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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSUE VARGAS MORALES,

Defendant and Appellant.

Case No. S SUPREME COURT
FILED

JUL 28 2015

Frank A. McGuire Clerk

Deputy

Fourth Appellate District, Division Three, Case No. G051142
Orange County Superior Court, Case No. 13WF3934
The Honorable Christopher Evans, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
Issue Presented.....	1
Reason for Granting Review.....	1
Statement of the Case and Facts	2
Argument	3
Conclusion	9

TABLE OF AUTHORITIES

	Page
CASES	
<i>In re Ballard</i> (1981) 115 Cal.App.3d 647	3
<i>In re Bush</i> (2008) 161 Cal.App.4th 133	3
<i>In re Sosa</i> (1980) 102 Cal.App.3d 1002	2
<i>People v. Brown</i> (2014) 230 Cal.App.4th 1502	6
<i>People v. Cardwell</i> (2012) 203 Cal.App.4th 876	8
<i>People v. Floyd</i> (2003) 31 Cal.4th 179	3
<i>People v. Hickman</i> (2015) 237 Cal.App.4th 984	1, 5
<i>People v. Park</i> (2013) 56 Cal.4th 782	3
<i>People v. Rubalcava</i> (2000) 23 Cal.4th 322	8
<i>People v. Superior Court (Cervantes)</i> (2014) 225 Cal.App.4th 1007	3
<i>People v. Yearwood</i> (2013) 213 Cal.App.4th 161	6
<i>Quarterman v. Kefauver</i> (1997) 55 Cal.App.4th 1366	3
<i>Robert L. v. Superior Court</i> (2003) 30 Cal.4th 894	3

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

Health & Safety Code

§ 11350, subd. (a)2

Penal Code

§ 1170, subd. (a)(3)3

§ 1170.187

§ 1170.18, subd. (a) 2, 4

§ 1170.18, subd. (b)4

§ 1170.18, subd. (d) passim

§ 1170.18, subd. (m) 2, 5, 6

§ 1170.126, subd. (e)6

§ 1170.126, subd. (k)6

§ 2900.5 1, 2

§ 2900.5, subds. (a) & (c)3

COURT RULES

California Rules of Court

rule 8.5001

rule 8.500(b)(1)1



TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.500 of the California Rules of Court, petitioner, the People of the State of California, respectfully requests this Court grant review of the published decision of the Court of Appeal, Fourth Appellate District, Division Three, in this matter. The panel's opinion reversing the judgment of the Orange County Superior Court, filed June 26, 2015, is attached to this Petition.

ISSUE PRESENTED

Can excess custody credits be used to reduce or eliminate one-year Proposition 47 parole under Penal Code section 1170.18, subdivision (d)?¹

REASON FOR GRANTING REVIEW

Review of this case is necessary to secure uniformity of decision and to settle an important question of law. (Cal. Rules of Court, rule 8.500(b)(1).) The Court of Appeal held that custody credits could be used pursuant to section 2900.5 to reduce parole under section 1170.18, subdivision (d). (Slip opn. at pp. 7-10.) In so doing, the court expressly disagreed with the opinion in *People v. Hickman* (2015) 237 Cal.App.4th 984, 188 Cal.Rptr.3d 417, where that court reached the opposite conclusion. (Slip opn. at pp. 9-10.) Thus, review of this case is necessary to secure uniformity of decision so that trial courts know whether or not to apply credits to parole under section 1170.18 subdivision (d). This is also an important question of law because in most such cases, whether a defendant is supervised or not turns on whether credits can be applied to the parole period under section 1170.18, subdivision (d).

¹ All future undesignated code references are to the Penal Code.

STATEMENT OF THE CASE AND FACTS

On December 22, 2013, appellant was found in possession of a useable quantity of heroin and a syringe used for unlawfully injecting a controlled substance. (CT 17.)

On March 20, 2014, appellant pleaded guilty, as relevant here, to possession of a controlled substance, heroin. (Health & Saf. Code, § 11350, subd. (a).) (CT 1-2, 8; Slip opn. at p. 2.) On April 10, 2014, the trial court imposed a 16-month prison term. (CT 10-11; Slip opn. at p. 2.)

In August 2014, appellant was released from prison into postrelease community supervision (PRCS) for a period of three years. (Slip opn. at p. 2.)

In November 2014, after voters passed Proposition 47, appellant filed a petition for recall of sentence under section 1170.18, subdivision (a), to have his possession of heroin conviction reduced to a misdemeanor. The trial court resentenced appellant to 365 days in jail with time served and ordered him to be placed on parole for one year pursuant to section 1170.18, subdivision (d). (CT 12-13, 24; Slip opn. at p. 2.)

Appellant appealed, contending, among other things, that under section 2900.5, his excess custody credits, known as *Sosa*² credits, should be applied against his parole time. (Slip. opn. at pp. 2, 8.) The Court of Appeal agreed, relying on the general rule that excess custody time is credited against the parole period; the language of section 1170.18, subdivision (m), which states that the section is not intended to diminish or abrogate any rights otherwise available; and the absence of any indication that the voters intended to change the law regarding custody credits. (Slip opn. at pp. 8, 10.)

² *In re Sosa* (1980) 102 Cal.App.3d 1002, 1006.

ARGUMENT

Generally, excess custody credits must be applied to shorten the parole period, and if the excess credits exceed the entire parole period, the prisoner is entitled to be discharged unconditionally. (§§ 1170, subd. (a)(3), 2900.5, subds. (a), (c); *In re Bush* (2008) 161 Cal.App.4th 133, 144; *In re Ballard* (1981) 115 Cal.App.3d 647, 650.) Whether the voters intended for this general rule to apply in Proposition 47 cases is ultimately a question of statutory construction.

The interpretation of a ballot initiative is governed by the same rules that apply in construing a statute enacted by the Legislature. (*People v. Park* (2013) 56 Cal.4th 782, 796.) First, the language of the statute is given its ordinary and plain meaning. (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901.) Second, the statutory language is construed in the context of the statute as a whole and within the overall statutory scheme to effectuate the voters' intent. (*Ibid.*)

Where the statutory language is clear and unambiguous, there is no need for statutory construction or to resort to legislative materials or other outside sources. (*Quarterman v. Kefauver* (1997) 55 Cal.App.4th 1366, 1371.) On the other hand, where the language is ambiguous, a reviewing court will look to "other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*Robert L.*, at p. 900; *People v. Floyd* (2003) 31 Cal.4th 179, 187-188 [ballot pamphlet information is valuable aid in construing the intent of voters].) Ultimately, the reviewing court's duty is to interpret and apply the language of the initiative "so as to effectuate the electorate's intent." (*Robert L.*, at p. 900.) The interpretation of a statute is a question of law that is reviewed independently. (*People v. Superior Court (Cervantes)* (2014) 225 Cal.App.4th 1007, 1013.)

Section 1170.18, subdivision (d), in relevant part, states:

A person who is resentenced pursuant to subdivision (b)³ *shall* be given credit for time served *and shall* be subject to parole for one year following completion of his or her sentence, unless the court, in its discretion, as part of its resentencing order, releases the person from parole.

(Italics added.)

The plain language of section 1170.18, subdivision (d), establishes that a person who is resentenced under this provision is not entitled to have excess custody time credited against the one year term of parole. A person who is resentenced to a misdemeanor under subdivision (b) must be given credit for time served and must serve a one-year parole term if the trial court, in its discretion, decides to impose parole. By using the word “and”

³ Section 1170.18, subdivisions (a) and (b), in relevant part, state:

(a) 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 (“this act”) 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 . . . as those sections have been amended or added by this act.

(b) Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a). If the petitioner satisfies the criteria in subdivision (a), the petitioner’s felony sentence shall be recalled and the petitioner resentenced to a misdemeanor pursuant to Section 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 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety. . . .

the intent was to require that credits be given for time served and for there to be a one-year parole period. This intent was also shown by using the word “shall” twice, once before the credit for time served and again in regard to the one-year parole period.

In its opinion, however, the Court of Appeal rejected this argument, stating the People did not give due consideration to the phrase “subject to,” because the statute only states that a defendant “shall be subject to parole,” not “that the defendant shall *serve* a period of parole.” (Slip opn. at p. 8.) While a defendant is only “subject to” parole because the trial court has discretion whether to impose parole, that does not change the fact that “shall” was used twice to indicate that credits would be given for time served and a one year of parole would be imposed if the trial court, in its discretion, decided to impose it. Thus, under the plain language of section 1170.18, subdivision (d), a person is not given credits against the one year of parole. Accordingly, the Court of Appeal in *People v. Hickman* reached the correct result. (See *People v. Hickman, supra*, 188 Cal.Rptr.3d at pp. 419-420.)

In its contrary ruling that Proposition 47 unambiguously allowed custody credits to be applied to Proposition 47 parole, the Court of Appeal below relied on the general rule that excess custody time is credited against a parole period and on section 1170.18, subdivision (m), which provides, “Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.” (Slip opn. at p. 8.) The Court of Appeal noted it was required to “assume that voters had in mind existing law when they enacted Proposition 47.” (Slip. opn. at p. 8, quoting *People v. Woodhead* (1987) 43 Cal.3d 1002, 1012.) The court concluded, “[T]here is no clear indication the voters intended to change the law on this front; to the contrary, they expressly retained all ‘otherwise available’ remedies.” (Slip. opn. at p. 8, quoting § 1170.18, subd. (m).)

The Court of Appeal was mistaken as to section 1170.18, subdivision (m). The “otherwise available” language in section 1170.18, subdivision (m), harmonizes with section 1170.18, subdivision (d). While the latter subdivision clearly indicates that custody credits cannot be applied against Proposition 47 parole, the former subdivision simply indicates that the provisions of the statute do not foreclose a defendant from seeking other remedies or rights not addressed by the statute. This interpretation of subdivision (m) is consistent with the caselaw addressing identical language in section 1170.126, subdivision (k), Proposition 36, the Three Strikes Reform Act. For example, in *People v. Brown* (2014) 230 Cal.App.4th 1502, the court rejected the argument that the language of section 1170.126, subdivision (k), meant “the Legislature intended to give a trial court the authority to exercise its discretion under section 1385 in determining whether a defendant is eligible to be resentenced under the Reform Act.” (*Id.* at pp. 1512-1513.) The court noted “the plain and commonsense meaning” of another provision of the statute, section 1170.126, subdivision (e), “precludes a trial court from exercising its discretion in the furtherance of justice under section 1385 when determining whether an inmate has satisfied the three criteria set out in that subdivision.” (*Id.* at p. 1513.) Similarly, in *People v. Yearwood* (2013) 213 Cal.App.4th 161, the court held, “Section 1170.126(k) protects prisoners from being forced to choose between filing a petition for a recall of sentence and pursuing other legal remedies to which they might be entitled (e.g., petition for habeas corpus). Section 1170.126(k) does not have any impact in determining if amended sections 667 and 1170.12 operate retroactively.” (*Id.* at p. 178.) Hence, similar to section 1170.126, subdivision (k), section 1170.18, subdivision (m), does not unambiguously allow custody credits to be applied to parole under section 1170.18, subdivision (d), as concluded by the Court of Appeal.

To the extent that section 1170.18 is ambiguous with respect to whether excess custody credits may reduce the one-year parole term, the Voter Information Guide establishes that in voting for Proposition 47, there was no voter intent to decrease, or eliminate, the one-year period of parole by the use of custody credits. Specifically, the Voter Information Guide told voters, "Offenders who are resentenced would be required to be on state parole for one year, unless the judge chooses to remove that requirement." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), Resentencing of Previously Convicted Offenders, p. 36.) The voters were also told, "[T]he resentencing of individuals currently serving sentences for felonies that are changed to misdemeanors would temporarily increase the state parole population by a couple thousand parolees over a three-year period. The costs associated with this increase in the parole population would temporarily offset a portion of the above prison savings." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), State Effects of Reduced Penalties, State Prison and Parole, pp. 36-37.)

Hence, in voting for Proposition 47, voters were told that when an offender was placed on parole, it would be for one year; that resentencing under the proposition would lead to a large increase in parolees; and that costs for those parolees would increase. The voters were not told that credits would be used to offset, or eliminate, the mandated one year parole period. There would have been no reason for voters to expect and vote for a large increase in parolees and the costs associated with that increase, if in fact the vast majority of defendants would have their parole period eliminated by the use of custody credits. Thus, in voting for Proposition 47, there was no voter intent to decrease, or eliminate, the one-year period of parole by the use of custody credits.

Furthermore, to interpret section 1170.18, subdivision (d), to require that credits be used against the one-year parole period would all but render

the one-year parole language surplusage. Namely, in every case in which a defendant serves even the shortest possible prison term, he or she would be entitled to less (and possibly substantially less) than one year of parole. For example, even if a defendant had only served eight months in prison on a 16-month prison term and was on PRCS, that defendant, so long as he or she did not face a limit on credits, would be entitled to the full 16 months of time based on worktime credits. And even if that defendant is given the full 365 days in jail with time served, the defendant would still have four months of excess credits and thus, only serve eight months on parole, which is counter to the one-year parole period mandated in section 1170.18, subdivision (d). Construction of a statute that renders some words surplusage should be avoided. (*People v. Cardwell* (2012) 203 Cal.App.4th 876, 882.)

Finally, interpreting section 1170.18, subdivision (d), to require that credits be used against the one-year parole would lead to the absurd result that people who had been sentenced to more time in prison would serve less time, or no time, on parole. Although it is true that by granting a petition for recall of sentence, the defendant would have moved from being a felon to a misdemeanor, the fact that the defendant had more prison time imposed upon them, for example, two years instead of 16 months, typically would mean that defendant was a worse criminal than a person who received 16 months. Such a defendant who received two years and was on PRCS would be entitled to enough actual and worktime credits that even if the court imposed 365 days, this more culpable criminal would not have to serve any of the one-year parole period. That is an absurd result, and an interpretation that would lead to such a result should be avoided. (*People v. Rubalcava* (2000) 23 Cal.4th 322, 328.)

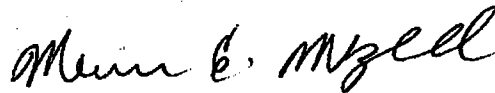
CONCLUSION

For the reasons set forth above, respondent respectfully requests this Court grant review in the present case.

Dated: July 22, 2015

Respectfully submitted,

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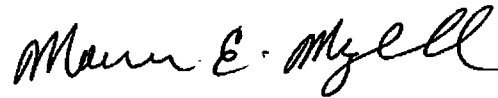
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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13-point Times New Roman font and contains 2,536 words.

Dated: July 22, 2015

KAMALA D. HARRIS
Attorney General of California

A handwritten signature in black ink, reading "Marvin E. Mizell". The signature is written in a cursive style with a large, stylized initial "M".

MARVIN E. MIZELL
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ATTACHMENT

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSUE VARGAS MORALES,

Defendant and Appellant.

G051142

(Super. Ct. No. 13WF3934)

OPINION

Appeal from a postjudgment order of the Superior Court of Orange County, Christopher Evans, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed in part and reversed in part and remanded with directions.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Sean M. Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

In 2014 the voters passed Proposition 47, which reclassified certain offenses from felonies to misdemeanors. Proposition 47 also enacted a procedure whereby a defendant who suffered a felony conviction for one of the reclassified offenses could petition to have the conviction redesignated a misdemeanor. If the defendant is still serving a sentence, the defendant can have the sentence recalled and be given a misdemeanor sentence instead. Defendants who are resentenced are subject to one year of parole unless the court, in its discretion, waives the parole requirement.

Here, in March 2014, defendant pleaded guilty to felony possession of a controlled substance. In April 2014, he was sentenced to 16 months in state prison. In August 2014, he was released to postrelease community supervision (PRCS) for a period of three years. In November 2014, defendant filed a petition to have his sentence recalled and to have his felony conviction reclassified as a misdemeanor. The court recalled his sentence, imposed a jail sentence of time served, and imposed one year of parole.

On appeal, defendant contends he was not still serving a sentence and thus the court had no authority to impose parole, but could only redesignate the conviction from a felony to a misdemeanor. In the alternative, defendant contends his excess custody credits should be counted against his parole time. We disagree with his first contention and conclude he was still serving his sentence when he petitioned to recall the felony conviction. However, we agree he was entitled to credit his excess custody time against his parole. We also agree with defendant's contention that he is entitled to have excess custody days credited against his fines, and thus we remand for a recalculation of his parole period and fines.

DISCUSSION

Defendant Was Subject to One Year of Parole

Proposition 47, “the Safe Neighborhoods and Schools Act” was passed in November 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) “Proposition 47 makes certain drug- and theft-related offenses misdemeanors, unless the offenses were committed by certain ineligible defendants. These offenses had previously been designated as either felonies or wobblers (crimes that can be punished as either felonies or misdemeanors). Proposition 47 (1) added Chapter 33 to the Government Code (§ 7599 et seq.), (2) added sections 459.5, 490.2, and 1170.18 to the Penal Code, and (3) amended Penal Code sections 473, 476a, 496, and 666 and Health and Safety Code sections 11350, 11357, and 11377.” (*Id.* at p. 1091.)

Penal Code section 1170.18 is a resentencing provision that provides two distinct remedies.¹

First, “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 (‘this act’) 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.” (§ 1170.18, subd. (a), italics added.) “A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year following completion of his or her sentence, unless the court, in its

¹ All statutory references are to the Penal Code.

discretion, as part of its resentencing order, releases the person from parole.” (*Id.*, subd. (d).)

Second, “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.)

The question presented by this appeal is whether a person who has completed a prison term but is on PRCS is still “serving a sentence,” such that the court may impose parole, or whether that person has “completed his or her sentence,” such that only redesignation of the conviction is available.

The People contend such a person is still serving a sentence, relying primarily on section 3000, subdivision (a)(1), which states, “A sentence resulting in imprisonment in the state prison pursuant to Section 1168 or 1170 *shall include* a period of parole supervision or postrelease community supervision, unless waived, or as otherwise provided in this article.” (Italics added.)

In contending otherwise, defendant relies primarily on the statute in question, section 1170.18, subdivision (d), which states, “A person who is resentenced pursuant to subdivision (b) shall be given credit for time served and shall be subject to parole for one year *following completion of his or her sentence . . .*” (Italics added.) Defendant argues this language demonstrates that parole is something that occurs after the sentence is complete and is thus not part of the sentence.

At first blush, this may appear to create a contradiction. In fact, however, these uses of “sentence” are reconcilable. A person convicted of a felony and given a prison term receives a period of parole or PRCS as a matter of course. Accordingly, section 3000, which refers to individuals sentenced to state prison — i.e., felons —

includes parole or PRCS as a part of the sentence. By contrast, misdemeanor offenders do not receive a period of parole or PRCS as a matter of course following a jail term, and thus a reference to a misdemeanor sentence would not include a parole or PRCS period. Accordingly, section 1170.18, subdivision (d), refers to the unique parole period added by Proposition 47 as occurring after the *misdemeanor* sentence has been completed. This follows from the plain language of subdivision (d), which applies on its face only to a person who is *resentenced* to a misdemeanor pursuant to the statute.

To interpret section 1170.18, subdivision (a), therefore, we must simply consider which sentence is being referred to — the felony sentence to be recalled or the new misdemeanor sentence. Subdivision (a) permits the resentencing of “[a] person currently serving a sentence for a conviction, whether by trial or plea, *of a felony.*” (Italics added.) Since this refers to the felony sentence, it includes PRCS. And since defendant was still serving PRCS when he filed his petition under section 1170.18, he was still serving his sentence and thus subject to the parole requirement.

Defendant also relies on section 1170, which is part of the same chapter as section 1170.18. Section 1170, subdivision (a)(3), addresses determinate sentencing and provides for the accounting of custody credits using the following language: “In any case in which the amount of preimprisonment credit under Section 2900.5 or any other provision of law is equal to or exceeds any sentence imposed pursuant to this chapter, *the entire sentence* shall be deemed to have been served and the defendant shall not be actually delivered to the custody of the secretary. The court shall advise the defendant that he or she shall serve a period of parole and order the defendant to report to the parole office closest to the defendant’s last legal residence, *unless the in-custody credits equal the total sentence, including both confinement time and the period of parole.*” (Italics added.) Defendant argues this language “contemplates a ‘sentence’ as being the period of confinement not inclusive of [parole or PRCS] and a ‘total sentence’ as being the period of confinement and [PRCS] that follows the term in custody under the applicable law.”

However, defendant's argument omits a modifier. Section 1170 refers to the prison term as not merely the "sentence" but the "entire sentence." It then refers to the prison term plus parole period as the "total sentence." In using the terms "entire sentence" and "total sentence," there is no indication the Legislature meant to create distinct technical definitions. Rather, this simply shows that the word "sentence" can be used in different ways and must be interpreted in context. The context makes plain that the "entire sentence," as used in the statute, refers to the period of incarceration, and that the "total sentence" refers to the period including both time in custody and either parole or PRCS. Additionally, section 1170, subdivision (c), goes on to state, "The court shall also inform the defendant that *as part of the sentence* after expiration of the term he or she may be on parole for a period as provided in Section 3000." (Italics added.) To the extent that section 1170 provides any clear guidance on what the word "sentence" means in isolation, therefore, it suggests "sentence" includes a parole period consistent with section 3000.

Defendant also relies on *People v. Nuckles* (2013) 56 Cal.4th 601 (*Nuckles*). The issue presented in *Nuckles* is whether someone who helped a parolee abscond from parole was an accessory under section 32, which defines an accessory as someone who "after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or *punishment*, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof" (*Nuckles*, at p. 605.) The court concluded that parole is part of the punishment, and thus the defendant was an accessory. (*Id.* at p. 608.) In reaching that conclusion, the court discussed parole in these terms: "[T]he general objectives of sentencing include protecting society, punishing offenders, deterring future crimes, and treating with uniformity those committing the same types of offenses [citations], whereas the objective of parole is, through the provision of supervision and counseling, to assist in the parolee's transition

from imprisonment to discharge and reintegration into society.’ [Citation.] [¶] Although parole constitutes a distinct phase from the underlying prison sentence, a period of parole following a prison term has generally been acknowledged as a form of punishment.” (*Id.* at pp. 608-609.)

Nuckles was not addressing the issue before us. And it merely reinforces the notion that the word “sentence” can be used in different ways and must be interpreted in context. As we have noted above, the context of section 1170.18 is that its reference to a felony sentence includes PRCS, and its reference to a misdemeanor sentence does not. Because defendant was still serving a felony sentence at the time he filed his petition in this case, he was subject to one year of parole after completing his misdemeanor sentence.²

Defendant’s Excess Custody Credits Apply to His Parole Period and Fines

Next, defendant contends that if he is subject to the parole requirement, his excess custody credits should reduce his parole period. We agree.

² Defendant also contends, in the alternative, that the court abused its discretion in imposing parole. However, that argument seems to be based on the faulty premise that defendant’s PRCS was set to expire in less than one year, such that the one year of parole would have made defendant’s period of supervision longer. Arguably, that would be improper under section 1170.18, subdivision (e), which states, “Under no circumstances may resentencing under this section result in the imposition of a term longer than the original sentence.” However, the People filed a request for judicial notice, which we grant, demonstrating that defendant was released on PRCS in August 2014, which was set to expire in August 2017, which is longer than the one year of parole the court imposed. Defendant also contends the court improperly considered previously stricken strikes, but nothing in the record supports that assertion. In addition, defendant filed a request for judicial notice of the online docket for defendant’s underlying offense as well as the plea form defendant executed. We deny defendant’s request for judicial notice as the attached material to the request is not necessary or helpful in resolving this appeal.

As a general rule, excess custody credits (referred to as *Sosa* credits)³ reduce parole. (*In re Ballard* (1981) 115 Cal.App.3d 647, 650 [“section 2900.5 credits may be applied against either or both of the period of incarceration and the parole period”].) And as defendant also notes, section 1170.18, subdivision (m), states, “Nothing in this section is intended to diminish or abrogate any rights or remedies otherwise available to the petitioner or applicant.”

The People contend, however, that applying custody credits to the period of parole is not consistent with the statutory language of section 1170.18, subdivision (d), which states, “A person who is resentenced pursuant to subdivision (b) shall be given credit for time served *and shall* be subject to parole for one year following completion of his or her sentence” (Italics added.) The People contend that use of the words “and shall” indicates the voters’ intent that the defendant serve a parole period notwithstanding any credits. However, the People fail to give due consideration to the phrase “subject to.” The statute does not state that the defendant shall *serve* a period of parole, only that the defendant shall be subject to parole. And as noted above, a person subject to parole is entitled to credit excess custody time against the parole period. “We must assume that the voters had in mind existing law when they enacted Proposition” 47. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1012.) There is no clear indication the voters intended to change the law on this front; to the contrary, they expressly retained all “otherwise available” remedies. (§ 1170.18, subd. (m).)

The People also contend this interpretation would lead to the absurd result that the worst offenders — i.e., those who had been given the longest sentences — would have the least supervision. But “[w]e must exercise caution using the ‘absurd result’ rule; otherwise, the judiciary risks acting as a “super-Legislature” by rewriting statutes to find an unexpressed legislative intent.” (*California School Employees Assn. v. Governing*

³

In re Sosa (1980) 102 Cal.App.3d 1002, 1006.

Bd. of South Orange County Community College Dist. (2004) 124 Cal.App.4th 574, 588.)

And we do not find this result to be so absurd as to warrant a departure from a straightforward interpretation of the language of section 1170.18. The result we reach is not so unusual: all felons are intended to be subject to postrelease supervision as a general rule (§ 3000), yet if they have excess custody credits they are entitled to reduce or even eliminate their parole (§ 2900.5, subs. (a), (c)). Permitting that same result here is even more tolerable than usual because those subject to resentencing have by definition committed a minor offense and do not “pose an unreasonable risk of danger to public safety” under section 1170.18, subdivision (b).

As this opinion was being finalized, the Court of Appeal, Second Appellate District, Division Six filed *People v. Hickman* (June 17, 2015, B260928) ___ Cal.App.4th ___ (*Hickman*), which reached the opposite result and concluded *Sosa* credits do not apply to parole imposed pursuant to section 1170.18. *Hickman* relied on two authorities.

First, it analogized the issue to *People v. Espinoza* (2014) 226 Cal.App.4th 635 (*Espinoza*), which was decided by the same panel. The issue in *Espinoza* was whether *Sosa* credits reduce a period of PRCS, and the court concluded they do not. The *Espinoza* court reasoned that section 2900.5, the statutory basis for *Sosa* credits, applies credits only to “any period of imprisonment and parole,” stating nothing about PRCS. It then noted that section 3451, subdivision (a), which introduced PRCS, states that “Notwithstanding any other law,” most felons (excluding so-called super strikers) will be subject to PRCS. (*Espinoza*, at pp. 638-639.) The *Espinoza* court relied heavily on the phrase “[n]otwithstanding any other law” to conclude the Legislature did not intend for *Sosa* credits to apply to PRCS. (*Id.* at p. 639.)

Espinoza is inapt. Section 1170.18 does not have any phrase similar to “[n]otwithstanding any other law.” To the contrary, it expressly preserves “any rights or remedies otherwise available to the petitioner or applicant.” (*Id.*, subd. (m).) Moreover,

section 2900.5 does not provide for the application of credits to PRCS, but it expressly requires the application of credits to parole. (§ 2900.5, subd. (c).)

The second authority *Hickman* relied on is a treatise. (See Couzens & Bigelow, *the Safe Neighborhoods and School Act* (rev. Feb. 13, 2015) p. 56; <<http://www.courts.ca.gov/documents/Prop-47-Information.pdf>> (Couzens & Bigelow).) *Hickman* quotes Couzens & Bigelow for the proposition that parole supervision under section 1170.18 is “*in addition* to any resentence imposed by the court, and without consideration of any [custody] credit that the petitioner may have earned. . . .” (*Hickman, supra*, ___ Cal.App.4th. ___ [p. 5].) But this quote omits the words that come right before it, which are, “*It appears that* the intent of the initiative is to authorize the one-year period of parole supervision *in addition to*” (Couzens & Bigelow, *supra*, at p. 56, first set of italics added.) In the full context of the quote, therefore, it is clear that the treatise authors do not take a strong stand on the issue. Moreover, the only authorities the treatise authors cite are *Espinoza, supra*, 226 Cal.App.4th 635 and *People v. Tubbs* (2014) 230 Cal.App.4th 578, which addressed the same issue as *Espinoza* and simply relied on *Espinoza* to reach the same conclusion (*Tubs*, at p. 585). For the reasons stated above, we find those authorities inapplicable. Accordingly, because we find the analysis in *Hickman* unpersuasive, we respectfully disagree with its holding.

Defendant’s final contention is that excess custody credits should reduce fines imposed on defendant, and we agree. Section 2900.5, subdivision (a), permits excess custody credits to be “credited to any fine, including, but not limited to, base fines, on a proportional basis, that may be imposed, at the rate of not less than thirty dollars (\$30) per day, or more, in the discretion of the court imposing the sentence.” Section 1170.18 says nothing about fines, and thus credit against applicable fines is a remedy

otherwise available.⁴ (See *People v. Robinson* (2012) 209 Cal.App.4th 401, 406-407 [credits apply only against punitive fines].)

DISPOSITION

The matter is remanded to the trial court with instructions to recalculate defendant's parole period consistently with this opinion, and to apply any excess credits against any applicable fines defendant owes. In all other respects the postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

ARONSON, J.

⁴ Defendant also contends the court should have reduced his \$280 restitution fine and his \$280 PRCS revocation fine, which were the minimum fines for a felony, to \$140, which was the minimum fine for a misdemeanor. (§ 1202.4, subd. (b)(1).) However, the maximum fine was \$1,000, even for a misdemeanor (*Ibid.*), and thus the fines were not an unauthorized sentence. Defendant failed to object below and has thus forfeited the issue. (*People v. Garcia* (2010) 185 Cal.App.4th 1203, 1218 ["The appropriate amount of restitution is precisely the sort of factual determination that can and should be brought to the trial court's attention if the defendant believes the award is excessive. Here, because defendant did not object to the amount of restitution in the trial court, he forfeited our consideration of the issue on appeal".])

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Josue Vargas Morales**

No.: S _____

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On July 23, 2015, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Alan Carlson Court Executive Officer/Clerk of the Court Orange County Superior Court Deliver to Hon. Christopher Evans, Judge 700 Civic Center Drive West Santa Ana, CA 92701	The Honorable Tony J. Rackauckas District Attorney Orange County District Attorney's Office 401 Civic Center Drive West Santa Ana, CA 92701
Christian C. Buckley Buckley & Buckley 9921 Carmel Mountain Rd. #355 San Diego, CA 92129 <i>Attorney for Appellant, 2 Copies</i>	Mr. Kevin J. Lane, Clerk/Administrator California Court of Appeal Fourth Appellate District, Division Three 601 W. Santa Ana Blvd. Santa Ana, CA 92701
Appellate Defenders, Inc 555 West Beech Street, Ste. 300 San Diego, CA 92101	

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 23, 2015, at San Diego, California.

C. Pasquali
Declarant


Signature