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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDREW GARCIA, Defendant and Appellant.	B276149 (Los Angeles County Super. Ct. No. KA111703)

APPEAL from an order of the Superior Court of Los Angeles County, Rogelio G. Delgado, Judge. Affirmed.

James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen A. Kenealy, Acting Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Andrew Garcia appeals the trial court's denial of his petition to designate his felony conviction of Vehicle Code section 10851 a misdemeanor pursuant to Proposition 47, the Safe Neighborhoods and Schools Act. Because Garcia committed his offense and was convicted long after Proposition 47's effective date, and because Vehicle Code section 10851 is not an offense eligible for redesignation under Penal Code section 1170.18,[1] we affirm the trial court's order.

BACKGROUND AND PROCEDURAL HISTORY[2]

On January 30, 2016, El Monte Police Department Officer Avila saw Garcia driving a blue 1995 Honda Accord. Avila made a traffic stop after Garcia failed to use his turn signal. Garcia stopped in the middle of the street, exited the car without putting it in park, and charged toward the officer, "yelling incoherently." Garcia ignored Avila's command that he lie on the ground. Believing Garcia was going to physically attack him, Avila subdued Garcia with a kick and handcuffed him. A search of Garcia's person revealed a baggie containing a substance resembling methamphetamine. Avila also found a "shaved" key in the Honda's ignition. Once in custody, Garcia stated, " '[It's] stolen, but I didn't take it. My friend told me to drive it, I don't steal cars no more.' " The Honda's owner had not given Garcia permission to drive or take the vehicle.

On February 2, 2016, the People filed a complaint charging Garcia with unlawfully driving or taking a vehicle, a felony (Veh. Code, § 10851, subd. (a)); receiving stolen property, a felony

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1 All further undesignated statutory references are to the Penal Code.

2 We glean the facts from the police report.

(§ 496d, subd. (a)); possession of a controlled substance, methamphetamine, a misdemeanor (Health & Saf. Code, § 11377); and delaying or obstructing a peace officer, a misdemeanor (§ 148, subd. (a)(1)).

On February 17, 2016, Garcia pled no contest to the Vehicle Code section 10851 charge as part of a plea agreement.[3] Defense counsel stipulated to a factual basis for the plea based on the police reports. In accordance with the negotiated disposition, the trial court suspended imposition of sentence and placed Garcia on formal probation for three years, on condition he serve 180 days in jail, with credit for 37 days. The remaining three counts were dismissed pursuant to the terms of the plea agreement.

On May 9, 2016, the trial court revoked Garcia's probation and issued a bench warrant for his arrest because he had failed to appear for his probation orientation appointment. Garcia was subsequently arrested. The hearing on the probation violation was ultimately continued to July 27, 2016.

On June 22, 2016, defense counsel filed a document entitled "Defendant's felony charge is now a misdemeanor charge." Therein, Garcia asserted that his crime was a misdemeanor because the value of the stolen vehicle was under $950, and he had no disqualifying prior convictions. Attached to the document were copies of the police report, which listed the value of the Honda as $500, and a police "Vehicle Report," which stated the Honda's owner valued the car at $900.

On July 13, 2016, the trial court considered Garcia's request for reduction of the offense to a misdemeanor, apparently

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[3] Counsel stipulated that the complaint be deemed an information for purposes of the plea.

treating it as the functional equivalent of a petition for redesignation pursuant to section 1170.18.[4] While acknowledging that the law on the issue was unsettled, defense counsel argued that, based on language in section 490.2, violation of Vehicle Code section 10851 was a misdemeanor when the vehicle stolen was valued at $950 or less. The People countered that Vehicle Code section 10851 was "not an enumerated charge" subject to Proposition 47 redesignation. The trial court denied the petition, but observed that it would revisit the issue should the law be clarified in Garcia's favor.

On July 14, 2016, Garcia filed a notice of appeal stating he "appeals from the judgment rendered on July 13, 2016." (Cf. *Teal v. Superior Court* (2014) 60 Cal.4th 595.)

DISCUSSION

1. *Proposition 47 and the standard of review*

On November 4, 2014 the voters enacted Proposition 47, which went into effect the following day. (*People v. Morales* (2016) 63 Cal.4th 399, 404; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47 reclassified certain drug and theft offenses from felonies or wobblers to misdemeanors, unless committed by ineligible defendants. (*People v. Lewis* (2016) 4 Cal.App.5th 1085, 1090; *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091; *People v. Lynall*, *supra*, at p. 1108.) One of the mechanisms by which Proposition 47 reduced theft crimes to misdemeanors was the enactment of

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[4] The June 22, 2016 pleading referred to Garcia as both defendant and petitioner, defense counsel referred to the pleading as "a Prop. 47 motion," and the court's July 13, 2016 minute order refers to a "Proposition 47 petition" hearing.

section 490.2, which provides that thefts of property valued at $950 or less are petty theft.

Proposition 47 also enacted section 1170.18, which created a procedure whereby an eligible defendant who has suffered a felony conviction of one of the reclassified crimes can petition to have it designated a misdemeanor. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879; *People v. Lynall*, *supra*, 233 Cal.App.4th at p. 1109.) A defendant who is currently serving a felony sentence for an offense now classified as a misdemeanor by Proposition 47 may petition to recall the sentence and request resentencing. (§ 1170.18, subd. (a); *People v. Rivera*, *supra*, 233 Cal.App.4th at pp. 1092, 1099.) If the petitioner meets the statutory eligibility criteria, he or she is entitled to resentencing unless the trial court determines, in its discretion, that resentencing would pose an unreasonable risk of danger to public safety. (§ 1170.18, subd. (b).) Eligible persons who have already completed their sentences may file an application to have their felony convictions designated as misdemeanors, without regard to their current dangerousness. (*Id*., subds. (f), (g), (h); *People v. Lewis*, *supra*, 4 Cal.App.5th at pp. 1088-1089, 1092; *People v. Abdallah* (2016) 246 Cal.App.4th 736, 744; *People v. Rivera*, *supra*, at p. 1099.)

Where, as here, a trial court's denial of a Proposition 47 petition involves only questions of statutory interpretation, we independently review its ruling. (*People v. Prunty* (2015) 62 Cal.4th 59, 71; *People v. Camp* (2015) 233 Cal.App.4th 461, 467; *People v. Sherow*, *supra*, 239 Cal.App.4th at p. 878.) When interpreting a ballot initiative, our primary purpose is to ascertain and effectuate the voters' intent. (*People v. Park* (2013) 56 Cal.4th 782, 796; *People v. Briceno* (2004) 34 Cal.4th 451, 459;

Robert L. v. Superior Court (2003) 30 Cal.4th 894, 901.) We apply the same principles that govern statutory construction. Thus, we look first to the language of the statute, giving the words their ordinary meaning. (*Park*, at p. 796; *Briceno*, at p. 459.) The plain meaning of the statutory language controls, unless it would lead to absurd results the electorate could not have intended. (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) The statutory language must be construed in the context of the statute as a whole and the overall statutory scheme. (*Briceno*, at p. 459; *Robert L.*, at p. 901.) When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. (*People v. Hendrix* (1997) 16 Cal.4th 508, 512; *People v. Vasquez* (2016) 247 Cal.App.4th 513, 519.)

2. *Garcia's appeal is operative despite the absence of a certificate of probable cause*

Preliminarily, we address the People's contention that Garcia's appeal must be dismissed because he failed to obtain a certificate of probable cause. A defendant may not appeal from a judgment of conviction upon a plea of guilty or no contest unless he has obtained a certificate of probable cause. (§ 1237.5; *People v. Cuevas* (2008) 44 Cal.4th 374, 379; *People v. Shelton* (2006) 37 Cal.4th 759, 766; see Cal. Rules of Court, rule 8.304(b).) Despite this broad language, the California Supreme Court has held two types of issues may be raised following a guilty or no contest plea without the need for a certificate: issues relating to the validity of a search and seizure pursuant to section 1538.5, subdivision (m), and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. (*People v. Shelton*, *supra*, at p. 766; *People v. Buttram* (2003) 30 Cal.4th 773, 780;

People v. French (2008) 43 Cal.4th 36, 43.) In making this determination, we look to the substance of the appeal. " ' "[T]he crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.] Hence, the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.' [Citation.]" (*People v. French*, at p. 44; *People v. Cuevas* at p. 381; *People v. Buttram* at pp. 781-782.) The certificate requirement is strictly applied. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098; *People v. Zuniga* (2014) 225 Cal.App.4th 1178, 1183.) When an appeal is predicated solely on grounds requiring a certificate and the defendant has failed to obtain one, the appeal is not operative and we must dismiss it. (*People v. Mendez*, *supra*, at p. 1095; *People v. McEwan* (2007) 147 Cal.App.4th 173, 175.)

Here, the People urge that because Garcia pleaded no contest to a felony and agreed to a specific sentence as part of his plea bargain, his challenge to the trial court's ruling on his Proposition 47 petition was, in substance, an attack on the validity of the plea. Accordingly, since Garcia failed to obtain a certificate of probable cause, his challenge on appeal is unreviewable.

Certainly, we agree with the People that any purported changes Proposition 47 made to the Vehicle Code were already in effect when Garcia committed the crimes, was charged with the crimes, pled no contest to one of the charges, and admitted a factual basis for the felony plea.

In the unique circumstances presented here, however, no certificate of probable cause was required. Garcia is not appealing his conviction; he is appealing the trial court's denial of

his Proposition 47 petition. Garcia did not appeal his conviction immediately after his plea, entered on February 17, 2016. Instead, several months after his conviction, and after his probation was revoked, Garcia requested redesignation of his offense pursuant to Proposition 47. The trial court and the parties treated this request as a petition under section 1170.18. Indeed, Garcia did not ask the trial court to allow him to withdraw his plea. In addition, the People never suggested below that Garcia's Proposition 47 petition was unreviewable because he was attempting to unravel a negotiated plea deal, or because he should have appealed from the underlying judgment of conviction. The People's arguments on appeal are new, and should have been raised by them before the trial court in the first instance. (See *People v. Tillman* (2000) 22 Cal.4th 300, 302 [People's objection on appeal was waived by their failure to object to omission at the time of sentencing].) Ultimately, we find that it is the trial court's denial of the Proposition 47 petition, not the judgment of conviction, which Garcia appeals. His notice of appeal states he is appealing the "the judgment rendered on July 13, 2016," that is, the date the trial court denied his Proposition 47 request. Section 1237.5 does not apply to Proposition 47 petitions; it applies only to a judgment of conviction upon a plea of guilty or nolo contendere, or to a revocation of probation following an admission of violation. (Cf. *People v. Maultsby* (2012) 53 Cal.4th 296, 298-299 [defendant could challenge his admission he had suffered a prior "strike" conviction without obtaining a certificate of probable cause].) In sum, we find that Garcia's challenge to the denial of his Proposition 47 petition is reviewable by this court.

3. *The trial court properly denied the Proposition 47 petition*

Garcia argues that the trial court erred by denying his petition. He reasons that under section 490.2, theft of any property valued at $950 or less is misdemeanor petty theft. Because the Honda he drove or stole was valued at less than $950, he urges that the offense must be reduced to a misdemeanor. We disagree, for at least two reasons. Section 1170.18 does not apply to defendants who committed their crimes after Proposition 47 became effective, and in any event violation of Vehicle Code section 10851 is not a qualifying offense for purposes of Proposition 47.

a. *Because Garcia committed his offense long after Proposition 47's effective date, he is not eligible to have it redesignated as a misdemeanor under section 1170.18*

First, section 1170.18 does not provide for resentencing or redesignation of an offense where the defendant committed his crime after Proposition 47's effective date. Section 1170.18's resentencing and redesignation provisions are purely retrospective in nature. (See generally *People v. Gonzales* (2016) 6 Cal.App.5th 1067, 1070 [§ 1170.18 provides for "retrospective relief for defendants who were serving or had completed a sentence for a previous conviction that would have been a misdemeanor"], review granted Feb. 15, 2017, S240044; *People v. Johnston* (2016) 247 Cal.App.4th 252, 256, review granted July 13, 2016, S235041.)

This conclusion is compelled by the statutory language. As originally enacted, and as in effect at all relevant times, former section 1170.18, subdivision (a) provided: "A person currently serving a sentence for a conviction, whether by trial or plea, of a

felony or felonies *who would have been guilty of a misdemeanor under the act that added this section . . . had this act 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 in accordance with Sections 11350, 11357, or 11377 of the Health and Safety Code, or Section 459.5, 473, 476a, 490.2, 496, or 666 of the Penal Code, as those sections have been amended or added by this act."[5] (Italics added.) Subdivision (f) provided that "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies *who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense*, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors." (§ 1170.18, subd. (f), italics added.) Thus, section 1170.18, by its plain terms, does not apply to persons who committed their crimes after Proposition 47 took effect. The language "had this act been in effect at the time of the offense" is incompatible with a contrary conclusion and demonstrates that only those persons whose crimes were committed before Proposition 47's effective date are authorized to bring a section 1170.18 petition or application.

Indeed, applying section 1170.18 to persons like Garcia – who committed their crimes and were sentenced *after* Proposition 47 became effective – would make no sense. Crimes committed

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[5] Section 1170.18 was subsequently amended to apply only to persons "who on November 5, 2014," were serving such a sentence. (Stats. 2016, ch. 767, § 1, effective Jan. 1, 2017.)

after Proposition 47's effective date were defined as either misdemeanors or felonies by Proposition 47 itself; no retrospective action was necessary. Put differently, where a defendant committed his or her crime after Proposition 47's effective date, there is no need for resentencing or redesignation; the offense was already required to be charged and sentenced in accordance with the law as amended by Proposition 47.

Thus, section 1170.18 did not authorize Garcia to petition for resentencing and reclassification. He already had the benefit of Proposition 47's amendments to the law when he committed his crimes and when he pleaded no contest. If he believed his offense was only a misdemeanor, he had the option to put the People to their proof at a preliminary hearing and trial, rather than plead no contest. Instead, he opted to plead and cannot, at this juncture, attempt to circumvent that choice with an unauthorized section 1170.18 petition.

b. *Vehicle Code section 10851 is not a qualifying offense under Proposition 47*

Alternatively, even if Garcia's Proposition 47 petition was authorized by section 1170.18, the trial court properly denied it because Vehicle Code section 10851 is not a qualifying offense for purposes of Proposition 47's resentencing provisions.

Garcia argues that although Vehicle Code section 10851 is not listed in section 1170.18, a reasonable interpretation of Proposition 47's provisions requires the conclusion that Vehicle Code section 10851 offenses are "functionally theft offenses as described in the newly added . . . section 490.2 and are thus included within the provisions of Proposition 47." In other words, Garcia contends that because Vehicle Code section 10851 can be violated by the theft of a vehicle, and because section 490.2

makes theft of any property valued at $950 or less a misdemeanor, his conviction is eligible for resentencing.

The appellate courts are split on the question of whether Vehicle Code section 10851 convictions are eligible for proposition 47 relief, and our Supreme Court is currently considering the issue. (See, e.g., *People v. Sauceda* (2016) 3 Cal.App.5th 635, 651 [Veh. Code, § 10851 convictions not eligible for Proposition 47 resentencing], review granted Nov. 30, 2016, S237975; *People v. Johnston*, *supra*, 247 Cal.App.4th at p. 255, rev.gr. [same]; *People v. Van Orden* (2017) 9 Cal.App.5th 1277, 1283 [Proposition 47 applies to theft-based Veh. Code, § 10851 convictions when the vehicle's value is $950 or less, but does not apply to such convictions when based on driving], review granted June 14, 2017, S241574; *People v. Page* (2015) 241 Cal.App.4th 714, review granted Jan. 27, 2016, S230793; *People v. Haywood* (2015) 243 Cal.App.4th 515, review granted Mar. 9, 2016, S232250; *People v. Ortiz* (2016) 243 Cal.App.4th 854, review granted Mar. 16, 2016, S232344; *People v. Solis* (2016) 245 Cal.App.4th 1099, review granted June 8, 2016, S234150.)

To begin, a brief examination of the relevant statutes defining theft is helpful. Section 484 defines theft. In pertinent part it provides: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another . . . is guilty of theft." (§ 484, subd. (a).) An element of the crime of theft is the intent to permanently deprive the owner of the property. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1117; *In re Jesus O.* (2007) 40 Cal.4th 859, 867; *People v. Avery* (2002) 27 Cal.4th 49, 52.) Prior to Proposition 47's enactment, section 487, defined grand theft by reference to the value of the property stolen, with three exceptions: where the property

(1) was taken from the person of another; (2) was an automobile; and (3) was a firearm. In those cases, the value of the property was irrelevant. "For all other grand theft crimes under Penal Code section 487—those defined by the value of the property—a petty theft charge was required where the value of the property stolen did not exceed a statutory cap." (*People v. Sauceda*, *supra*, 3 Cal.App.5th at p. 649, rev.gr.)[6]

Proposition 47 altered this scheme by enactment of section 490.2. As relevant here, section 490.2, subdivision (a) provides: "Notwithstanding Section 487 or any other provision of law defining grand theft, 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 and shall be punished as a misdemeanor," unless the defendant has suffered specified prior convictions. Thus, by enacting Proposition 47, voters changed the former scheme to "eliminate grand theft charges in all instances where the value of the stolen property supporting the theft charge was below $950." (*People v. Sauceda*, *supra*, 3 Cal.App.5th at p. 649, rev.gr.)[7]

Unlike section 484, Vehicle Code section 10851 does not require the intent to permanently deprive the owner of the

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[6] As noted *ante*, review has been granted in *Sauceda* and certain other opinions cited herein. These authorities are citable as persuasive authority under the new publication rules that went into effect on July 1, 2016. (See Cal. Rules of Court, rules 8.1105, 8.1115.)

[7] Currently, theft of a firearm is a felony regardless of value. Section 490.2 was amended by Proposition 63 to provide that it does not apply to theft of a firearm. (§ 490.2, subd. (c); Prop. 63, § 11.1, Gen. Elec. Nov. 8, 2016.)

property.[8] It " 'proscribes a wide range of conduct.' " (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) There "are two ways of violating [Vehicle Code] section 10851: the defendant can either 'drive' or 'take' the vehicle." (*People v. Smith* (2013) 57 Cal.4th 232, 242.) Thus, a "person can violate section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' " (*Garza*, *supra*, at p. 876.) In *Garza*, our Supreme Court held, prior to Proposition 47's passage and in a different context, that "[u]nlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction and may not also be convicted under section 496(a) of

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[8] Vehicle Code section 10851, subdivision (a), provides: "Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or pursuant to subdivision (h) of Section 1170 of the Penal Code or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment." Other subdivisions of the statute address, inter alia, the theft or unauthorized driving of specific types of vehicles and punishment for recidivists. (Veh. Code, § 10851, subds. (b), (e).)

receiving the same vehicle as stolen property. On the other hand, unlawful *driving* of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete (for convenience, we will refer to this as posttheft driving). Therefore, a conviction under section 10851(a) for posttheft driving is not a theft conviction and does not preclude a conviction under section 496(a) for receiving the same vehicle as stolen property." (*Id.* at p. 871.)

Garcia urges that violations of Vehicle Code section 10851 fall within section 1170.18's purview because, although Vehicle Code section 10851 is not listed therein, section 490.2 is. He argues that a vehicle is "any property" – the language used by section 490.2 – and Vehicle Code section 10851 can be violated by theft of a vehicle. (See *Garza*, *supra*, 35 Cal.4th at p. 871.)

While Garcia's argument has superficial appeal, we are not persuaded. Proposition 47 did not directly amend Vehicle Code section 10851, but left its provisions intact. As Garcia acknowledges, section 1170.18 fails to expressly include Vehicle Code section 10851 as one of the enumerated offenses eligible for resentencing. Nor does section 490.2 expressly mention Vehicle Code section 10851. Instead, it directly references only the grand theft statute, section 487.

These omissions are significant. When the drafters of a statute "intend[ ] for a statute to prevail over all contrary law," they "typically signal[ ] this intent by using phrases like 'notwithstanding any other law' or 'notwithstanding other provisions of law.' [Citations.]" (*In re Greg F.* (2012) 55 Cal.4th 393, 406-407.) Here, the electorate included such "notwithstanding" language in regard to section 487 and statutes defining grand theft, but *not* to Vehicle Code section 10851.

Vehicle Code section 10851 does not define grand theft; it defines the offense of unlawfully driving or taking a vehicle. Had the electorate intended section 490.2 to apply to Vehicle Code section 10851, it could easily have drafted section 490.2 to read "notwithstanding Vehicle Code section 10851, Section 487, or any provision of law defining grand theft." That the provision approved by the voters did not include this or similar language suggests section 490.2 was not intended to encompass Vehicle Code section 10851.

Furthermore, application of section 490.2 to Vehicle Code section 10851 is problematic because, unlike statutes prohibiting theft alone, Vehicle Code section 10851 is much broader. It applies to defendants who have committed posttheft driving, an offense that does not require an intent to steal, is not a theft offense, and therefore is not covered by section 490.2. Thus, section 490.2 cannot apply to all violations of Vehicle Code section 10851. (See *People v. Sauceda*, *supra*, 3 Cal.App.5th at p. 644, rev.gr.) "For this reason, the sole fact that one has violated Vehicle Code section 10851 does not demonstrate one has obtained any property by theft under the ordinary meaning of the term. . . . Regardless of the underlying conduct supporting the conviction, the statutory requirements for conviction lack all the elements of common law theft because a violation of Vehicle Code section 10851 can be fully and completely satisfied whether or not the required intent for theft has been proven." (*Id.* at pp. 644-645.) "[I]f one's conviction does not necessarily require a conviction for theft, the property has not been obtained by theft," and "none of the crimes covered by California's theft statute" have necessarily been committed. (*Id.* at p. 645.)

That some defendants' Vehicle Code section 10851 convictions are based on the "theft" form of the offense, rather than the posttheft driving form of the offense, does not compel the conclusion that Proposition 47 is applicable to Vehicle Code section 10851. As *People v. Sauceda* explained: "*Garza*'s conclusion that one factual scenario supporting a conviction under Vehicle Code section 10851 is a theft offense does not indicate that Proposition 47 was intended to modify the punishment for that type of conviction. To the contrary, it further suggests that no modification was intended. It is presumed that the electorate is aware of cases bearing on enacted statutory schemes. [Citation.] . . . Presuming the electorate was aware that Vehicle Code section 10851 did not constitute a theft offense in all instances, there appears little persuasive value in *Garza*'s analysis when seeking support for the conclusion that Proposition 47 intended to modify the punishment for Vehicle Code section 10851. Despite precedent demonstrating that Vehicle Code section 10851 extended to conduct constituting both theft and nontheft offenses, punishing them equally, the drafters of Proposition 47 chose not to directly modify the punishment scheme under Vehicle Code section 10851, or otherwise connect their amendments with the statute." (*People v. Sauceda*, *supra*, 3 Cal.App.5th at p. 647, rev.gr.)

Moreover, it is settled that a specific statute prevails over a general statute on the same subject. (*People v. Ahmed* (2011) 53 Cal.4th 156, 163; *People v. Betts* (2005) 34 Cal.4th 1039, 1058; *Velasquez v. Superior Court* (2014) 227 Cal.App.4th 1471, 1475; Code Civ. Proc., § 1859.) Here, Vehicle Code section 10851 is the more specific statute. Subdivision (a) provides that violation of the statute is generally a "wobbler," that is, the offense may be

punished alternatively as a felony or a misdemeanor. (See *People v. Park*, *supra*, 56 Cal.4th at p. 789 & fn. 4.) Vehicle Code section 10851, subdivision (b) makes the offense a felony and prescribes specific terms when a defendant takes or unlawfully drives specialized vehicles under certain circumstances, i.e., ambulances and distinctively marked law enforcement or fire department vehicles on emergency calls, and vehicles that have been modified for the use of a disabled veteran or any other disabled person and display a distinguishing placard or plate. Subdivision (e) provides that recidivists are punishable as set forth in section 666.5. Section 666.5 specifies that a person who, having been previously convicted of a felony violation of Vehicle Code section 10851 or other statutes, and is "subsequently convicted of *any of these offenses*" shall be punished as a felon. (§ 666.5, subd. (a), italics added.) Section 490.2 conflicts with these provisions. For example, a defendant who stole one of the vehicles enumerated in subdivision (b) of Vehicle Code section 10851, if valued at $950 or less, could be sentenced only as a misdemeanant, rather than to the two, three, or four year term specified.[9] A recidivist who stole a vehicle worth less than $950 could not be punished for his or her recidivism, since under section 666.5 both the current and prior crimes must be felonies.

Garcia argues that the ballot materials accompanying Proposition 47 indicate the voters intended violations of Vehicle Code section 10851 to be encompassed within section 490.2. He

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[9] We acknowledge it is unlikely, as a practical matter, that a police car, fire vehicle, or ambulance being used on an emergency call would ever fall beneath the $950 threshold. The same is not necessarily true in regard to a vehicle modified for a disabled person.

urges that by passage of Proposition 47, the electorate sought to ensure "prison spending is focused on violent and serious offenses" and to "maximize alternatives for nonserious, nonviolent crime." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 2, p. 70.) He points out that violation of Vehicle Code section 10851 is not defined as a serious or violent felony, and therefore excluding it from Proposition 47's sweep would not further the purposes of the initiative.

But the ballot materials did not inform voters that Proposition 47 would apply to Vehicle Code section 10851. The voter guide explained the initiative would reduce the penalties for specific offenses, namely grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession. (Voter Information Guide, Gen. Elec., *supra*, analysis of Prop. 47 by Legis. Analyst, pp. 35-36; see *People v. Sauceda*, *supra*, 3 Cal.App.5th at p. 641, rev.gr.) Vehicle Code section 10851 was not listed. (See *Sauceda* at p. 648.) The initiative's "Purpose and Intent" section stated that resentencing was available to persons "currently serving a sentence for any of the offenses listed herein that are now misdemeanors." (Voter Information Guide, *supra*, text of Prop. 47, § 3, subd. (4), p. 70.) The ballot materials thus did not suggest other, unlisted crimes – such as Vehicle Code section 10851 – would be reduced to misdemeanors. The stated intent to focus prison spending on violent and serious offenses cannot override the fact the electorate was informed that only certain offenses would be affected by the initiative. " '[W]e may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.' [Citation.]" (*People v. Park*, *supra*, 56 Cal.4th at p. 796.)

In arguing for his interpretation of Proposition 47, Garcia invokes the "rule of lenity," which compels a court to resolve true statutory ambiguities in a defendant's favor. (See *People v. Oates* (2004) 32 Cal.4th 1048, 1068; *People v. Lee* (2003) 31 Cal.4th 613, 627.) However, that rule applies as a tie-breaking principle where two reasonable interpretations of a statute stand in relative equipoise, and a reviewing court can do no more than guess at what the Legislature, or electorate, intended. (*People v. Manzo* (2012) 53 Cal.4th 880, 889; *People v. Ramirez* (2014) 224 Cal.App.4th 1078, 1085-1086.) The rule does not apply every time two or more reasonable interpretations of a penal statute exist, however. (*People v. Manzo*, *supra*, at p. 889.) There must be " 'an egregious ambiguity and uncertainty to justify invoking the rule.' " (*People v. Avery*, *supra*, 27 Cal.4th at p. 58.) In our view, there are not two equally reasonable interpretations of Proposition 47 at issue here.

Garcia further argues an interpretation of law that excludes Vehicle Code section 10851 from Proposition 47's reach would violate equal protection principles. In his view, persons convicted of violating Vehicle Code section 10851 are similarly situated to those convicted of auto theft (§§ 484, 487), and there is no rational basis for disparate treatment. In fact, he contends, Vehicle Code section 10851 is a lesser included offense of theft when the defendant did not specifically intend to permanently deprive the owner of possession.

We discern no equal protection violation. "To prevail on an equal protection challenge, a party must first establish that ' "the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." ' [Citation.] If such a classification of similarly situated individuals exists and

does not affect a fundamental right or a legally suspect class, the next inquiry is whether the classification is rationally related to a legitimate government interest. If so, it must be upheld against an equal protection challenge: 'Where, as here, a disputed statutory disparity implicates no suspect class or fundamental right, "equal protection of the law is denied only where there is no 'rational relationship between the disparity of treatment and some legitimate governmental purpose.' " [Citation.] "This standard of rationality does not depend upon whether lawmakers ever actually articulated the purpose they sought to achieve. Nor must the underlying rationale be empirically substantiated. [Citation.] While the realities of the subject matter cannot be completely ignored [citation], a court may engage in ' "rational speculation" ' as to the justifications for the legislative choice [citation]. It is immaterial for rational basis review 'whether or not' any such speculation has 'a foundation in the record.' " . . . If a plausible basis exists for the disparity, courts may not second-guess its " 'wisdom, fairness, or logic.' " ' " (*People v. Zamudio* (2017) 12 Cal.App.5th 8, 16; *Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.) "To mount a successful rational basis challenge, a party must ' "negative every conceivable basis" ' that might support the disputed statutory disparity." (*Johnson v. Department of Justice*, *supra*, at p. 881.)

The classification challenged here does not involve a suspect class or a fundamental right. A defendant does not have a fundamental interest in a specific term of imprisonment, or in the designation a particular crime receives. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 838; *People v. Varner* (2016) 3 Cal.App.5th 360, 368, review granted Nov. 22, 2016, S237679, review

dismissed Aug. 9, 2017.) Thus, the rational basis standard applies.

Applying the rational basis test, our Supreme Court has explained that "neither the existence of two identical criminal statutes prescribing different levels of punishments, nor the exercise of a prosecutor's discretion in charging under one such statute and not the other, violates equal protection principles. [Citation.]" (*People v. Wilkinson*, *supra*, 33 Cal.4th at p. 838.) A defendant therefore may not complain that he or she was charged with a felony violation under a statute providing for a higher punishment, even where another identical statute prescribes a lesser punishment. (*Ibid.*) "[N]umerous factors properly may enter into a prosecutor's decision to charge under one statute and not another, such as a defendant's background and the severity of the crime, and so long as there is no showing that a defendant 'has been singled out deliberately for prosecution on the basis of some invidious criterion,' that is, ' "one that is arbitrary and thus unjustified because it bears no rational relationship to legitimate law enforcement interests[,]" ' the defendant cannot make out an equal protection violation. [Citation.]." (*Id.* at pp. 838-839; see *People v. Romo* (1975) 14 Cal.3d 189, 197 ["a car thief may not complain because he may have been subjected to imprisonment for more than 10 years for grand theft of an automobile [citations] when, under the same facts, he might have been subjected to no more than 5 years under the provisions of section 10851 of the Vehicle Code"].)

Applying these principles in the Proposition 47 context, courts have rejected equal protection arguments like the one Garcia makes here. "[T]he disparity between the former punishment for 'grand theft auto' and unlawful taking or driving

is not a basis for finding a violation. [Citation.] Even if we assume the two categories of crimes are situated similarly, there is a rational basis for the distinction in treatment: The electorate was not obligated to extend relief under the initiative to *all* similar conduct. It could instead move in an incremental way, gauging the effects of this sea change in penal law. Particularly given the insignificant numbers of vehicle thefts at issue in light of vehicle prices at present, the electorate could conclude this would not work an injustice. . . . [T]he electorate could expect a prosecutor to exercise discretion to charge an unlawful taking or driving of a $950 vehicle as a misdemeanor. [Citation.]" (*People v. Johnston*, *supra*, 247 Cal.App.4th at p. 259, rev.gr.; see *People v. Sauceda*, *supra*, 3 Cal.App.5th at pp. 651-653, rev.gr.; cf. *People v. Acosta* (2015) 242 Cal.App.4th 521, 527-528 [electorate could rationally extend misdemeanor punishment to some nonviolent offenses but not to others, as a means of testing whether Proposition 47 has a positive or negative impact on the criminal justice system; the Legislature has broad discretion to proceed in an incremental and uneven manner without necessarily engaging in arbitrary and unlawful discrimination].)

Further, assuming arguendo that violation of Vehicle Code section 10851 is sometimes a lesser included offense of grand theft, this fact does not compel the conclusion Garcia seeks. One offense is necessarily included in another if all its elements are also elements of the greater offense, such that the greater cannot be committed without also committing the lesser. (*People v. Bailey* (2012) 54 Cal.4th 740, 748; *People v. Sanchez* (2001) 24 Cal.4th 983, 988.) "[T]here is no reason why a lesser included offense must be punished less severely than the primary offense to which it attaches." (*People v. Sauceda*, *supra*, 3 Cal.App.5th at

p. 651, rev.gr.) A lesser included offense is not necessarily less serious than a greater offense; it simply has fewer statutory elements. (See *People v. Wilkinson*, *supra*, 33 Cal.4th at p. 839 [it is not necessarily irrational to punish a lesser included offense more severely than the greater offense].) "Here, such a scheme could rationally be explained by a desire to seriously punish conduct that may affect vulnerable citizens but may not qualify as theft, such as temporarily taking a vehicle to prevent a victim from fleeing." (*People v. Sauceda*, *supra*, at p. 651.)

Applying these principles here, Garcia has not shown a violation of equal protection requiring a conclusion that Proposition 47 extends to violations of Vehicle Code section 10851 (see *People v. Sauceda*, *supra*, 3 Cal.App.5th at p. 654, rev.gr.), nor has he demonstrated he was singled out based on some invidious criterion. Accordingly, his equal protection challenge fails. The trial court properly denied Garcia's Proposition 47 petition.[10]

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[10] In light of our conclusion, we do not reach the parties' arguments regarding whether the petition was properly denied because Garcia was bound by the terms of his plea agreement.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.