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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LAC TO,

Defendant and Appellant.

H041961

(Santa Clara County

Super. Ct. Nos. C1360654, C1365217)

Defendant Lac To settled two criminal cases in May 2014 by pleading no contest to several charges, including felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and felony petty theft with three or more priors (Pen. Code, § 666, subd. (a)).¹ The trial court suspended imposition of sentence and placed To on probation.

After the passage of Proposition 47, the Safe Neighborhoods and Schools Act (hereafter Proposition 47),² To filed a petition under section 1170.18 for recall and resentencing of the felony convictions. However, To contested the need to go through the petition process for resentencing, arguing that having received probation he was not “currently serving a sentence” within the meaning of the statute. He argued instead that he was entitled to have his convictions reduced to misdemeanors by operation of law

¹ Unspecified statutory references are to the Penal Code.

² Enacted by the voters on November 4, 2014 (Prop. 47, as approved by voters, Gen. Elec., Nov. 4, 2014).

under the retroactivity principle of *Estrada*.³ The trial court rejected this argument and granted To's petition.

On appeal, To contends the trial court erred in requiring him to proceed by petition under section 1170.18. To also asserts error in the trial court's failure to resentence him after redesignating his two felony convictions as misdemeanors and failure to specify the misdemeanor for the petty theft with priors conviction.

We find that To, as a probationer, was subject to the petitioning procedures specified by section 1170.18 but conclude that To's other issues on appeal have merit and must be addressed by a remand to the trial court.

I. BACKGROUND

A. FACTS

We briefly summarize the underlying facts as presented in the charging documents and the petition for modification of terms of probation, filed January 21, 2015.

Case No. C1360654

California Highway Patrol officers initiated a traffic stop on May 24, 2013, of a vehicle traveling at about 50 miles per hour in a 65-mile-per-hour zone, weaving in the lane, and braking erratically. The driver, later identified as Lac To, admitted having a beer at a friend's house and smoking cocaine about three hours earlier. To performed poorly on a series of field sobriety tests and showed signs of impairment. Officers discovered what appeared to be two nuggets of rock cocaine on To's person and several more nuggets in the driver-side compartment of the vehicle.

Case No. C1365217

To entered a Target store in San Jose on September 2, 2013, placed multiple items from the electronics display in his pockets and waistband, and exited the store without paying for the merchandise. Target's loss prevention personnel detained To outside of

³ *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

the store and placed him under citizen's arrest until the police arrived. To already had multiple prior theft convictions.

B. PROCEEDINGS

To was charged by complaint in case No. C1360654 with felony possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a); count 1), misdemeanor being under the influence (*id.*, § 11550, subd. (a); count 2), misdemeanor driving under the influence of drugs (Veh. Code, § 23152, subd. (a); count 3), misdemeanor driving under a suspended license (*id.*, § 14601.1, subd. (a); count 4), and possession of marijuana while driving (*id.*, § 23222, subd. (b); count 5, an infraction). The complaint alleged two prior convictions within the meaning of Health and Safety Code section 11550. A second complaint charged To in case No. C1365217 with felony petty theft with three or more prior theft convictions (§ 666, subd. (a))⁴ and alleged a prior prison term commitment (§ 667.5, subd. (b)).

On May 19, 2014, To entered into a negotiated disposition that settled both cases. In case No. C1360654, To pleaded no contest to counts 1 through 4 and admitted the prior convictions. In case No. C1365217, he pleaded no contest to petty theft with priors (count 1) and admitted the prior prison allegation.

On June 17, 2014, the court suspended imposition of sentence and placed To on formal probation for three years in both cases, conditioned on serving one year in county jail, which could be completed through a Salvation Army program, and on other terms. About two months later, the court summarily revoked probation in both cases and issued a bench warrant after To's alleged failure to appear at appointments as ordered and alleged failure to comply with his program requirements.

⁴ As discussed *post*, section II.C, section 666 was later amended by Proposition 47.

On November 20, 2014, To filed an “Application for Misdemeanor Designation/Petition for Resentencing” pursuant to section 1170.18. Per the form, To alleged that he had suffered no disqualifying convictions and was “still serving a sentence on the felony count(s).” To’s counsel also filed written argument that a person on probation is not “currently serving a sentence” within the meaning of section 1170.18, subdivision (a), and therefore need not submit to the petition process, but should be entitled to retroactive application of Proposition 47 “by operation of law.” The trial court later confirmed that To had not waived his objection to the petition process by filing the form as directed by the clerk’s office.

On November 25, 2014, To admitted violating probation in both matters. The trial court reinstated probation in case No. C1360654, reinstated and terminated probation in case No. C1365217, and set both matters for resentencing under Proposition 47.

At a hearing on December 19, 2014, the prosecution and defense debated “what it means to be currently serving a sentence under the new Penal Code Section [1170.18].” Defense counsel on behalf of To and other defendants⁵ argued that the phrase “currently serving a sentence” must be read in conjunction with the reference to a “judgment of conviction,” thus excluding orders of probation, which are considered final judgments “only for the limited purpose of filing appeal,” not for recall of sentence under Proposition 47. Defense counsel urged the probationers should be entitled to a reduced sentence without the necessity of a petition. As argued, to interpret an order of probation as the equivalent of “currently serving a sentence” within the meaning of section 1170.18 would conflict with the language of the statute and create “a host of problems” in the implementation of Proposition 47, including making misdemeanor reclassification

⁵ The deputy public defender argued the issue on behalf of defendants in nine cases, including To’s cases, in an effort to clarify the county’s approach to Proposition 47 in such circumstances.

discretionary for probationers and subjecting probationers to state parole supervision. The People responded that the “commonsense” understanding of probation is as a sentence and should be viewed that way in consideration of the voters’ intent for Proposition 47, thus requiring probationers to follow the petition process set forth in section 1170.18.

The trial court issued a written order on December 23, 2014, and an amended order on January 20, 2015, rejecting the argument that a probationer with imposition of sentence suspended “need not petition for recall of sentence nor be subjected to a dangerousness assessment, but . . . still . . . benefit from ‘misdemeanor conversion by operation of law’—something for which the Act does not provide.” The court concluded based on the “apparent intent of the voters” that To and the other defendants were each “ ‘currently serving a sentence’ within the meaning of section 1170.18(a) and must petition for recall of sentence and resentencing under that subdivision” in order to procure relief under Proposition 47.

On January 21, 2015, the trial court designated count 1 in both of To’s cases as misdemeanors and ordered that probation remain revoked. To filed this timely appeal.

II. DISCUSSION

A. APPLICABILITY OF PETITIONING PROCEDURE UNDER SECTION 1170.18

Proposition 47 reclassified specified drug and theft offenses as misdemeanors, including both felony offenses to which To pleaded no contest. Among the changes enacted, Proposition 47 created a new resentencing provision to afford relief to persons already convicted of the specified offenses, unless committed by certain ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091, 1093.)

Section 1170.18, subdivision (a) states that a person “currently serving a sentence” for a felony conviction, who would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of the offense, “may petition for a recall of sentence before the

trial court that entered the judgment of conviction in his or her case to request resentencing” Section 1170.18, subdivision (a) thus creates a mechanism for a person “currently serving a sentence” for a qualifying conviction to petition the trial court for relief under Proposition 47. If the court finds “the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).)

To contends that as a probationer he is not “currently serving a sentence” within the meaning of section 1170.18, subdivision (a) and not subject to the petitioning procedure. Rather, he claims that he may obtain the relief offered by Proposition 47 under the retroactivity principle of *Estrada*. As we will explain, retroactive application of Proposition 47 is relevant here only if we agree with To that a probationer is not “currently serving a sentence” and therefore not subject to the petition process for recall of sentence and resentencing.⁶

A statute’s application—prospective or retroactive—is in the first instance a matter of legislative intent. (*People v. Brown* (2012) 54 Cal.4th 314, 319 (*Brown*).) The “default rule” is that absent an express retroactivity provision, “ ‘a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.’ ” (*Ibid.*, quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208-1209; § 3.) In *Estrada*, the court created a

⁶ Several cases pending before the California Supreme Court address the retroactive application of Proposition 47 under *Estrada*. (See, e.g., *People v. DeHoyos* (2015) 238 Cal.App.4th 363, review granted Sept. 30, 2015, S228230; *People v. Delapena* (2015) 238 Cal.App.4th 1414, review granted Oct. 28, 2015, S229010; *People v. Valenzuela* (2016) 244 Cal.App.4th 692, 707, review granted Mar. 30, 2016, S232900; *People v. Davis* (2016) 246 Cal.App.4th 127 (*Davis*), review granted July 13, 2016, S234324.)

“contextually specific qualification to the ordinary presumption that statutes operate prospectively: When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.” (*Brown, supra*, 54 Cal.4th at p. 323, fn. omitted; *Estrada, supra*, 63 Cal.2d at pp. 742-748.) But “[t]he rule in *Estrada* . . . is not implicated where the Legislature clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 793.)

To recognize the saving clause exception to the *Estrada* rule of retroactivity and appears to concede that subdivisions (a) and (f) of section 1170.18 operate as the equivalent of a saving clause for “persons currently serving a sentence for a conviction and those with a completed sentence.” But he argues that as a probationer with imposition of sentence suspended, he falls under neither. To cite *In re May* (1976) 62 Cal.App.3d 165 (*May*) as support for the proposition that retroactive application of statutory relief is appropriate here.

In *May*, the appellate court considered retroactive application of a statutory amendment reducing a felony drug possession offense to a misdemeanor. (*May, supra*, 62 Cal.App.3d at p. 167.) The amendment had taken effect after proceedings in the case were suspended and the defendant was placed on probation. (*Ibid.*) The court applied the rationale of *Estrada*, finding that “[s]ince the proceedings were suspended, no final judgment was entered for the purposes of this case. [Citation.] Thus, the rationale of *Estrada* applies to this case because the amendatory statute became effective after the commission of the act but before the judgment of conviction was final.” (*Id.* at p. 169.)

While the court in *May* found the probationer’s judgment of conviction was not final, the court did not have reason to address the issue of an express or implied saving clause, which we find determinative here. The First District Court of Appeal in *Davis*,

supra, 246 Cal.App.4th 127, review granted,⁷ explained the operation of section 1170.18 as follows: “In the case of Proposition 47, the electorate spoke with exceptional precision about the intended retroactive application of the changes to California criminal law at issue here. Persons ‘currently serving a sentence’ for a conviction of a crime reduced from a felony to a misdemeanor by Proposition 47 are entitled to the benefit of the statutory changes, but only to the extent and under the conditions specified by section 1170.18, which governs the retroactive application of these changes. (§ 1170.18, subd. (a).) A person who has ‘completed his or her sentence’ for such a crime is similarly entitled to a reduction of the conviction from a felony to a misdemeanor, again subject to the statutory procedure. (*Id.*, subd. (f); see *id.*, subd. (g).)” (*Davis, supra*, at pp. 136-137, review granted.)

By way of comparison, courts have held that the “functional equivalent of a saving clause” was included in Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act), which similarly created a resentencing petition process under section 1170.126 for qualifying individuals serving indeterminate life sentences. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 172 (*Yearwood*)). The court in *Davis* deemed section 1170.18 of Proposition 47 “identical to the sentence modification provisions of Proposition 36” as it pertains to determining retroactivity. (*Davis, supra*, 246 Cal.App.4th at p. 137, review granted.)

We agree with *Davis* that section 1170.18 denotes a clear intent for the retroactive application of Proposition 47 for the classes of persons specified by the statute. Section 1170.18 expressly states the procedures for defendants who are “currently serving” a sentence for a qualifying conviction (§ 1170.18, subd. (a)) or who “ha[ve] . . .

⁷ Under the recently amended California Rules of Court, rule 8.1105(e)(1)(B), as of July 1, 2016, grant of review by the California Supreme Court does not affect the appellate court’s certification of the opinion for publication.

completed” a sentence (*id.*, subd. (f)) in order to seek relief from Proposition 47. Like the resentencing petition process of the Reform Act discussed in *Yearwood*, the petitioning procedure created by section 1170.18 is “the sole remedy available” for defendants seeking to benefit from the relief provided by Proposition 47. (Cf. *Yearwood, supra*, 213 Cal.App.4th at p. 172.) Subdivisions (a) and (f) of section 1170.18 therefore operate as the functional equivalent of a saving clause from the otherwise prospective application of the statute for the classes of persons identified by those subdivisions.

We turn to whether To was “currently serving a sentence” within the meaning of section 1170.18, subdivision (a). This is an issue of statutory interpretation.

“In construing statutes adopted by the voters, we apply the same principles of interpretation we apply to statutes enacted by the Legislature. [Citation.] ‘“The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.”’ (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) We begin with the language of the statute, to which we give its ordinary meaning and construe in the context of the statutory scheme. If the language is ambiguous, we look to other indicia of voter intent.” (*People v. Johnson* (2015) 61 Cal.4th 674, 682.)

To argues that “currently serving a sentence for a conviction” refers to a sentence where the trial court has actually entered a “judgment of conviction,” as that phrase is also used in subdivision (a) of section 1170.18 to require a defendant to “petition for a recall of sentence before the trial court that entered the judgment of conviction.” He asserts that this interpretation finds support in pertinent statutory and case authority. As our Supreme Court has held, when a trial court suspends imposition of sentence and places the defendant on probation, “no judgment is then pending against the probationer, who is subject only to the terms and conditions of the probation. [Citations.] The probation order is considered to be a final judgment only for the “limited purpose of taking an appeal therefrom.” ’ ’ (*People v. Scott* (2014) 58 Cal.4th 1415, 1423 (*Scott*),

quoting *People v. Howard* (1997) 16 Cal.4th 1081, 1087 (*Howard*); see § 1237, subd. (a) [order granting probation is a “final judgment” only for purposes of appeal].)

To argues that his interpretation is further supported by numerous statutory references that appear to distinguish imposition of sentence from probation. (See, e.g., § 1170, subd. (a)(3) [prison sentence differentiated from “any other disposition provided by law, including . . . probation,”]; § 1203, subd. (a) [defining “ ‘probation’ ” as “the suspension of the imposition or execution of a sentence and the order of conditional and revocable release in the community”]; § 1203.4, subd. (a)(1) [separately referring to “serving a sentence for any offense” or “on probation for any offense”].) He also points to language in section 1170.18 that appears to contemplate actual imposition of a prison sentence. (See, e.g., § 1170.18, subd. (d) [imposing one year of parole supervision for resentenced petitioners, subject to the trial court’s discretion]; *id.*, subd. (o) [defining a “resentencing hearing” under the statute as a postconviction release proceeding].)

Finally, To argues that imposing the petitioning procedure on probationers would contradict the stated purpose of Proposition 47 to “[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession” (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subd. (3), p. 70) by subjecting probationers to the heightened dangerousness standard under section 1170.18, subdivision (b) despite the fact that public safety is taken into account in the grant of probation, and by imposing on probationers the parole supervision provision under section 1170.18, subdivision (d) and the firearm ban under section 1170.18, subdivision (k).

The People do not respond to these arguments on statutory interpretation. However, we note that other courts have addressed this issue and found the relevant language in section 1170.18, subdivision (a) to be ambiguous, requiring consideration of other indicia of the voters’ intent. (*Davis, supra*, 246 Cal.App.4th at p. 139, review granted; *People v. Garcia* (2016) 245 Cal.App.4th 555, 558, fn. 2 (*Garcia*).)

In *Garcia*, the trial court suspended imposition of sentence and placed the defendant on felony probation for her conviction for possession of methamphetamine. (*Garcia, supra*, 245 Cal.App.4th at p. 557.) The trial court later rejected Garcia’s petition to reduce the conviction to a misdemeanor pursuant to Proposition 47, on the ground she was ineligible because she “ ‘has not been sentenced.’ ” (*Ibid.*) The People conceded on appeal, and a panel of this court agreed, that the trial court had erred. (*Ibid.*) After examining the statutory language and ballot material, this court concluded that the voters of Proposition 47 intended to include felony probation as a sentence subject to the petitioning provisions of section 1170.18. (*Garcia, supra*, at p. 558.)

So too in *Davis*, the trial court suspended imposition of sentence and granted probation following the defendant’s felony drug possession conviction. (*Davis, supra*, 246 Cal.App.4th at p. 132, review granted.) Like here, the defendant argued that he was not currently serving a sentence for purposes of filing a recall and resentencing petition under section 1170.18 and rather sought to redesignate his conviction under the retroactivity principle of *Estrada*. (*Davis, supra*, at p. 133.) After addressing the defendant’s retroactivity arguments, discussed *ante*, the court concluded that a defendant placed on probation is “within the class of persons covered by section 1170.18, subdivision (a).” (*Id.* at p. 143.)

To’s arguments do not persuade us to depart from the reasoning of this court in *Garcia* and of the First District in *Davis*. We find the phrase “currently serving a sentence” as used in section 1170.18 to be ambiguous, given the range of uses and meanings attributable to it. As To has demonstrated, statutes and case law commonly invoke distinctions between a sentence and probation, or probation and a final judgment of conviction. Indeed in *Davis*, the court observed that “the phrase ‘serving a sentence,’ when used within the law, generally refers to serving a term of confinement, and it is *contrasted* with a defendant’s being placed on probation.” (*Davis, supra*, 246 Cal.App.4th at p. 139, review granted; see also *Howard, supra*, 16 Cal.4th at p. 1092

[probation is “neither ‘punishment’ (see § 15) nor a criminal ‘judgment’ (see § 1445)” but “an act of clemency in lieu of punishment”]; *People v. Rosbury* (1997) 15 Cal.4th 206, 211 [defendant on probation was not “already serving” his sentence for purposes of applying three strikes law]; *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796 [although “order granting probation is ‘deemed to be a final judgment’ for the limited purpose of taking an appeal . . . it does not have the effect of a judgment for other purposes”].)

But it is equally true that “the term ‘sentence’ can also be understood to refer more generally to criminal sanction, whether by probation, prison term, or otherwise, and the relevant phrase from section 1170.18 can be interpreted to mean, in effect, ‘currently subject to judicially imposed sanction’ as a result of a felony conviction.” (*Davis, supra*, 246 Cal.App.4th at p. 139, review granted.) This usage aligns with the plain meaning or dictionary definition of the term “ ‘sentence.’ ” (*Ibid.*, quoting Merriam-Webster’s Collegiate Dict. (11th ed. 2003) p. 1134 [“ ‘one formally pronounced by a court or judge in a criminal proceeding and specifying the punishment to be inflicted upon the convict’ and ‘the punishment so imposed’ ”].) Various appellate court decisions reflect this more colloquial usage by referring to a “sentence” in connection with a grant or reinstatement of probation. (*Davis, supra*, at p. 140, fn. 5 [listing judicial references to probation as a “sentence,” “ ‘sentencing option,’ ” “ ‘sentence choice,’ ” and “ ‘form of sentence’ ”]; see also *In re DeLong* (2001) 93 Cal.App.4th 562, 571 [“an order granting probation and suspending imposition of sentence is a form of sentencing”].) This is, in fact, the interpretation adopted in *Garcia, supra*, 245 Cal.App.4th 555, which we noted earlier held that a person on felony probation has been “sentenced” within the meaning of Proposition 47 and is entitled to petition for resentencing under section 1170.18. (*Garcia, supra*, at p. 559.)

It is not clear from the language of the statute that the portion of section 1170.18, subdivision (a) directing the defendant to “petition for a recall of sentence before the trial

court that entered the *judgment of conviction* in his or her case . . .” (italics added) imbues the phrase “currently serving a sentence” with the meaning that To urges. That there is “no judgment” pending against a probationer when the trial court suspends imposition of sentence, as articulated in *Howard, supra*, 16 Cal.4th at page 1087 and as later applied in *Scott, supra*, 58 Cal.4th at page 1423, does not eliminate the countervailing notion that at least for purposes of an appeal, an order granting probation is deemed to be a “judgment of conviction.” (§ 1237.) Thus the argument that the statute refers to a person currently serving a sentence for a conviction where the trial court has entered a judgment of conviction “merely shifts the focus from the ambiguity of ‘sentence’ to the ambiguity of ‘judgment.’ . . . Because Proposition 47 does not tell us what type of judgment the electorate had in mind, the argument does not move us any closer to a resolution.” (*Davis, supra*, 246 Cal.App.4th at p. 140, review granted.)

Nor do the references in subdivisions (d) or (o) of section 1170.18 to completion of sentence or to postconviction release proceedings elucidate the electorate’s intended meaning of “serving a sentence” as used in subdivision (a). These provisions apply to defendants who have served a term in prison but “are not inconsistent with a conclusion that probationers are entitled to petition under section 1170.18”; they are instead “merely inapplicable to such petitioners.” (*Davis, supra*, 246 Cal.App.4th at p. 140, review granted.) And although To contends that to subject probationers with no disqualifying convictions to the heightened dangerousness review would lead to absurd consequences, subdivision (b) of section 1170.18 merely grants the trial court receiving the petition under subdivision (a) the discretion to determine whether “resentencing the petitioner would pose an unreasonable risk of danger to public safety” (§ 1170.18, subd. (b)) and lists criteria that the trial court may consider in exercising its discretion.

Because the statutory language is ambiguous as to whether section 1170.18, subdivision (a) applies to probationers, we refer to other indicia of voter intent. (*People v. Johnson, supra*, 61 Cal.4th at p. 682; *Robert L. v. Superior Court* (2003) 30 Cal.4th

894, 900-901.) *Garcia* examined the ballot materials for Proposition 47 and concluded that “the voters regarded probation as one of the options within a sentencing procedure” (*Garcia, supra*, 245 Cal.App.4th at p. 558.) This was based in part on the analysis of the legislative analyst referring “to offenders who are ‘sentenced’ to supervision by a county probation officer while indicating that both jail time for eligible offenders and the caseloads of probation officers would be reduced by including felony probation as a disposition eligible for resentencing under section 1170.18.” (*Ibid.*)

Davis similarly found it likely, based on the legislative analysis, that “the electorate viewed ‘serving a sentence’ more broadly than serving a term of confinement.” (*Davis, supra*, 246 Cal.App.4th at p. 141, review granted.) The court explained: “In a background discussion of ‘Felony Sentencing,’ the analyst discussed commitment to state prison, commitment to county jail, and placement on probation. [Citation.] All of these options were presented as ways in which ‘[o]ffenders convicted of felonies can be sentenced.’ [Citation.] Similarly, in discussing ‘Misdemeanor Sentencing,’ the analyst stated, ‘Under current law, offenders convicted of misdemeanors may be sentenced to county jail, county community supervision, a fine, or some combination of the three.’ [Citation.] A voter who reviewed the official ballot pamphlet therefore had reason to believe that ‘serving a sentence’ for a felony included placement on probation, as well as a term of confinement.” (*Ibid.*)

Garcia also noted that “[n]othing in the text of the initiative, the legislative analysis, or the arguments for and against it indicate an intent to distinguish between a prison sentence and felony probation, or between a grant of probation after suspending imposition of sentence and an order imposing sentence but suspending its execution.” (*Garcia, supra*, 245 Cal.App.4th at p. 559.) And because the population of “ ‘nonserious, nonviolent’ ” offenders who Proposition 47 was intended to reach “would encompass many who were granted probation,” *Garcia* concluded that “[t]o deprive those defendants

of the benefit of the reduced penalty for their offenses would create an incongruity the voters would not have either anticipated or approved.” (*Ibid.*)

Davis also looked more broadly to the purposes and underlying public policy of Proposition 47 and concluded that the “more inclusive” definition of “ ‘currently serving a sentence’ ” (*Davis, supra*, 246 Cal.App.4th at p. 142, review granted) better meets “ ‘ ‘ ‘the ostensible objects to be achieved . . . ’ ’ ’ ” by the statute. (*Id.* at p. 141.) Given that “[t]he provision in question was intended to apply the changes effected by the proposition to persons who had already suffered felony convictions for crimes now declared to be misdemeanors” (*id.* at p. 142), the *Davis* court reasoned that the electorate likely intended “to make all persons who were subject to judicial sanction under a felony conviction eligible for recall of sentence under subdivision (a) of section 1170.18, rather than only those persons who were actually confined.” (*Ibid.*)

In urging retroactive application of Proposition 47 to probationers, To refers extensively to the penal policy behind the initiative to require misdemeanors for low-level theft and drug possession offenses, and the fiscal policy of “sav[ing] significant state corrections dollars on an annual basis.” (Voter Information Guide, *supra*, text of Prop. 47, § 3, subds. (3), (6), p. 70.) He argues that requiring probationers to petition for recall and resentencing under section 1170.18 contravenes these purposes and undermines the promised cost savings by mandating resentencing hearings under a heightened dangerousness standard and by inundating the parole system with probationers. Based on the analysis of the legislative analyst, which stated that the resentencing and parole provisions “would temporarily increase the state parole population by a couple thousand parolees over a three-year period” and “temporarily offset a portion of the above prison savings” (Voter Information Guide, *supra*, Prop. 47, Analysis by the Legislative Analyst, p. 36), To argues it is highly unlikely that the electorate intended that probationers convicted of petty theft and drug possession

crimes—whose numbers may be in the hundreds of thousands⁸—be placed on parole after their felony offenses were reduced to misdemeanors.

We concluded earlier that it is not inconsistent with the apparent intent of the electorate for the statutory language to grant the trial court discretion in determining whether “resentencing the petitioner would pose an unreasonable risk of danger to public safety” (§ 1170.18, subd. (b)) and to provide for those petitioners who have served time in prison to receive credit for time served and be subject to parole—the latter determination which also is expressly left to the trial court’s discretion (*id.*, subd. (d)). The consequences that To suggests will arise from including probationers within the scope of section 1170.18 are not, in our view, clearly contrary to the legislative scheme enacted by the voters. (Cf. *Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105 [“Courts may . . . disregard even plain language which leads to absurd results or contravenes *clear evidence of a contrary legislative intent.*”] (italics added).)

Moreover, nothing in the language of Proposition 47 or the ballot materials indicates an intent to distinguish between persons convicted of qualifying felony offenses who received a prison term as opposed to probation. “Proposition 47 makes no provision for the resentencing of any defendant without the conditions imposed by section 1170.18.” (*Davis, supra*, 246 Cal.App.4th at p. 143, review granted.) We agree with *Davis* that there is no basis to infer the granting of “essentially automatic recall of sentence to probationers” while persons sentenced to prison proceed via the provisions of section 1170.18. (*Davis, supra*, at p. 143.) We therefore continue to abide by this court’s conclusion in *Garcia* that the terms of section 1170.18, subdivision (a) “apply to all those with felony dispositions, including those placed on probation who otherwise meet the

⁸ To estimates the adult probation population based on data from a law review article. (See Feinstein, *Reforming Adult Felony Probation to Ease Prison Overcrowding: An Overview of California S.B. 678* (2011) 14 Chap. L. Rev. 375, 378-379.)

conditions specified in the statutory scheme.” (*Garcia, supra*, 245 Cal.App.4th at p. 559.)

B. PROBATION REVOCATION

In granting To’s petition on January 21, 2015, the trial court designated the felony count in each case as a misdemeanor. But the trial court did not resentence To or set further calendar dates, stating only that probation remains revoked. As the record reflects: “[Defense Counsel]: [T]his is probation to remain revoked. [*Sic.*] And we are supposed to designate as a misdemeanor in the case ending in 654, I believe. [¶] THE COURT: Probation remains revoked. Count 1 is redesignated to a misdemeanor. [¶] [Defense Counsel]: And in 217 also, Your Honor. [¶] [Prosecutor]: Both cases should be redesignated. [¶] THE COURT: Yes. Count 1 is redesignated in docket ending 217 also. Probation remains revoked.” The clerk’s minutes in each case likewise reflect only redesignation of count 1 under Proposition 47 and that probation remains revoked.

To obtained a certificate of probable cause on February 10, 2015, challenging the indefinite revocation of his probation. He contends the trial court acted in excess of its jurisdiction by ordering his probation to remain revoked without setting a further hearing date. He asserts there is no indication of when or how probation was revoked following the November 25, 2014 court date when he admitted violating probation—at which time the trial court reinstated probation in case No. C1360654, reinstated and terminated probation in case No. C1365217, and set the matters for resentencing under Proposition 47. In essence, To argues that there was never a revocation of probation, summary or otherwise, following the reinstatement of probation in case No. C1360654 and reinstatement and termination of probation in case No. C1365217, thus the court acted without jurisdiction on January 21, 2015, when it ordered revocation indefinitely.

The People concede the trial court failed to reinstate probation or place To on parole after redesignating his felonies as misdemeanors. We agree the concession is appropriate.

Section 1203.2 authorizes the court to summarily revoke probation “if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her supervision” (§ 1203.2, subd. (a).) The revocation tolls the running of the period of supervision. (*Ibid.*) The California Supreme Court has explained that “ ‘summary revocation gives the court jurisdiction over and physical custody of the defendant and is proper if the defendant is accorded a subsequent formal hearing in conformance with due process.’ ” (*People v. Leiva* (2013) 56 Cal.4th 498, 505.) The purpose of the formal hearing following summary revocation “ ‘is to give the defendant an opportunity to require the prosecution to prove the alleged violation occurred and justifies revocation.’ ” (*Ibid.*) Summary revocation and section 1203.2’s tolling provision do not permit “trial courts to retain jurisdiction to modify or extend a probationary term indefinitely.” (*People v. Freidt* (2013) 222 Cal.App.4th 16, 23.) This court has rejected the “status of perpetual revocation” created by the trial court’s failure to “exercise[] . . . its statutory options” following revocation. (*People v. Sem* (2014) 229 Cal.App.4th 1176, 1192 (*Sem*).)

Here, the trial court held no formal probation violation hearing, and the record does not indicate a future court date for such a hearing. Rather, To admitted violating probation at the November 25, 2014 court date, and the trial court reinstated probation in one case and reinstated and terminated probation in the other. The trial court was not authorized to order a term in which To’s probation was revoked for an indefinite period. Section 1170.18, subdivision (b) itself directs the court, upon determining that the petitioner satisfies the criteria for a reduction in sentence and does not “pose an unreasonable risk of danger to public safety,” to recall the felony sentence and resentence the petitioner to a misdemeanor in accordance with the specified statutes. Because the

trial court, like in *Sem, supra*, 229 Cal.App.4th at page 1192, “exercised none of its statutory options,” whether by reinstating probation, modifying it, or terminating it altogether, remand is appropriate.

C. RESENTENCING OF PETTY THEFT WITH PRIORS

Although the trial court designated To’s felony count in each case as a misdemeanor, the court did not state the Penal Code section that applies to the redesignated offenses. To argues as to case No. C1365217 that his conviction for petty theft with priors (§ 666) should have been designated a section 459.5 or section 490.2 conviction, because section 666, as amended, no longer applies to him. He argues that the issue is not forfeited on appeal despite the failure to object in the trial court, because the proper misdemeanor designation relates to a pure question of law based on undisputed facts. The People do not disagree and suggest that upon remand for resentencing, To can seek clarification from the trial court.

Proposition 47 amended section 666 to apply only to persons “who [are] required to register pursuant to the Sex Offender Registration Act, or who ha[ve] a prior violent or serious felony conviction, as specified in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667, or ha[ve] a conviction pursuant to subdivision (d) or (e) of Section 368.” (§ 666, subd. (b); *id.*, at subd. (a); Voter Information Guide, *supra*, text of Prop. 47, § 10, p. 72.) Proposition 47 also added sections 459.5 and 490.2 to the Penal Code which describe the offenses of “shoplifting” and “petty theft,” respectively. (Voter Information Guide, *supra*, text of Prop. 47, §§ 5, 8, pp. 71-72; see also *People v. Contreras* (2015) 237 Cal.App.4th 868, 890 (*Contreras*).)

To argues that section 666, as amended, does not apply to him because there are no allegations against him of any such prior violent or serious felony convictions or convictions requiring him to register as a sex offender. (See § 666, subd. (b).) As he points out, the relevant charging document alleges only a petty theft with three or more priors of property from Target, a commercial establishment.

The resentencing determination on a section 1170.18 petition is inherently factual, particularly as here, where the trial court must determine the factual circumstances of the offense. (See *Contreras, supra*, 237 Cal.App.4th at p. 892 [discussing factual determination required in order for defendant to qualify for resentencing under new shoplifting statute, § 459.5].) Similarly here, the determination whether the section 666 conviction may be resentenced under section 459.5 or section 490.2 is factual. (See § 459.5 [“shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open . . . where the value of the property that is taken . . . does not exceed nine hundred fifty dollars (\$950)”]; § 490.2 [“obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars (\$950) shall be considered petty theft . . .”].) We note that To has not established, and we have not discerned from the record, the value of property taken from Target, and whether it amounted to less than \$950. Accordingly, while the amended section 666 may not apply to To, this court is not in a position to determine whether his former section 666 offense may be resentenced as shoplifting under section 459.5, or as petty theft under section 490.2, both misdemeanors.

As discussed *ante*, section II.B., this matter must be remanded for resentencing. The trial court at that time will have the opportunity to state its intent in designating the section 666 felony as a misdemeanor in case No. C1365127.

III. DISPOSITION

The order of January 21, 2015, is reversed. Upon remand, the court shall specify the appropriate misdemeanor redesignation in case No. C1365127 and resentence To in accordance with Penal Code section 1170.18, subdivisions (b) through (e).

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Grover, J.