persons with prior convictions. The enactment permits those, like Banda, currently serving a sentence for enumerated offenses that would either not be offenses or would be lesser offenses if the current law were in effect at the time of the conviction, to petition for recall or dismissal of the sentence. Section 11358, under which Banda was convicted, is an enumerated offense. (§ 11361.8, subd. (a).)

The procedure for a petition for relief was specified in section 11361.8, subd. (b). Pursuant to the statute, the court is required to presume that the petitioner satisfies the criteria in subdivision (a), unless “the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety.” (Ibid.)

The statute permits petitioner to request a hearing, but does not require one in the absence of a request. (§11361.8, subd. (g).)

B. The People’s Burden of Proof

As outlined in the statute, the People bore the burden of demonstrating, by clear and convincing evidence, that Banda did not satisfy the criteria for relief. The statute does not, however, specify what evidence the court may consider.

Other recent voter approved initiatives, which provided a mechanism for relief for certain prior convictions similarly failed to specify procedural details, leaving trial courts in a quandary. Both the nature of the evidence the court could consider, and the ability to rely on evidence outside the record of conviction, were raised as issues requiring determination after the passage of both Proposition 36, the Three Strikes Reform Act of 2012, and Proposition 47, the Safe Neighborhoods and Schools Act (2014).

1. Proposition 47

Proposition 47 reduced the punishment for a broad category of crimes previously classified as felonies. In People v. Romanowski (2017) 2 Cal.5th 903, the Supreme Court considered, among other issues, how courts were to determine eligibility for relief. Under Proposition 47, the petitioner seeking relief bears the burden of proving his or her eligibility. The Court determined that, in some instances, the record of conviction would contain the facts necessary to demonstrate eligibility. In others, however, an evidentiary hearing would be required if, after considering the record and any matters in the petition, the return, affidavits, or matters subject to judicial notice, the court believed “the petitioner’s entitlement to relief depends on the resolution of an issue of fact.” (Id. at p. 916, quoting Cal. Rules of Court, rule 4.551(f).)

In Romanowski, as here, the issue of fact concerned a question not relevant at the time of conviction and sentencing: there, the value of property taken, and here, the number of plants under cultivation. (See also People v. Page (2017) 3 Cal.5th 1175, 1189 [where material facts are not established by the record of conviction, the court can conduct an evidentiary hearing after a prima facie showing is made by petitioner].)

2. Proposition 36

Proposition 36 allows resentencing for certain persons sentenced under the “Three Strikes” law for non-serious, nonviolent felonies. As was the case with Proposition 47, and is the case with Proposition 64, the enactment left open questions as to the nature of the proof required. In 2018,
the Supreme Court addressed those issues. (People v. Perez (2018) 4 Cal.5th 1055.)

In Perez, the court first clarified that, when a petition is filed, it is the prosecution’s burden to prove ineligibility for relief beyond a reasonable doubt; once petitioner makes an initial showing of eligibility, he or she has no further burden to provide any evidence. (Id. pp. 1062, 1066.) The court reaffirmed its ruling in People v. Estrada (2017) 3 Cal.5th 661, 672, that the court could properly consider facts beyond the record of conviction, and held that the court could, consistent with the Sixth Amendment, consider facts not found by the jury. (Perez, supra, 4 Cal.5th at p. 1063.)

Thus, to the extent the court and the parties in the Proposition 36 case were uncertain that the court could consider facts beyond the record of conviction, and could do so in an evidentiary hearing, the reasoning of the decisions in Perez and Romanowski indicate that the same should be true in cases under Proposition 64. Moreover, the statute here addresses the hearing issue, a fact the People failed to appreciate at the trial court; section 11361.8, subdivision (g), specifies that petitioner has a right to a hearing. Section 11361.8, subdivision (a) placed the burden of proof on the People; as Perez and Romanowski made clear, the People were not limited in meeting that burden to facts already in the record.

C. The People Failed To Meet Their Burden of Proof

1. The Probation Report Was Admissible Only If It Was Reliable

The only evidence submitted by the People to the trial court was the probation report; the People did not present, or ask the court to consider, any other evidence or documents. Probation reports are not, however, automatically admissible to prove relevant facts.

The People correctly assert that the petition in a Proposition 64 case, as in Propositions 36 and 47, bears the hallmarks of a resentencing proceeding. In such cases, trial courts may consider hearsay if that hearsay is reliable. (People v. Arbuckle (1978) 22 Cal.3d 749, 754, fn. 2; People v. Sledge (2017) 7 Cal.App.5th 1089, 1095 [eligibility hearing under Prop. 36 is a type of sentencing proceeding, allowing limited use of hearsay from probation reports if shown to be reliable]; People v. Lamb (1999) 76 Cal.App.4th 664, 683.)

A probation report is inadmissible hearsay, however, when “the report excerpt includes the officer’s assertions that certain events “reportedly” occurred [during the prior assault]. Narration of “reported” events is by definition based on the statements of others. Indeed, unless the probation officer was a percipient witness [to the assault], all of the narration contained in the excerpt must have been drawn from other people’s previous statements. [¶] The report fragment does not identify the declarant or declarants from whose statements the probation officer drew his factual summary.” (People v. Reed (1996) 13 Cal.4th 217, 230-231 [excerpt of probation report inadmissible hearsay in proceeding to prove that prior conviction was serious felony].)

In People v. Burns (2015) 242 Cal.App.4th 1452, 1459, the defendant had been convicted based on his plea. In a subsequent proceeding under Proposition 36, the trial court relied on the probation report related to that conviction. Assuming for purposes of decision that the probation report was properly before the trial court, the Burns court concluded the trial court nonetheless erred in relying on the facts contained in the report. As the court explained, “The probation report here was neither admissible nor reliable. The portion of the probation report that described the circumstances of defendant’s offenses was derived from a police report. The probation report thus constituted double hearsay or multiple hearsay, and the People never attempted to show that the probation report was admissible under an exception to the hearsay rule. Moreover, nothing in the probation report established the reliability of the asserted circumstances of the offenses: the probation report did not include a copy of the police report; the probation report did not state whether it was directly quoting from the police report or summarizing the police report; the probation report did not specify whether it contained all of the facts included in the police report; the probation report did not state when the police report was prepared; the probation report did not identify the person who prepared the police report; and the probation report did not specify whether the facts in the police report were based on firsthand knowledge or hearsay. Given these circumstances, it is impossible to conclude that the probation report reliably described the circumstances of defendant’s offenses. Because the probation report was neither admissible nor reliable, the trial court erred in relying upon it in determining that defendant was ineligible for resentencing. [Citation].” (Ibid.)

The same is true in this case. The trial court made no finding that the probation report was reliable, despite Banda’s repeated objections.11 The fact that the court found it necessary to rely on other documents indicates that it may not have believed the probation report was sufficient. If we assume for purposes of decision that the trial court implicitly found the probation report to be reliable, that finding was an abuse of discretion. As in Burns, the source of the report was unknown; if the probation officer relied on the police report, he

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9. We invited the parties to address Perez, which was decided after briefing was complete in this matter. Each party advised this Court of their belief that Perez has no impact in this matter. We disagree.

10. The People argued on appeal that Banda failed to introduce evidence contradicting the probation report and that, as a result, the People had met their burden of proof. However, under Proposition 64, as under Proposition 36, the burden is on the People. The introduction of only inadmissible evidence to meet that burden means that Banda had no obligation to produce additional evidence.

11. This Court, having had the opportunity to review the police report, notes that there are factual inconsistencies related to Banda between that document and the probation report, which further calls into question the reliability of the probation report. Because that report did not meet the standard for admissibility described above, we need not resolve those inconsistencies.
included no information about the preparation or contents of that report. The probation report contained hearsay on its face, for which no exception was argued; indeed, no one directly related to the events was contacted in its preparation. Nothing on the face of the report demonstrated that the hearsay it contained was reliable. As in Burnes, the report was not evidence that Banda was ineligible for the relief he sought.\(^\text{12}\)

The People relied on Sledge, supra, 7 Cal.App.5th 1089, but it does not support the admission of the probation report here. In Sedge, the court found the report, despite its hearsay nature, to be reliable because it: had been prepared by probation officers performing their official duties, relying in part on information obtained from official court records prepared by clerks performing their regular duties; was used by both parties without objection throughout the case; and contained conclusions supported by other facts before the court. (Id. at pp. 1097-1098.) Here, in contrast, while the report was prepared by the probation officer, who we presume was performing his official duties, it was only submitted to for a limited purpose, a purpose that did not relate to the factual issue now presented. Moreover, in this case the People relied on no other evidence to support the showing they were required to make.

2. Even If The Probation Report Were Properly Admitted, It Contains No Evidence Establishing That Banda Was Ineligible For Dismissal

In this case, as in Romanowski, the facts relevant to the determination of eligibility were not relevant at the time of plea and sentencing. (See, e.g., Johnson, supra, 1 Cal.App.5th at pp. 966-967 [Proposition 47 created misdemeanors that did not previously exist, or that were felonies requiring different punishments and sentences. (See, e.g., Johnson, supra, 1 Cal.App.5th at p. 967.)]) A stipulation to a document to provide a factual basis for a plea is an admission only of the facts necessary to the charged offense itself. (Reed, supra, 13 Cal.4th at p. 224; People v. Thoma (2007) 150 Cal.App.4th 1096, 1104.) As a result, in this case, even had the probation report provided the factual basis for the plea, as the People believed, that report did not provide substantial evidence of the number of plants, the critical issue in this proceeding.\(^\text{13}\)

With respect to the probation report, even had Banda been interviewed by the probation officer who prepared the report, admissions made by a defendant after a guilty plea do “not reflect the facts upon which [the defendant] was convicted.” (People v. Trujillo (2006) 40 Cal.4th 165, 180 [admissions in post-conviction probation report may not be relied on in determining whether prior conviction qualifies as a strike].) Here, Banda was not interviewed; he made no admissions. Instead, his counsel submitted to the report for purposes of sentencing. The sentence had been agreed to as part of the plea, and, like the plea itself, did not concern in any way the number of plants involved. Accordingly, submission to the probation report was not an admission as to the number of plants described in that report.\(^\text{14}\)

The People presented no admissible evidence with respect to the number of plants, the factual issue critical to this proceeding.

3. Judicial Notice Augmenting The People’s Showing Was Improper

The People failed to submit substantial evidence or any admissible evidence at all, to meet its burden to show, by clear and convincing evidence, that Banda was ineligible for relief. The trial court augmented that insufficient showing by taking judicial notice of other documents, documents not proffered by any party.

The trial court attempted to fill in the blanks left by the prosecution by taking judicial notice. Evidence Code section 452, subdivision (d) allows the trial court in its discretion to take judicial notice of its own records. However, if the subject of judicial notice is “of substantial consequence to the determination of the action,” Evidence Code section 455 requires the court to allow each party to present information relevant to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. (Estate of Russell (1971) 17 Cal.App.3d 758, 765 [where the previous financial condition of the trust would have been “of substantial consequence to the action,” the trial court could not take judicial notice of records of the court containing financial information absent notice to the parties].)

This the trial court did not do; although it indicated it intended to take judicial notice of the return to the search warrant, to which Banda objected, it did not indicate it was taking judicial notice of the police report until after it had ruled, depriving Banda of both notice and the opportunity to object. (See People v. Griffith (1971) 19 Cal.App.3d 948, 951 [no waiver of objection to judicial notice when court ruled

12. See also People v. Johnson (2016) 1 Cal.App.5th 953, 968 fn. 16 [finding insufficient evidence in Prop. 47 case after a negotiated plea agreement where there was no evidence of value; the probation report was not admissible evidence; and the police report was unauthenticated and contained multiple levels of hearsay].

13. In People v. Holmes (2004) 32 Cal.4th 432, the Supreme Court explained the requirement of a statement of factual basis for a plea, either by the defendant, or through counsel’s stipulation to a document supporting the charges to which the plea pertained. What the Court required was “a factual basis for each essential element of the crime.” (Id. at p. 440.) The number of plants was not an essential element of the crime of cultivation at the time of Banda’s plea in this case.

14. We need not resolve whether counsel’s submission to the probation report for the purpose of imposition of the previously agreed to sentence reflected binding agreement to the contents of that report, or only a conclusion that, under the circumstances, nothing further need be said. Even a direct statement by a defendant to a probation officer, made after the guilty plea has been accepted is not evidence of the “facts of the offense for which the defendant was convicted.” (Trujillo, supra, 40 Cal.4th at p. 179; citing Reed, supra, 13 Cal.4th at p. 223.) The failure to dispute facts set forth for sentencing, post-plea, is not an adoptive admission of the facts allowing hearsay statements to be used; only admissions made prior to the plea are admissible. (Thoma, supra, 150 Cal.App.4th at pp. 1102-1103.)
immediately after commenting upon the possibility of taking judicial notice.

Even had judicial notice of the police report been proper, despite the People’s failure to proffer it to meet their burden of proof, the trial court erred by considering Banda’s stipulation to that report as the factual basis for the plea as proof of the number of plants under cultivation, as that issue was irrelevant to his plea. In Reed, supra, 13 Cal.4th 217, the Court addressed the proof necessary to show that a previous conviction was a serious felony for the purpose of imposing a sentence enhancement under Penal Code section 667, subdivision (a). At issue was the use of a preliminary hearing transcript and the excerpt of a probation report for the prior conviction, which had been based on a plea. Respondent argued that both documents, although hearsay, were properly considered as defendant’s admissions to show that the previous conviction was a qualifying felony. The Supreme Court rejected that position, reasoning, in relevant part, that: “[n] o evidence suggests that in his plea defendant was asked to, or did, admit any particular facts stated in the preliminary hearing or probation report other than those facts necessary to the [ ]charge itself.” (Reed, supra, 13 Cal.4th at p. 224.) The Court held the admission of the probation report was error, although harmless under the circumstances, because the report contained hearsay to which no exceptions applied. (Id. at p. 230.) It was error here as well.15

4. The People Forfeited Any Argument That Granting Banda’s Petition Would Pose An Unreasonable Risk

The trial court, finding that Banda was ineligible for relief, did not make the determination required by section 11361.8, subdivision (b) whether dismissing the sentence “would pose an unreasonable risk of danger to public safety.” The People neither requested that determination in their opposition to Banda’s petition in the trial court, nor presented any evidence to support such a finding. The People have not asserted in this court that the record would support such a finding. Accordingly, the People have forfeited the issue. (Landry v. Berryessa Union School Dist. (1995) 39 Cal.App.4th 691, 699-700 [“When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary. [Citations.]”].)

I concur: PERLUSS, P. J.

WILEY, J., dissenting.

I respectfully dissent from the majority’s thoughtful opinion. Defendant Michael Banda stipulated, first, to the police report when he pleaded guilty and, second, to the presentence probation report at his later sentencing. Those two reports and Banda’s two separate stipulations establish that he had hundreds more marijuana plants than Proposition 64 allows. His proper Proposition 64 sentence is a misdemeanor, as the trial court ruled. I would affirm.

I

When on March 10, 2016 Banda pleaded guilty to cultivating marijuana, the trial court was required to satisfy itself that there was a factual basis for his plea. Courts can satisfy this requirement by asking defense counsel to stipulate to a particular document that provides an adequate factual basis, such as a police report or probation report. (People v. Palm er (2013) 58 Cal.4th 110, 112-113.) This trial court asked Banda to stipulate to the police report to establish the factual basis for Banda’s plea. Banda did so.

Later, on April 8, 2016, the trial court sentenced Banda. At this second hearing, Banda again stipulated to the prosecution’s version of events, this time set out in a different and shorter document: the probation report.

The stipulated police report and the stipulated probation report explain what happened in this case. Police approached the Green Star Collective with a search warrant. Banda tried to leave the location, but officers detained him. Banda told police he resided at the location and was engaged in construction there. A room at the location contained 192 medium marijuana plants and 77 small marijuana plants, for a total of 269 marijuana plants.

The law changed after Banda’s sentencing. In November 2016, Proposition 64 legalized personal cultivation of marijuana. Today, people can legally grow six or fewer marijuana plants, but Proposition 64 makes it a misdemeanor to grow more than that. (Health & Saf. Code, §§ 11362.1, subd. (a) (3), 11358, subd. (c.) Banda grew 263 plants more than six.

Proposition 64 permits people in Banda’s situation to petition to apply the new rules to their cases. Banda did so, but asked the trial court entirely to abolish his conviction, which would be appropriate only if Banda had been cultivating six plants or fewer. The prosecution disagreed, pointing to the probation report to which Banda had stipulated, which numbered his plants at more than six. At his Proposition 64
hearing on August 9 and 10, 2017, however, Banda objected to this probation report as inadmissible hearsay. In response, the trial court read aloud from the transcript of Banda’s sentencing hearing, noting that Banda had acknowledged and accepted the probation report. The court asked Banda why his stipulation to the probation report was insufficient. Based on Banda’s stipulation, the trial court then reduced his conviction to a misdemeanor but refused to erase the conviction completely.

II

The trial court was right. At the Proposition 64 hearing, the prosecution bore the burden of proving the facts by clear and convincing evidence. The prosecution offered more than that. It offered Banda’s stipulation. The Proposition 64 hearing judge did not confront an evidentiary contest requiring weighing and resolution by a clear and convincing standard of proof. Instead, the prosecution showed that, at sentencing, all sides had stipulated to the facts. Such a stipulation is conclusive without reference to additional evidentiary support. (People v. Palmer, supra, 58 Cal.4th at pp. 117–118.)

As with other discretionary sentencing decisions where the defendant has had an opportunity to review the postplea probation report and to challenge its contents, including its statement of the facts and circumstances of the offense, the trial court is entitled to consider the information in that report in determining whether to reduce a felony conviction to a misdemeanor. (Cf. People v. Tran (2015) 242 Cal.App.4th 877, 887 [interpreting Pen. Code, § 17, subd. (b)].)

Under the new Proposition 64 rules, the proper sentence for Banda is a misdemeanor.

Banda now maintains his stipulation does not count. Why not? Banda gives six erroneous reasons.

A

First, at oral argument Banda claimed he did not stipulate to the probation report. The record is to the contrary:

“THE COURT: [This case is] here for sentencing. Mr. Banda is present. Waive formal arraignment for judgment, time for sentence?

“BANDA’S COUNSEL: Yes. No legal cause.

“THE COURT: And submit to the probation officer’s report?

“PROSECUTOR: Yes.

“THE COURT: Submit to the probation officer’s report?


“BANDA’S COUNSEL: Yes.” (Italics added.)

This exchange established a stipulation. On April 9, 2017, Banda agreed. In the trial court, during his Proposition 64 hearing on that date, Banda described this transcribed exchange as a “stipulation.” On appeal, however, Banda reversed course to claim during oral argument that his agreement to “submit” on the probation report was not a stipulation. This opportunistic reversal is untenable.

The reasonable interpretation of Banda’s words at sentencing is that he was not contesting the probation report: he was waiving any possible objection. Had Banda intended some other and more limited meaning, evidence law (as well as ordinary courtroom procedure and simple fairness) required Banda to state a timely and specific objection to the probation report. Crossing fingers behind your back should not work in court.

B

Second, Banda argues the probation report was admissible only if it was reliable. This is incorrect: Banda stipulated to the probation report.

Banda’s stipulation was akin to an evidentiary stipulation, the making of which is a tactical decision entrusted to trial counsel. Such a stipulation is conclusive without reference to additional evidentiary support. (People v. Palmer, supra, 58 Cal.4th at pp. 117–118.)

This rule is consistent with defense counsel’s broad authority to stipulate to factual and procedural matters on his client’s behalf. Even at trial, counsel may stipulate to the existence or nonexistence of essential facts. Counsel may also stipulate to the admissibility of evidence or to narrow the range of litigable issues. Stipulations obviate the need for proof and are independently sufficient to resolve the matter at issue in the stipulation. (People v. Palmer, supra, 58 Cal.4th at p. 118.)

Unless the trial court, in its discretion, permits a party to withdraw from a stipulation, it is conclusive upon the parties, and the truth of the facts it contains cannot be contradicted. (Palmer v. City of Long Beach (1948) 33 Cal.2d 134, 141–142 (Traynor, J.); cf. CALCRIM No. 222 [“During the trial, you were told that the People and the defense agreed, or stipulated, to certain facts. This means that they both accept those facts as true. Because there is no dispute about those facts you must also accept them as true.”] [Citing Palmer v. City of Long Beach, supra, 33 Cal.2d at pp. 141–142].)

Parts routinely stipulate to documents that would be inadmissible absent the stipulation. (E.g., People v. Holmes (2004) 32 Cal.4th 432, 436 [when taking a guilty plea, trial court should ask defense to stipulate to a particular document that provides an adequate factual basis, such as a police report or a probation report].)

Why would someone stipulate to an inadmissible document? The usual reason is because the stipulation is true and the other side can prove it.

Hearsay can be objectionable and inadmissible, but that does not mean the hearsay is untrue. If Abby tells Barry that
Carol told her the sky is blue, that is multiple hearsay. Nonetheless, the sky truly is blue. That is easy to prove. There are many witnesses. It can be advantageous simply to agree to hear that is true.

Many stipulations are to documents drafted by counsel for purposes of litigation. These documents would be inadmissible hearsay without a stipulation. Those otherwise inadmissible documents, however, can summarize the inevitable result of proving the documents’ contents through formal and time-consuming evidentiary processes. A stipulation saves the time and effort of summoning witnesses from their daily responsibilities to a courthouse where they will have to wait to testify in a trial court with a sizable docket of its own. A stipulation can achieve the same end, swiftly and cleanly, with complete fidelity to the truth.

Banda stipulated to the probation report. Such a stipulation is conclusive without reference to additional evidentiary support. ([People v. Palmer, supra, 58 Cal.4th. at pp. 117–118.]

C

Third, Banda claims his stipulation was of a limited scope. This claim has no basis in the record. When the court asked if Banda submitted to the probation report, Banda’s attorney gave a one-word answer: “Yes.” Banda’s stipulation was counseled, unqualified, and unlimited. (Cf. [People v. French (2008) 43 Cal.4th 36, 42, 50–51 [defendant pleaded no contest and defense counsel qualified the factual basis stipulation accordingly].)

Banda suggests he stipulated to the probation report without stipulating to the facts it recited. This argument puzzles me. It suggests that, despite having stipulated to a factual summary, Banda remained free to contest the summarized facts. I know of no precedent for this suggestion, which would have the practical effect of making stipulations meaningless. Rendering courtroom agreements meaningless would be an unhappy result, with unfortunate consequences for all.

D

Fourth, Banda claims the facts about his offense were not relevant when he pleaded guilty and was sentenced. This is inaccurate. The facts of Banda’s crime indeed were relevant.

When parties negotiate a plea deal and sentence, the magnitude of culpability is relevant. The goal of criminal law is to determine whether the defendant has committed a crime, and, if so, to impose a punishment that fits the crime. What punishment fits Banda’s crime? In contraband cases, the presence of the contraband, and in what magnitude, is relevant. Banda and the prosecution negotiated his plea deal before Banda pleaded guilty. Negotiated plea deals are adjustable in degrees: how many days in custody, how many days of community service work, how many dollars in fines, and so on. The degree of Banda’s culpability was relevant to this negotiated adjustment. One cannot reasonably maintain the prosecution would have given Banda the same deal no matter his level of culpability. Orders of magnitude matter.

The Supreme Court required stipulations of the sort Banda made when pleading guilty. One reason is to provide a more adequate record of the conviction process. ([People v. Holmes, supra, 32 Cal.4th at p. 438, fn. 2.) This more adequate record of the conviction process shows Banda pleaded guilty on the same factual basis as in the stipulated probation report: 269 plants; flight from the Green Star Collective; Banda telling police he resided at and was performing construction at the location.

The police report to which Banda stipulated during his guilty plea is longer than the probation report and elaborates on some details. A “small” marijuana plant was six to 10 inches tall, while a “medium” plant was two and a half to three feet tall. The room with the marijuana plants was a hydroponic facility. Banda told police that most of the tools inside the location were his and that he was familiar with hydroponics. In the opinion of the arresting officer, the location was the beginning stages of an advanced hydroponic marijuana grow.

Proposition 64 introduced a new distinction between growing six versus seven plants. The distinction did not exist at the time of Banda’s sentencing. This new distinction does not imply the facts of Banda’s crime were irrelevant to his plea and sentence. No defense attorney expects a prosecutor to treat a small time personal-use hobbyist the same as someone building a large scale commercial drug supply site.

Banda twice agreed the number of plants was 269. This fact about 269 plants was the basis for the deal that the prosecution and the defense negotiated and that the court accepted and imposed. The magnitude of culpability, including the magnitude of contraband, was relevant when Banda chose to stipulate. It remains relevant today. Banda’s stipulation is binding.

E

Fifth, Banda at oral argument claimed there were inconsistencies between the police report and the probation report. Banda did not identify these inconsistencies. I see none.

The probation report accurately summarized the longer and more detailed police report. The two documents are consistent in every detail.

For instance, the probation report stated police detained Banda and the other arrestee while the two were “attempting to flee the location.” The police report contains additional detail. It states an officer observed the other arrestee “run from the rear” of the location into a parking lot, where police detained him. “A few minutes later” the same officer observed Banda “exit the rear” of the same location, and the same officer “detained Banda in the rear without incident.” So police detained both Banda and the other man while they were attempting to flee the location. The probation report is consistent with the more detailed police report.

In another example of consistent and additional detail, the police report states the location of the Green Star Collective marijuana operation encompassed two adjoining street
addresses while the probation report summarily refers to a single “location” without including the immaterial point about two street addresses.

The two reports are consistent, despite Banda’s assertion to the contrary. Most significantly, there can be no claim there was inconsistency about the number of plants. Both documents agree there were 192 medium plants and 77 small ones, for a total of 269 plants.

Sixth, Banda cites case law. None of it construes the statute at issue here, which is Proposition 64. None of it permits Banda to ignore his binding stipulations.

Banda argues two Supreme Court opinions, Trujillo and Reed, limit the effect of his stipulation to the facts necessary to the charged offense itself. (See People v. Trujillo (2006) 40 Cal.4th 165; People v. Reed (1996) 13 Cal.4th 217.) But neither Trujillo nor Reed involved stipulations. Neither holding permits Banda to disregard the facts to which he twice has stipulated.

There is a second and independent reason why Trujillo and Reed cannot control this case. Trujillo and Reed are recidivism cases. Trujillo held that, within the meaning of the “Three Strikes” law, a probation officer’s report is not part of the record of conviction that a trial court may consider in determining whether a defendant’s past conviction was a serious or violent felony. (People v. Trujillo, supra, 40 Cal.4th at pp. 175, 178, 181.) Reed held that, for purposes of the habitual criminals statute, a statement in a probation report cannot prove a past conviction was for a serious felony. (People v. Reed, supra, 13 Cal.4th at pp. 220, 230.)

These cases do not interpret the statute in this case, which is Proposition 64. Trujillo and Reed interpreted statutes that differ fundamentally from Proposition 64.

Recidivism statutes embody principles contrary to Proposition 64. The goal is to punish recidivism by lengthening current sentences based on past convictions. The recidivism laws allow prosecutors to collect old facts about past convictions as a way to increase the punishment imposed for later offenses. By contrast, Proposition 64 aims to decrease sentences, and in some cases to abolish convictions altogether, because social attitudes about marijuana have changed. Proposition 64 heads the opposite way from the recidivism statutes.

The concerns that animate the recidivism holdings are missing from the Proposition 64 setting. In the recidivism arena, defendants can be in danger of being prosecuted and punished twice for the same offense. There is also a speedy trial issue. Permitting prosecutors to litigate the circumstances of a crime committed years in the past thus raises serious problems akin to denial of speedy trial and double jeopardy. (See People v. Trujillo, supra, 40 Cal.4th at pp. 176, 177, 179, 180; People v. Reed, supra, 13 Cal.4th at p. 223.)

Speedy trial and double jeopardy concerns do not exist in the Proposition 64 setting. Under Proposition 64, events are triggered not by prosecutors but by people like Banda. There is no speedy trial concern because Banda decided to petition. Banda, not prosecutors, controlled the timing. And there is no double jeopardy concern, as Banda conceded at oral argument. Banda faces no danger of being prosecuted twice for a single culpable action. (Cf. People v. Tran, supra, 242 Cal.App.4th at pp. 889–890 [“Defendant argues People v. Tran (2006) 40 Cal.4th 165 (Trujillo) supports his claim the probation report could not be considered by the trial court, as the court in Trujillo stated postplea probation reports ‘do not “reflect[] the facts of the offense for which the defendant was convicted.”’ [Citation.] Trujillo does not assist defendant, as it deals with a different circumstance than the one at issue here. . . . Here, the prosecution is not attempting to prove an enhancement allegation to increase defendant’s sentence. Rather, defendant is seeking leniency from the court to reduce his offense. . . . Accordingly, there is no risk akin to double jeopardy or forcing defendant to relitigate the circumstances of the crime.”].)

Banda also cites People v. Thoma (2007) 150 Cal.App.4th 1096, but that opinion is a recidivism holding as well. (See id. at pp. 1099, 1101, 1102–1104 [decision is based on Trujillo and Reed].) Thoma did not interpret Proposition 64. Thoma also prefaced the Supreme Court’s 2013 statement in People v. Palmer that stipulations are conclusive without reference to additional evidentiary support. (People v. Palmer, supra, 58 Cal.4th at pp. 117–118.)

“[Banda] has offered no authority for his position that considering the facts and circumstances of an offense, as related in a probation report, somehow transforms the conviction itself or redefines the crime for which defendant has been convicted. [Banda] has offered no cogent reason why the trial court should not have been able to consider the crime summaries of the conduct supporting his conviction . . . . Just as it was appropriate for the trial court to consider the facts and circumstances of the offense in determining the appropriate sentence at the original sentencing hearing [citation], it was appropriate to consider those same facts and circumstances of the offense in making” later Proposition 64 adjustments. (People v. Tran, supra, 242 Cal.App.4th at p. 891 [interpreting Pen. Code, § 17, subd. (b)].)

In sum, the trial court result was correct. It followed the law, it honored the truth to which the parties had agreed, and it achieved justice. I would affirm.

WILEY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
In re D.B., a Person Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent,
v.
T.B. et al., Defendants and Appellants.

No. D073807
In The Court of Appeal of the State of California
Fourth Appellate District
Division One
(Super. Ct. No. J519664B)
APPEALS from findings and orders of the Superior Court of San Diego County, Michael Popkins, Judge. Affirmed.
Filed August 20, 2018

COUNSEL
Marisa L. D. Conroy, under appointment by the Court of Appeal, for Defendant and Appellant T.B.
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OPINION
T.B. and L.B. appeal findings and orders adjudicating their younger son a dependent of the juvenile court under Welfare and Institutions Code section 300, subdivision (j),¹ and removing him from their custody under section 361, subdivision (c)(1). They do not challenge findings and orders under sections 300, subdivision (a) and 361, made on behalf of their older son, Jordan, who suffered serious injuries as a result of the parents’ routine practice of hitting him with a belt as punishment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND
T.B. and L.B. have two sons, six-year-old Jordan,² and two-year-old D.B. On January 28, 2018, when Jordan arrived at school, his teacher noticed he was limping badly and blood was seeping through his jeans. Jordan said his right leg hurt “all the way up.” Examinations revealed numerous linear marks, mainly on his right thigh, in different stages of healing. In many areas, the marks had scabbed over. He had a two-inch scar on his middle back. Jordan’s skin was broken in some places and he was bleeding. Jordan was wearing a shirt held together by a safety pin and it appeared that his hair had not been recently groomed. He refused to talk to the social worker.

Jordan’s mother, L.B., told a social worker several times that Jordan was injured in a fall. When questioned again, she said T.B. had given Jordan a beating. Reached by telephone, T.B. told the social worker that Jordan fell. The social worker told T.B. she did not believe him, and he said, “I beat him last night.” When the parents arrived at Rady Children’s Hospital, they informed the social worker that the previous evening L.B. hit Jordan with a belt approximately 15 to 20 times after he ate four doughnuts without permission. The parents said they routinely disciplined Jordan by hitting him with a belt or by making him exercise. L.B. and T.B. each said they were disciplined in a similar manner when they were growing up and, in later interviews, described childhoods with significant physical, and in L.B.’s case, sexual abuse.

The parents denied using physical discipline on D.B., who was then 18 months old. D.B. did not have any bruises, marks or injuries. T.B. said he was trying to protect his wife when he said he had beaten Jordan. They physically disciplined Jordan approximately four times a month using a belt. T.B. said he kept the buckle in his hand, folded the belt, and hit Jordan between five and 15 times, depending on the situation. T.B. did not believe it was appropriate to hit a child with a broom or other household item, but believed it was appropriate to hit a child for two to five minutes. The child should be told why he was being hit.

A pediatric child abuse specialist determined Jordan’s injuries were consistent with inflicted child abuse. The pattern of injuries on his body indicated he was hit with a belt and belt buckle. The parents could not tell the doctor how many times they had hit Jordan with a belt, but acknowledged it was more than 20 times. They denied ever hitting D.B.

In a later interview, L.B. told the social worker that prior to this incident she and T.B. “didn’t see beating kids as an issue” and they lived by the motto “spare the rod spoil the child.” L.B. denied that any of the previous beatings had left marks on Jordan. She claimed the older scars on Jordan’s body were “old scars from him being a kid.” She was “not stressed out or angry . . . just level-headed” when she hit him with the belt for eating doughnuts without permission. L.B. acknowledged her actions were “excessive and abusive.” She said she and T.B. had hit Jordan with a belt less than 10 times and reports they had hit him more than 20 times were incorrect. When asked why she initially said Jordan had fallen, L.B. described an incident in the park in which a little girl who was riding a bicycle collided with Jordan, knocking him down. Jordan got right up and did not appear to have been injured in the accident.

¹. Further unspecified statutory references are to the Welfare and Institutions Code.
². T.B. is Jordan’s presumed, but not biological, father. For brevity, we refer to T.B. as Jordan’s father.
T.B. said they had placed Jordan on restriction three months earlier for taking food and other items without permission. He would take chips and candy and hide them in the kitchen. Jordan was not allowed to go into the kitchen without permission. Even though there were crumbs all over him and the couch, Jordan denied eating the doughnuts. T.B. said he let L.B. discipline Jordan and went upstairs to bathe D.B. He could hear Jordan screaming and crying. He felt that the incident was excessive and said he and L.B. needed to make sure it never happened again.

After several initial visits with his parents, during which he was quiet and withdrawn, six-year-old Jordan refused further visits with his parents, even when they arrived to see him. He did not want to see his little brother. When told his parents were there to see him, Jordan would start crying and say he was scared. His caregiver reported that if they drove near the parents’ home, Jordan would become tense and say, “don’t turn there.” Once, when he thought the caregiver was taking him to his parent’s house, Jordan said, “No, scared, sad, scared.” The caregiver said Jordan was constantly hungry, even after eating a full meal, and was hoarding food. Jordan told her that his mother had hit him with a clothes hanger.

School staff reported that Jordan’s behaviors had completely changed after he was removed from his parents’ care and he was more active and verbal.

D.B. was doing well in foster care. There were no concerns about his development. His visits with his parents were positive, active, and pleasant. The parents gave clear directions to him, took time to teach him new things, and encouraged him with praise.

The jurisdictional and dispositional hearings were held on March 29, 2018. The parents submitted on the jurisdictional allegations of physical abuse in Jordan’s case, and the juvenile court proceeded with a contested hearing in D.B.’s case. The San Diego County Health and Human Services Agency’s court reports, as detailed above, were admitted in evidence. In an updated report, the social worker said the parents immediately started actively participating in services, with positive feedback from the service providers. The service providers said the parents understood the connection between how they were raised and how they decided to discipline their children, and accepted responsibility for their actions.

The social worker reported that Jordan continued to refuse to visit his parents. She believed it was unusual for a child that young to not want to see his mother or father. The parents’ visits with D.B. were going well. The social worker said D.B. remained at risk of physical abuse because of the frequency and severity of the parents’ physical abuse of his brother. D.B. was highly vulnerable to abuse due to his age, nonverbal status, and entry into a developmental stage typically associated with defiant and/or unruly behaviors. The parents had not had sufficient time to demonstrate they were able to handle their children’s challenging behaviors without resorting to physical discipline.

L.B. testified she started using a belt to discipline Jordan when he was five and a half years old. She never used corporal punishment on D.B. She was participating in a parenting class and was learning noncorporal disciplinary techniques. L.B. was also taking a child abuse class, which she described as eye-opening. She would never again resort to corporal punishment. L.B. acknowledged Jordan could not be returned to her care because they were still learning how to properly discipline him. She felt that she and T.B. were more than capable of properly caring for D.B.

T.B. testified he was participating in services. He completed a Positive Parenting course and was participating in an eight-week anger management class. He understood that violence in the home affected babies. During a visit, T.B. implemented a new technique when D.B. started throwing a tantrum. T.B. knelt and talked to him, and then made a game out of putting away the toys. He denied he or L.B. had ever physically disciplined D.B. He acknowledged they did not know how to deal with Jordan, who had been exhibiting challenging, disruptive, and defiant behaviors at home and at school.

The juvenile court said the parents were intelligent and articulate, and had gained insight and made some progress in services. However, the undisputed evidence showed that they had seriously physically abused Jordan. In assessing whether D.B. was at substantial risk of abuse or neglect, the juvenile court considered D.B.’s age and the fact he was the same gender as his abused sibling. The court found that D.B. had suffered emotional abuse by hearing his brother scream as he was being beaten by a belt. The reason for the beating— that a child had eaten doughnuts without permission—was an aggravating risk factor. Although the parents had made progress with services, the court had concerns about their credibility in view of their false statements to the social worker. The court sustained the jurisdictional allegations as to D.B. under section 300, subdivision (j) by clear and convincing evidence, and removed him from the physical custody of his parents.

**DISCUSSION**

**A**

**Issues on Appeal**

T.B. and L.B. contend there is not substantial evidence to support the jurisdictional and dispositional orders for D.B. under sections 300, subdivision (j) and 361.5, subdivision (c) (1). T.B. asserts the juvenile court erred by failing to apply statutory factors required under section 300, subdivision (j). He argues because section 300, subdivision (j) does not reference section 300, subdivision (c), which permits jurisdiction on grounds of emotional abuse, the finding that D.B. suffered emotional abuse was not a valid basis for jurisdiction under subdivision (j). He further contends that at the time of the hearing there was no evidence to show that D.B. would be at substantial risk of abuse or neglect if returned home and the juvenile court failed to consider whether there were
reasonable means by which D.B.’s physical health could be protected in the home. L.B. asserts the jurisdictional findings should be dismissed because the incidents of corporal punishment to Jordan do not constitute substantial evidence to support the finding that D.B. was at substantial risk of suffering serious physical harm. She contends the dispositional order removing D.B. from their custody should be reversed because she took proactive measures to learn new parenting techniques and expressed remorse for using corporal punishment, and an in-home safety plan could have been implemented to protect D.B.

B

Relevant Law and Standard of Review

At the jurisdictional hearing, the court considers only the question whether the child is described by one or more subdivisions in section 300. Section 300, subdivision (j) provides that any child may come within the jurisdiction of the juvenile court if “[t]he child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.” In enacting section 300, subdivision (j), the Legislature intended “to expand the grounds for the exercise of jurisdiction as to children whose sibling has been abused or neglected as defined in section 300, subdivision (a), (b), (d), (e), or (i). Subdivision (j) does not state that its application is limited to the risk that the child will be abused or neglected as defined in the same subdivision that describes the abuse or neglect of the sibling. Rather, subdivision (j) directs the trial court to consider whether there is a substantial risk that the child will be harmed under subdivision (a), (b), (d), (e) or (i) of section 300, notwithstanding which of those subdivisions describes the child’s sibling.’ “ (In re I.J. (2013) 56 Cal.4th 766, 774 (I.J.).) “Because the assessment of risk to a sibling depends in part on the circumstances of an abused or neglected child, subdivision (j) implies that the more egregious the abuse, the more appropriate for the juvenile court to assume jurisdiction over the siblings.” (In re D.C. (2015) 243 Cal. App.4th 41, 53, quoting I.J., at p. 778.)

At the dispositional hearing, a dependent child may not be taken from the physical custody of the parent under section 361 unless the court finds there is clear and convincing evidence there is or would be a substantial danger to the child’s physical health, safety, protection, or physical or emotional well-being if returned home, and that there are no reasonable means to protect the child’s physical health without removing the child (detriment finding). (§ 361, subd. (c)(1).) The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child. (In re T.V. (2013) 217 Cal.App.4th 126, 135-136 (T.V.).)

We review the entire record to determine whether the trial court’s jurisdictional and dispositional findings are supported by substantial evidence. Substantial evidence is evidence that is reasonable in nature, credible, and of solid value. We do not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts. We draw all legitimate and reasonable inferences in support of the judgment. The appellant has the burden to demonstrate there is no evidence of a sufficiently substantial nature to support the findings or orders. (In re Dakota H. (2005) 132 Cal.App.4th 212, 228 (Dakota H.).)

C

Analysis

I. The juvenile court properly considered the totality of D.B.’s circumstances under section 300, subdivision (j).

We are not persuaded by T.B.’s argument the juvenile court failed to properly consider the statutory factors described in section 300, subdivision (j), and further erred by basing its decision on a finding that D.B. had suffered emotional abuse. Section 300, subdivision (j) requires the juvenile court to consider “the circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.” This “expansive statutory language” has been interpreted to require the juvenile court “to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm, within the meaning of any of the subdivisions enumerated in [section 300,] subdivision (j).” (In re Ashley B. (2011) 202 Cal.App.4th 968, 982-983.)

Contrary to T.B.’s claim, the record shows the juvenile court considered the statutory factors enumerated in section 300, subdivision (j). The court explicitly considered D.B.’s age and gender, and the mental condition of the parents, noting they were intelligent and articulate, and had gained some insight. The court expressed concerns about the parents’
credibility in view of their changing stories and the misinformation they had provided to the social worker. The court found that the reason the parents gave for physically disciplining Jordan—that he ate four doughnuts without permission—made the abuse more egregious. The record thus belies T.B.’s argument the juvenile court did not properly consider the enumerated statutory factors.

Similarly, we are not persuaded by the argument the juvenile court improperly based jurisdiction for D.B. on section 300, subdivision (c),4 which is not included as a statutory ground for jurisdiction under section 300, subdivision (j). In making this argument, T.B. misconstrues the juvenile court’s findings. The record shows the juvenile court explicitly found that the physical abuse in Jordan’s case was “very, very serious” and that this finding alone would support jurisdiction on behalf of D.B. under section 300, subdivision (j). The court then considered the enumerated statutory factors, as described above. In addition to considering those factors, the court also found the parents had subjected D.B. to emotional abuse. The finding of emotional abuse was not the basis for dependency jurisdiction, as T.B. argues, but part of the court’s consideration of the totality of the circumstances surrounding the abuse or neglect of the sibling.

Section 300, subdivision (j) clearly states the court may consider any other factor it considers probative in determining whether abuse or neglect of a sibling presents a substantial risk to the child. Here, the juvenile court considered the emotional effect on D.B. of hearing his brother scream and cry as his mother hit and injured him with a belt, and found it to be a probative factor in determining whether there was a substantial risk of harm to D.B. The court was correct. The parents’ lack of attention to, or disregard for, the effect their physical abuse of Jordan had on D.B. is relevant to the totality of the circumstances risk analysis required under section 300, subdivision (j).

2. There is substantial evidence to support the jurisdictional findings.

L.B. contends the section 300, subdivision (j) finding is not supported by substantial evidence because: (1) the parents’ past use of corporal punishment on Jordan does not support a reasonable inference D.B. was at substantial risk of serious physical harm; (2) there is no evidence to show the parents had ever inappropriately disciplined or physically harmed D.B.; (3) the parents admitted error, were remorseful, and had learned effective parenting techniques and addressed child abuse issues through services; (4) the parents did not begin using corporal punishment on Jordan until he was five years old and they hit him only a total of 10 times; (5) D.B. was not at risk because he would not be the same age as Jordan when the abuse started for more than three years; and (6) there were no other risk factors in the home.

T.B. argues by the time of the jurisdictional hearing, there was no current risk to D.B. in the home. The parents were participating in services and were remorseful, and their visits with D.B. were going well.

The parents do not meet their burden on appeal to show there is no evidence of a sufficiently substantial nature to support the findings or orders. (Dakota H., supra, 132 Cal. App.4th at p. 228.) We reject L.B.’s argument the parents hit Jordan with a belt only 10 times in his life. The record shows the parents admitted to routinely using a belt to discipline Jordan. T.B. said he or L.B. hit Jordan with a belt approximately four times a month, striking him each time from five to 15 times depending on the circumstance. The parents believed sparing the rod spoiled the child. L.B. told the social worker that before the children were detained in protective custody, she and T.B. did not “see beating kids as an issue.” Jordan’s caregiver reported that Jordan said L.B. hit him with a clothes hanger. Jordan had wounds on his body in different stages of healing, from which we draw the reasonable inference he was subjected to beatings inflicting injury on multiple occasions.

Jordan refused any contact with his mother and father, saying he was afraid of them. The social worker said it was unusual for a young child to refuse visits with his parents. Jordan was afraid to drive past his parents’ home. This evidence suggests Jordan was severely traumatized by physical abuse, and the extent and nature of the abuse was far greater than the parents acknowledged. L.B. and T.B. each acknowledged they were just starting to learn appropriate child disciplinary techniques and how to implement those techniques. T.B. testified he did not know how to deal with Jordan’s challenging, disruptive, and defiant behaviors. The social worker noted that D.B. was on the verge of “the terrible two’s,” a developmental stage that often brings many parenting challenges. The social worker believed there was a risk the parents would not handle those challenges without resorting to physically disciplining D.B.

In addition, contrary to the parents’ claims, there were risk factors in the home other than physical abuse. Jordan’s constant hunger and practice of hoarding food may evince emotional trauma and/or food deprivation. He was not permitted to enter the kitchen in his home without permission. The record also supports the conclusion one or both parents were inattentive to Jordan to the point of neglect when they sent him to school, limping badly, with blood oozing from his jeans. Although a relatively minor point, the fact Jordan was disheveled and his hair apparently had not been groomed for some time also points to parental neglect.

4. Section 300, subdivision (c), is a ground for dependency jurisdiction where “[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care.” (§ 300, subd. (c).) It is not referenced in section 300, subdivision (j).

5. The juvenile court’s finding that D.B. was at substantial risk of serious physical harm due to his parents’ physical abuse of his sibling also supports jurisdiction under section 300, subdivision (a). (See fn. 3, ante.)
Even if the juvenile court had concluded, which it did not, that the parents had credibly mitigated the risk to D.B. by participating in services for four or five weeks and disavowing the use of corporal punishment, there would be substantial evidence to support the juvenile court’s finding under section 300, subdivision (j). At the time of the jurisdictional hearing, D.B. was 18 months old. He was vulnerable because of his age, size, and nonverbal status. Our Supreme Court explains: “‘Some risks may be substantial even if they carry a low degree of probability because the magnitude of the harm is potentially great.’ . . . In other words, the more severe the type of sibling abuse, the lower the required probability of the child’s experiencing such abuse to conclude the child is at a substantial risk of abuse or neglect under section 300. If the sibling abuse is relatively minor, the court might reasonably find insubstantial a risk the child will be similarly abused; but as the abuse becomes more serious, it becomes more necessary to protect the child from even a relatively low probability of that abuse.” (I.J., supra, 56 Cal.4th at p. 778.) Here, the record permits the reasonable inference that in view of Jordan’s multiple injuries and D.B.’s age, even a single episode of corporal punishment could have devastating consequences to D.B.’s physical health and safety. We conclude there is ample evidence to support the juvenile court’s finding that D.B. was a child described by section 300, subdivision (j).

3. Substantial evidence supports the dispositional findings.

“The jurisdictional findings are prima facie evidence the minor cannot safely remain in the home.” (T.V., supra, 217 Cal.App.4th at p. 135.) In determining whether a child may be safely maintained in the parent’s physical custody, the juvenile court may consider the parent’s past conduct and current circumstances, and the parent’s response to the conditions that gave rise to juvenile court intervention. (In re Cole C. (2009) 174 Cal.App.4th 900, 917.) The juvenile court must also consider whether there are any reasonable protective measures and services that can be implemented to prevent the child’s removal from the parent’s physical custody. (§ 361, subd. (c)(1); see §§ 202, subd. (a), 16500.5, 16501, 16501.1.)

We are not persuaded by the parents’ claim reversal of the dispositional order is required because there was no longer a current risk to D.B. in their care. They rely on In re Jasmine G. (2000) 82 Cal.App.4th 282 (Jasmine G.), in which a division of this court reversed a dispositional order removing a 15-year-old girl from parental custody who was adjudicated a dependent due to excessive physical discipline. The parents expressed remorse for their actions, attended services, and the child wanted to return home. The social worker believed there was a current risk to the child if returned home because the parents lacked a full understanding of adolescent issues. (Jasmine G., at pp. 284, 286, 288-289.) The reviewing court held there was not substantial evidence to support the removal order. (Id. at p. 289.)

The circumstances here are not comparable to those in Jasmine G. This is a case in which the parents repeatedly physically abused the child’s sibling and the juvenile court found, by clear and convincing evidence, that D.B. was at substantial risk of harm to his physical safety. (§ 300, subd. (j).) A 15-year-old child may be able to protect herself against corporal punishment or call for help; an 18-month-old child cannot. Corporal punishment presents a far greater risk of injury—and serious injury—to a toddler than it does to an older teenager. In addition, here, the juvenile court expressed concern about the parents’ credibility in renouncing the use of corporal punishment.

The record shows the juvenile court considered the parents’ past conduct and viewed it as a very serious case of physical abuse of a child. Although the court found the parents had made “some progress” and had gained “some insight” as to their parenting practices, the court determined “it was just too soon” to conclude D.B. would not be at substantial risk of physical abuse were he returned home. The court could not dismiss the possibility the parents were saying only what they expected the court wanted to hear. In view of the parents’ credibility issues and the severity of abuse on the sibling, the juvenile court reasonably found there would be a substantial danger to D.B.’s physical health, safety, protection, or physical or emotional well-being if returned home, and there were no reasonable means to protect his physical health without removal from the parents’ custody. (§ 361, subd. (c)(1).) We conclude there is substantial evidence to support the dispositional findings and orders. (Dakoka H., supra, 132 Cal.App.4th at p. 228.)

DISPOSITION

The findings and orders are affirmed.

McCONNELL, P. J.

WE CONCUR: O’ROURKE, J., GUERRERO, J.

No. F074581
In The Court of Appeal of the State of California
Fifth Appellate District
(Super. Ct. No. VCF314447)
APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.
Filed July 27, 2018
Modified and Certified for Pub. August 20, 2018

COUNSEL
Caitlin M. Plummer, under appointment by the Court of Appeal, for Defendant and Appellant.

ORDER MODIFYING OPINION AND GRANTING REQUEST FOR PUBLICATION
[NO CHANGE IN JUDGMENT]
It is hereby ordered that the opinion filed on July 27, 2018, be modified as follows:

1. On page 9, the first sentence of the first full paragraph commencing, “As for effectuating the voters’ intent….” is modified to read:

“Our construction of section 459.5, subdivision (b), effectuates the voters’ intent.”

There is no change in the judgment. Except for the modification set forth above, the opinion previously filed remains unchanged.

The Attorney General has requested the opinion filed July 27, 2018, be certified for publication. It appears our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c). The request is granted.

The opinion filed on July 27, 2018, and modified pursuant to this order, is ordered published in the Official Reports.

WE CONCUR: Poochigian, Acting P.J., Ellison, J. †

† Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION

INTRODUCTION

Appellant Anthony Lopez stands convicted of petty theft with a prior, pursuant to Penal Code1 sections 484, subdivision (a) and 666, subdivision (a). The court found true a prior strike conviction, three prior prison terms, and five felony convictions within the meaning of section 1203, subdivision (e)(4). Lopez contends his conviction must be reversed because section 459.5 precludes alternate charging. Alternatively, he contends defense counsel rendered ineffective assistance by failing to object to the alternate charging. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On February 12, 2015, Lopez and a female companion were inside a Walmart store. Lopez was observed placing a home stereo unit and several small items inside a Walmart bag in a shopping cart. Lopez did not pay for the items before exiting the store. Outside the store, an asset protection officer stopped Lopez; Lopez admitted he had not paid for the items. The value of the unpaid items was determined to be $496.37.

Lopez told police he had gone to Walmart to purchase a few items, but only had five dollars with him. Lopez claimed he had no intention of stealing anything prior to entering the store, but formed the intent to steal once inside. He admitted placing items inside his cart and leaving the store without paying for them.

On March 12, 2015, a complaint was filed charging Lopez with shoplifting in violation of section 459.5. Because Lopez is a section 290 registrant, the count was charged as a felony. (§ 459.5, subd. (a).) In addition, the complaint alleged that Lopez had been convicted of multiple prior felonies and served prior prison terms.

At the September 17, 2015, preliminary hearing, the People commenced by stating, “we’ll be looking for a bindover for PC 666 as well. 459.5 on the rap also supports PC 666.” At the conclusion of testimony, the trial court stated:

“If you wanted to enter a plea, I’d be inclined to maybe put the sentencing over for a couple months so he can get his affairs in order, if he wants to take advantage of the two-year sentence.

Otherwise, I’ll bind it over on both counts and he’s probably looking at three years with the prior prison

1. All statutory references are to the Penal Code.
commitment, possibly four given his prior record. Looks like he’s been to prison a couple times.”

At this point, there was a pause in the proceedings, after which defense counsel stated Lopez “would like to proceed with his case.” The People then moved to hold Lopez to answer to the charge of shoplifting in the complaint, and the additional charge of petty theft with a prior. The trial court inquired if defense counsel had any response, and defense counsel replied, “Submitted.” The trial court replied, “The Court will hold him to answer on both those charges with all the special allegations.”

In an information filed September 28, 2015, the People charged Lopez with felony shoplifting pursuant to section 459.5, subdivision (a) and petty theft with a prior pursuant to section 484, subdivision (a) and 666, subdivision (a). The information also alleged Lopez had suffered a prior strike conviction; served three prior prison terms within the meaning of section 667.5, subdivision (b); and had five prior felony convictions within the meaning of section 1203, subdivision (e)(4).

Before trial, Lopez asked the trial court to exercise its authority pursuant to section 1385 and People v. Superior Court (Romero) (1996) 13 Cal.4th 497, to strike the prior strike allegation. The trial court heard and granted the motion on June 30, 2016.

A jury trial commenced on August 29, 2016. During closing argument, the People argued the facts showed Lopez had an intent to steal when he entered the Walmart store because he only “had $5 on him when he came to Wal-Mart, but then he also brought a [Walmart] plastic bag with him.” The People argued that Lopez bringing a Walmart bag with him “seemed to indicate that he had decided previously to commit the theft.”

The defense argued that the shoplifting charge was “a little more specific” than the petty theft charge because the People had to prove “what his intention was the moment he walked into the store.”

After retiring to deliberate, the jury asked for a read back of testimony. The jury then asked a question, “Can we use the instructions from 1800 to determine the intent from the shoplifting charge? We just need clarification.” The People argued the facts showed Lopez had an intent to steal when he entered the Walmart store because he only “had $5 on him when he came to Wal-Mart, but then he also brought a [Walmart] plastic bag with him.” The People argued that Lopez bringing a Walmart bag with him “seemed to indicate that he had decided previously to commit the theft.”

The defense argued that the shoplifting charge was “a little more specific” than the petty theft charge because the People had to prove “what his intention was the moment he walked into the store.”

After retiring to deliberate, the jury asked for a read back of testimony. The jury then asked a question, “Can we use the instructions from 1800 to determine the intent from the shoplifting charge? We just need clarification.” The trial court discussed with both counsel the appropriate response to the question and provided a response to the jury.

A second question was asked by the jury, “[C]an we use the prior conviction we used to show the intent for shoplifting?” The trial court again discussed the appropriate response with both counsel and provided a response to the jury. A third question was received from the jury asking, “Does number 2 of 1700 mean prior intent or intent once he enters the store?” Again, the trial court discussed the response to be provided the jury with both counsel.

On August 30, 2016, the jury indicated they had reached a verdict as to one count and were unable to reach a verdict on the other count. The jury returned a verdict of guilty on count 1, the charge of petty theft with a prior. No verdict was reached on the count 2 charge of shoplifting. The trial court declared a mistrial as to count 2 and the People dismissed count 2.

In a bifurcated court trial on the allegations, the trial court found all of the remaining allegations true. The trial court imposed a total term of two years at the November 10, 2016, sentencing.

Lopez filed a timely notice of appeal on November 15, 2016.

DISCUSSION

Lopez contends his conviction should be reversed because section 459.5, subdivision (b) prohibited the People from charging him with any offense other than shoplifting. He contends that if we conclude this issue is forfeited, defense counsel rendered ineffective assistance.

Forfeiture

The People amended the charges at the preliminary hearing to add the petty theft with a prior count, in addition to the shoplifting charge. There was no objection by Lopez. The People contend Lopez has forfeited any challenge to the filing of the amended information and the additional charge of petty theft with a prior. Generally, a defendant’s failure to object to an amended information forfeits his right to assert the error on appeal. (People v. Carrasco (2006) 137 Cal.App.4th 1050, 1057; People v. Carbonie (1975) 48 Cal.App.3d 679, 691; People v. Spencer (1972) 22 Cal.App.3d 786, 799-800; People v. Collins (1963) 217 Cal.App.2d 310, 313.)

Anticipating the forfeiture argument, Lopez contends defense counsel rendered ineffective assistance. Therefore, we address the merits of Lopez’s contention.

Section 459.5 – Shoplifting

Proposition 47 created the new crime of “shoplifting,” set forth in section 459.5. (People v. Gonzales (2017) 2 Cal.5th 858, 862 (Gonzales).) 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. Shoplifting shall be punished as a misdemeanor, except that a person with one or more prior convictions for an offense specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or for an offense requiring registration pursuant to subdivision (c) of Section 290 may be punished pursuant to subdivision (h) of Section 1170.
“(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.”

Lopez contends that because he was charged with shoplifting pursuant to section 459.5, he could not also be charged with petty theft with a prior pursuant to sections 484 and 666. The People argue that in order to avoid absurd results, this court should interpret section 459.5 to permit alternate charging of shoplifting and petty theft.

The purpose of the preliminary hearing is to determine whether a defendant should be bound over for trial and on what charges he or she is to be tried. (People v. Esmaili (2013) 213 Cal.App.4th 1449, 1459.) The evidence at the preliminary hearing was that Lopez maintained he formed no intent to steal until after entering Walmart. If true, then the charge of shoplifting would not lie as Lopez did not have the intent to commit larceny when he entered Walmart. (§ 459.5, subd. (a).) The prosecutor charged Lopez with shoplifting, the only charge that could be brought if he entered Walmart with the intent to commit larceny. The prosecutor also asked that Lopez be held to answer on a charge of petty theft with a prior, which does not require that Lopez have entered Walmart with the intent to commit larceny.

The People elected to proceed on both shoplifting and petty theft with prior charges after the preliminary hearing and the jury verdict reflects the People’s concerns with proof of intent. The jury failed to convict on the shoplifting charge; their questions indicate they struggled to find intent to commit larceny at the time of entry into Walmart.

Lopez argues, however, that section 459.5, subdivision (b) explicitly limits the prosecutor’s charging discretion and that no charge of petty theft with a prior could be brought when he is charged with shoplifting. The People acknowledge the literal language of section 459.5, subdivision (b) appears unambiguous. The People contend that a literal reading of “section 459.5 presumes that it will be clear whether a defendant’s conduct constitutes shoplifting or not, before the prosecutor makes the charging decision.” The People argue that prohibiting alternative charging under the facts of Lopez’s case is not what the voters intended when they enacted Proposition 47.

Whether to prosecute and what charges to file are decisions that generally rest in the prosecutor’s discretion. (United States v. Batchelder (1979) 442 U.S. 114, 123-124.) Section 954 allows the prosecutor to charge “two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts.” As the Supreme Court in Manduley v. Superior Court (2002) 27 Cal.4th 537, 552 stated:

“[T]he prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from "the complex considerations necessary for the effective and efficient administration of law enforcement" [Citations.] The prosecutor’s authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch.”

However, prosecutorial discretion on charging can and has been limited in certain instances. (See e.g., People v. Murphy (2011) 52 Cal.4th 81, 87; People v. Rader (2014) 228 Cal.App.4th 184, 194-200; People v. Kilborn (1996) 41 Cal. App.4th 1325, 1332-1333.)

The Supreme Court has held the language of section 459.5, subdivision (b) precludes alternate charging of “any act of shoplifting.” (Gonzales, supra, 2 Cal.5th at p. 876.) Gonzales stated section 459.5, subdivision (b) expressly prohibits alternate charging for the “underlying described conduct.” (Gonzales, at p. 876.) Gonzales applied section 459.5 essentially in a retroactive situation because it addressed section 459.5 in the context of a petition for recall of a sentence and resentencing. (Gonzales, at p. 862.) Gonzales did not address the circumstances where a prosecutor charged shoplifting and another offense because of potential evidentiary problems in proving the requisite intent upon entry into a commercial establishment required for a shoplifting conviction.

We do not construe section 459.5 or the Gonzales case as restricting a prosecutor’s ability to charge another theft offense when the element of intent upon entering the commercial establishment is absent or in question. In statutory construction, an appellate court adheres to the plain language of the statute “unless doing so would lead to absurd results the Legislature could not have intended.” (People v. Birkett (1999) 21 Cal.4th 226, 231.) In construing “statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration.” (Gonzales, supra, 2 Cal.5th at p. 868.)

Subdivision (b) of section 459.5 provides that “[a]ny act of shoplifting as defined in subdivision (a) shall be charged as shoplifting.” Shoplifting is defined as requiring an intent to commit larceny at the time of entering the commercial establishment. (§ 459.5, subd. (a).) In our view, the intent of section 459.5, subdivision (b) is clear: if a defendant enters a commercial establishment with the intent to commit larceny, the only charge that will lie is shoplifting under section 459.5, subdivision (a). In other words, a prosecutor may not elect to charge shoplifting under section 459.5 and second degree burglary under sections 459 and 460. (§ 459.5, subd. (b).) Nor may a prosecutor pursue a theft charge other than

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2. Section 459 generally defines the crime of burglary.
shoplifting when all the elements of shoplifting, including intent upon entry, are present. (§ 459.5, subd. (b).)

Section 954 “permits the charging of the same offense on alternative legal theories, so that a prosecutor in doubt need not decide at the outset what particular crime can be proved by evidence not yet presented.” (People v. Ryan (2006) 138 Cal.App.4th 360, 368.) Section 459.5 limits a prosecutor’s charging discretion under section 954 with respect to crimes where the defendant enters a commercial establishment during regular business hours with the intent to commit larceny. Section 459.5 does not preclude the filing of an alternate charge of petty theft, when the evidence may not demonstrate the defendant entered the commercial establishment with the intent to commit larceny as required for shoplifting. The prosecution should not be precluded from charging different offenses based upon the evidence that may be adduced at trial.

As for effectuating the voters’ intent, our construction of section 459.5, subdivision (b) does effectuate the voters’ intent. The voters gave shoplifting a narrower, or more specific, definition than under common law by requiring entry into the commercial establishment with intent, as opposed to any theft. The Gonzales court stated that section 459.5 provides a specific definition of shoplifting and in doing so, “it creates a term of art, which must be understood as it is defined, not in its colloquial sense.” (Gonzales, supra, 2 Cal.5th at p. 871.) Section 459.5’s definition of shoplifting “as an entry into a business with intent to steal, rather than as the taking itself,” is a deviation from the “colloquial understanding of that term.” (Gonzales, at p. 871.)

The requirement of intent upon entry could easily have been omitted from the statutory language, but was not. We will not construe the entry with intent language in section 459.5 as surplusage without meaning. (People v. Valencia (2017) 3 Cal.5th 347, 357.)

Where uncertainty exists as to the meaning of statutory language, “consideration should be given to the consequences that will flow from a particular interpretation.” (People v. Valencia, supra, 3 Cal.5th at p. 358.) To adopt Lopez’s interpretation of section 459.5 and preclude alternate charging in all instances where shoplifting is charged would have the unforeseen consequence the People complain of on appeal—forcing the prosecutor to choose at the charging stage when evidence of intent is weak and allowing a defendant to avoid liability for his or her criminal conduct.

Precluding the prosecutor from filing a charge for petty theft with a prior when the evidence adduced at the preliminary hearing may not establish the necessary intent upon entry for shoplifting would lead to the absurd result that criminal conduct would go unpunished because a prosecutor was restricted to charging only shoplifting when an element of that offense potentially could not be proven. We do not be-

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3. The common definition of shoplifting as found in Webster’s Third New International Dictionary (1981) at page 2101, is “the stealing of goods on display in a store.”

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No Ineffective Assistance of Counsel

The standard of review when questioning whether a defendant received effective representation is well established. “In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel’s performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. [Citation.] To demonstrate deficient performance, defendant bears the burden of showing that counsel’s performance ‘ “fell below an objective standard of reasonableness . . . under prevailing professional norms.” ’ [Citation.] To demonstrate prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel’s deficient performance, the outcome of the proceeding would have been different.” (People v. Mickel (2016) 2 Cal.5th 181, 198.)

As we have concluded the prosecutor was not prohibited from charging Lopez both with shoplifting and petty theft with a prior, Lopez has failed to demonstrate that defense counsel’s failure to object to the addition of the petty theft with a prior charge was either deficient performance or prejudicial.

DISPOSITION

The judgment is affirmed.

Smith, J.

WE CONCUR: Poochigian, Acting P.J., Ellison, J. †

† Retired judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.