S239122

COPY

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS DONICIO VALENZUELA,

Defendant and Appellant.

Ct. App. 2/6 B269027

Ventura County
Super. Ct. No. 2013025724

PETITION FOR REVIEW
of a Published Opinion

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PETITION FOR REVIEW of a Published Opinion

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

Petitioner LUIS DONICIO VALENZUELA asks this Court to grant review of the Court of Appeal's published decision in the above-captioned matter to consider an issue of statewide importance: whether a sentence for the substantive crime of "street terrorism" (Pen. Code, § 186.22, subd. (a))[1] can lawfully be imposed at a Proposition 47 resentencing when the underlying felony offense of grand theft - a necessary element for the street terrorism offense - has been reduced to a misdemeanor by Proposition 47. (A copy of the published opinion of the Court of Appeal is bound at the back of this petition as Exhibit A.) The decision was filed November 14, 2016.

Mr. Valenzuela's petition presents an issue similar to the issue on review in *People v. Valenzuela,* S232900, review granted on March 30, 2016: "Is defendant eligible for resentencing on the penalty enhancement for serving a prior prison term on a felony conviction after the superior court had reclassified the underlying felony as a

[1] All further statutory references are to the Penal Code.

misdemeanor under the provision of Proposition 47." Review has also been granted in related cases: *In re Larson,* S232839, *People v. Carrea,* S233011, *People v. Ruff,* S233201, and *People v. Williams,* S233539, *People v. Acosta*, S235773. These cases are all on hold for the lead case in *Valenzuela* (S232900).

However, Mr. Luis Valenzuela's petition herein presents a different situation than that in the lead case *Valenzuela;* in this case, petitioner's felony conviction for grand theft had been properly reclassified and resentenced as a misdemeanor at the Proposition 47 resentencing. In other words, the electorate behind Proposition 47 had reclassified the underlying conduct that formed the basis for the felony grand theft conviction in count one as misdemeanor conduct requiring a concomitant misdemeanor sentence. Then, at the same Proposition 47 resentencing, the trial court used the now theft misdemeanor conviction to prove an essential element in the section 186.22(a) count, namely, that petitioner had committed a felony offense while participating in a street gang. In contrast, in *Valenzuela,* the defendant had already been sentenced on non-Proposition 47 counts, and the issue was whether Proposition 47 allowed a defendant to retroactively go back and have the prison prior enhancement stricken.

In the instant case, the opinion nonetheless held that petitioner's misdemeanor conviction for theft could still be used to prove up the underlying felony offense requirement for the section 186.22(a) count. The opinion relied on two arguments. First, the opinion held that section 186.22(a) only requires the commission of felonious conduct rather than the conviction of a felony offense. Second, according to the opinion, that distinction led to this conclusion: "[b]ecause the focus is on the commission rather than the conviction of a felony, it is irrelevant that Valenzuela's theft conviction 'shall [now] be considered a misdemeanor for all purposes.'" (cites).

Petitioner contends that this opinion directly conflicts with *People v. Abdallah* (2016) 246 Cal.App.4th 736, which held that a prison prior enhancement that has been reduced to a misdemeanor pursuant to Proposition 47 cannot thereafter be imposed at a subsequent sentencing. Petitioner posits that *Abdallah* is correctly decided and that this opinion is in error. Petitioner further contends that this opinion undercuts

this Court's recent opinion in *People v. Park* (2013) 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461.

Review is appropriate because there is a split of opinion between the courts' reasoning in *Valenzuela* and that in *Abdallah.* This court has not rendered an opinion on these important statewide issues.

QUESTION PRESENTED

- **Does the reclassification of a felony conviction to a misdemeanor conviction pursuant to Proposition 47 preclude the use of the misdemeanor conviction as either a felony offense or felonious criminal conduct for the purpose of proving up a street terrorism offense?**

Petitioner's Contention

- **A felony conviction that is reclassified to a misdemeanor under Proposition 47 cannot thereafter be used to prove that defendant engaged in a felony offense in a street terrorism prosecution.**

THE NECESSITY FOR REVIEW

Review is necessary to settle important questions of law. (Calif. Rules of Court, rule 8.500 (b)(1).) Review is also necessary to resolve the split of authority between *People v. Abdallah* (2016) 246 Cal.App.4th 736 and *People v. Valenzuela* (2016) 5 Cal.App.5th 449 (hereafter, *Abdallah* and *Valenzuela.*) The split of authority involves the issue of whether a felony conviction reduced to a misdemeanor can thereafter be used as a felony offense for either a sentence enhancement or to prove up a necessary element in a substantive crime. Put differently, the split of authority revolves around the meaning of section 1170.18, subdivision (k)'s requirement that under Proposition 47, a felony reduced to a misdemeanor is a "misdemeanor for all purposes."

The issue of whether a felony conviction reduced to a misdemeanor prevents the subsequent use of the misdemeanor conviction as a felony one is of great statewide public importance that should be resolved promptly. Accordingly, under well-settled principles, it is appropriate that this Court exercise its jurisdiction to review. (Calif. Rules of Court, rule 8.500 (b)(1).)

Statement of Facts

In this case, petitioner Luis Valenzuela stole a $200 bicycle from the person of the victim and was convicted after trial of grand theft. (Count 1: § 487, subd. (c).) In addition, an enhancement of having committed that crime for the benefit of a gang was found true. (§ 186.22, subd. (b)(1).) Petitioner was also convicted of street terrorism in count two. (§ 186.22, subd. (a).) The felony offense element requirement for the street terrorism offense was the grand theft conviction in count one. Petitioner was sentenced to an aggregate term of nine years, eight months, in prison. (*Valenzuela, supra,* 55 Cal.App.5th, at 451-452.)

After the passage of Proposition 47, petitioner filed a petition requesting to be resentenced based on the new statutory terms set forth in Proposition 47. The trial court granted his request and reclassified count one a misdemeanor given that the value of the bicycle was less than $950. The trial court also declined to impose the section 186.22, subdivision (b) gang enhancement attached to count one once the grand theft was reduced to a misdemeanor. However, the trial court eventually denied Mr. Valenzuela's motion to either dismiss the street terrorism count or resentence the count as a misdemeanor, finding that the reclassification of his theft conviction as a misdemeanor did not effect that count. (*Valenzuela, supra,* 5 Cal.App.5th at 451-452.) Petitioner's

sentence was then modified to 7 years and 8 months. [2]

Memorandum of points and authorities in support of the petition for review.

I.

The reclassification of the grand theft conviction to a misdemeanor prevented the court from thereafter using that conviction to prove up the felony offense requirement for the street terrorism count.

The *Valenzuela* opinion concluded the reclassification of the theft conviction to a misdemeanor did not preclude the court from imposing a felony sentence on the street terrorism count. The court reasoned in part that the crime of street terrorism required only felonious conduct, not a felony conviction. That distinction, according to the court, distinguished this case from sentence enhancements which require a felony conviction. "The gravamen of [street terrorism offense] is active participation in criminal a criminal street gang. [Citations omitted.] To that end, it requires participation in the 'felonious criminal conduct' of at least one other gang member. [Citations omitted.] It does not require that anyone sustain a conviction for that conduct. Because the focus on the commission rather than the conviction of a felony, it is irrelevant that Valenzuela's theft conviction 'shall [now] be considered a misdemeanor for all purposes.' [Citations omitted.]" (*Id.* at 452.)

The opinion's reliance on the distinction between felonious conduct and a felony conviction with respect to the necessary elements for a section 186.22, subdivision (a), felony conviction is a distinction without meaning. An authorized sentence for the felony offense of section 186.22, subdivision (a), requires that a defendant "willfully

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[2] The trial court reached 7 years and 8 months by imposing 32 months to count two – low term doubled because of a prior strike enhancement – plus five years for the section 667, subdivision (a), enhancement.

assisted, furthered, or promoted felonious criminal conduct by members of a gang either by: (a) directly and actively committing a felony offense; or (b) aiding and abetting a felony offense. (CALCRIM No. 1400, element No. 3, § 186.22, subd. (a).) There has to be a finding beyond a reasonable doubt that defendant either committed or aided in the commission of a felony offense. (*Id.*) In addition to the statewide jury instructions, the Fifth Amendment's due process clause requires proof beyond a reasonable doubt of each element. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-288.)

In the case at bar, the jury had found petitioner Luis Valenzuela guilty of grand theft, a felony in count one. That finding of guilt was then used to prove up an essential element in count two, namely, that petitioner had committed a felony offense. Although there is no fixed definition of conviction, the factual finding of guilt by a jury constitutes a conviction. In the ordinary legal meaning of "conviction" is a verdict of guilty or the confession of the defendant in open court, and not the sentence or judgment. (*People v. Banks* (1959) 53 Cal.2d 370, 390-391; *People v. Ward* (1901) 134 Cal. 301, 307-308, *Ex parte Brown* (1885) 68 Cal. 176, 179, 183; *In re Anderson* (1939) 34 Cal.App.2d 48, 50-51.) Indeed, it is settled that for purposes of a prior conviction statute, a conviction occurs at the time of entry of the guilty plea. (*People v. Balderas* (1985) 41 Cal.3d 144, 203; *Stephens v. Toomey* (1959) 51 Cal.2d 864, 869; *People v. Milosavljevic* (1997) 56 Cal.App.4th 811, 817.)

Consequently, contrary to the reasoning in the opinion, the requirement that there must be a finding of guilt that a defendant had either committed or aided in the commission of a felony offense for a lawful section 186.22, subdivision (a) sentence, means in effect that a defendant must have sustained a conviction for that felony offense. The opinion is wrong to conclude otherwise.

Assuming, arguendo, that "felonious criminal conduct" is distinct from a felony conviction, the reclassified theft conviction still did not qualify as felonious criminal conduct according to this court's decision in *People v. Lamas* (2007) 42 Cal.4th 516. In *Lamas,* this court addressed the issue of whether a gang member who carries loaded firearm in violation of section 12031, subdivision (a)(1), satisfies the felonious

conduct requirement in section 186.22, subdivision (a), in order to elevate an otherwise misdemeanor to a felony. If the answer was yes, then the gang member would be in violation of section 12031, subdivision (a)(2)(c), a felony. This court held that the answer was no. That is, carrying a loaded firearm was misdemeanor conduct and the fact that it was done by a gang member does not by itself constitute felonious criminal conduct in violation of section 186.22, subdivision (a). (*Id.* at 524.) This court held that both misdemeanor convictions and misdemeanor conduct do not constitute felonious criminal conduct. (*Ibid.*) (See also *People v. Green* (1991) 227 Cal.App.3d 692 – section 186.22 subdivision (a), covers "only conduct which is clearly felonious."

In sum, once the theft conviction in count one was reclassified to a misdemeanor pursuant to Proposition 47, the trial court was precluded from using the theft conduct to satisfy the felonious criminal conduct element in section 186.22, subdivision (a).

II.

The opinion erred by failing to take appellant back to the time of the original sentence and resentence him with the Proposition 47 count, now a misdemeanor.

The opinion claimed that the trial court "did treat the resentencing as a plenary sentencing" and properly resentenced him to a misdemeanor for the theft conviction in count one. (*Valenzuela, supra,* 5 Cal.App.5th at 452.) The opinion, however, then reasons that the reduction of the theft conviction has no bearing on the 186.22, subdivision (a), offense because when appellant engaged in the theft, it was felonious criminal conduct and the subsequent change in the law is irrelevant. (*Id.* at 453.) That conclusion is in error and depends on faulty logic.

The purpose of a Proposition 47 resentencing is to take the defendant back to the original sentencing and sentence the defendant with the Proposition 47 count now a misdemeanor. Section 1170.18, subdivision (a), provides in pertinent part: "[a] person currently serving a sentence for a conviction . . . 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 the sentence . . . (Italics added)."

A statutory interpretation of section 1170.18, subdivision (a), that requires the court, at a resentencing, to take the defendant back to the time of the original sentence and resentence him with a Proposition 47 count that is now a misdemeanor is consistent with the language and purpose of the Act. The court's role in "any case involving statutory interpretation . . . is to determine the Legislature's intent so as to effectuate the law's purpose. . . . If the statutory language is unambiguous, the plain meaning controls. . . . It is only when the language supports more than one reasonable construction that we may look to extrinsic aids like legislative history and ostensible objectives. . . . In the case of a provision adopted by the voters, their intent governs. (*Abdallah, supra,* 246 Cal.App.4th at 745.) In this case, section 1170.18, subdivision (a), entitles appellant to be resentenced on his felony counts that would have been misdemeanors had the Act been in effect at the time of the offense. The Act explicitly provides for retroactive relief for people either currently serving a sentence or for those who have completed a sentence. At appellant's resentencing, the court must resentence appellant to those counts affected by the Act as if they were a misdemeanor "at the time of the offense." The clear language of the Act compelled the trial court to resentence appellant on count two, with count one as a misdemeanor "at the time of the offense." The opinion erred by using the conduct of count one as a felony for the sole purpose of sentencing appellant to a felony term on count two.

A recent appellate decision concurred with appellant's interpretation of a resentencing pursuant to section 1170.18, subdivision (a). In *People v. Rouse* (2016) 245 Cal.App.4th 292, the court explained its position on a resentencing. "In our view, a resentencing hearing on a petition under section 1170.18, subdivision (a), . . . envisions, at least where multiple counts are at issue, as is the case here, that resentencing will occur anew . . . . 'The purpose of section 1170.18 is to take the defendant back to the time of the original sentence and resentence him with the "Proposition 47 count now a

misdemeanor.'" (*Id.,* at pp. 299-300; See also Couzens & Bigelow, *Proposition 47,* (Barrister Press, February 16, 2016), at p. 62.)

The opinion's glaring error is evident in the statement "[w]hen Valenzuela stole the bicycle, he engaged in felonious criminal conduct." (*Valenzuela, supra,* 5 Cal.App.5th 453.) Not true. After Proposition 47, when appellant stole the bicycle of a value less than $950, he engaged in *misdemeanor* conduct. Thus, appellant cannot be sentenced to a felony sentence in count two solely because at the time of the offense, the conduct could be charged as a felony. "Proposition 47 precludes the court from using that conviction as a felony merely because it was a felony at the time the defendant committed the offense." (*Abdallah, supra,* 246 Cal.App.4th at 747.) The opinion is irreconcilable both with *Abdallah* and the fact that with the passage of Proposition 47, appellant committed a misdemeanor theft, not a felony.

III.

Section 1170.18, subdivision (k), requires a trial court to treat a felony reduced to a misdemeanor as a misdemeanor at a Proposition 47 resentencing.

The resentencing in count two in this case ran afoul of section 1170.18, subdivision (k), in the Act. Section 1170.18, subdivision (k), commands that a felony reduced to a misdemeanor under the Act "shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm. . . ."

In the instant case, appellant's conviction for grand theft of a person in count one was reduced to a misdemeanor at the resentencing. The court then proceeded to resentence on count two. As previously explained, count two required that appellant commit a felony. To prove that element, the prosecutor relied on appellant's conviction *as a felony for count one which had been reduced to a misdemeanor.* Once count one was reduced to a misdemeanor, it could not thereafter be treated as a felony for purposes of sentencing appellant to a felony prison commitment. (See § 1170.18, subd. (k).)

Such a position is consistent with majority of cases that have addressed this issue, including our High Court's decision in *People v. Park* (2013) 56 Cal.4th 782 (*Park*). In *Abdallah,* the issue was whether a one-year prison prior enhancement conviction that was subsequently reduced to a misdemeanor pursuant to Proposition 47 could thereafter continue to be used as a prison prior enhancement. *Abdallah* held that section 1170.18, subdivision (k), precluded its use as a prior felony conviction for the purpose of a prison prior enhancement. *Abdallah* stated:

"Proposition 47 borrowed the 'for all purposes' language of section 1170.18, subdivision (k), from section 17, subdivision (b), which describes the effect of a judicial declaration that a wobbler offense is a misdemeanor. (See § 17, subd. (b) [where a crime is a wobbler, "it is a misdemeanor for all purposes . . . [w]hen . . . the court declares the offense to be a misdemeanor"]; [citations omitted.] In general, 'identical language appearing in separate statutory provision should receive the same interpretation when the statutes cover the same or analogous subject matter.' [Citations omitted.] Because section 1170.18, subdivision (k), and section 17 both address the effect of recalling and resentencing of a felony (or a wobbler that could be a felony) as a misdemeanor, we construe the phrase 'misdemeanor for all purposes' in section 1170.18, subdivision (k), to mean the same as it does in section 17. [Citations omitted.]" (*Abdallah, supra,* 246 Cal.App.4th at 745.)

The *Abdallah* court next reasoned that a felony reduced to a misdemeanor under either section 17, subdivision (b), or Proposition 47, precludes its use as a prior felony conviction in order to enhance defendant's sentence.

"The same logic applies to section 667.5, subdivision (b), and 1170.18, subdivision (k). Section 667.5, subdivision (b), excludes from the prior prison term enhancement a defendant who has neither committed 'an offense which results in a felony conviction' nor been subject to 'prison custody or the imposition of a term of jail custody . . . or any felony conviction resulting in the defendant's incarceration. Once the trial court recalled Abdallah's 2011 felony sentence and resentenced him to a misdemeanor, section 1170.18, subdivision (k), reclassified that conviction as a

misdemeanor 'for all purposes'. [Citations omitted.] Therefore, at the time of sentencing in this case, Abdallah was not a person who had committed 'an offense which result[ed] in a felony conviction' within five years after his release on parole for his prior conviction." (Id. at 746.)

Under the same analysis used in *Abdallah,* after the court granted the petition for resentencing for count one pursuant to section 1170.18, subdivision (a), the theft conduct could no longer be used to satisfy the felonious criminal conduct requirement for section 186.22, subdivision (a). Section 1170.18, subdivision (k), required the trial court to treat the theft conviction as misdemeanor, which necessarily included the conduct underlying the conviction. "All" means all. (*Rubin v. Western Mutual Ins. Co.* (1999) 71 Cal.App.4th 1539, 1547.) "Like the Cheshire Cat, the felony count disappeared from sight, leaving nothing behind but a mischievous grin." (*In re Ramey* (1999) 70 Cal.App.4th 508, 512.)

Another recent appellate case concurs with appellant Valenzuela's position that section 1170.18, subdivision (k), precludes the use of a prior felony conviction for all purposes, including the use for the purpose of felonious criminal conduct. In *People v. Evans* (2016) __ Cal.App.4th __, 2016, Cal.App. Lexis 1099 [Dec. 15, 2016], the court concluded that a defendant was entitled to have his prison prior enhancement dismissed if the underlying conviction had been reclassified as a misdemeanor before the judgment had become final. (*Ibid.,* relying on our Highest Court's decision in *In re Estrada* (1965) 63 Cal.2d. 740, 748.) In reaching its decision, the court focused on the language of section 1170.18, subdivision (k). "Section 1170.18(k)'s "for all purposes" language is broad, indicating the voters intended it to apply to all collateral consequences except firearm possession." (*Ibid.)*

Still another appellate decision that interpreted section 1170.18, subdivision (k), came to the same conclusion. (*Alejandro N. v. Superior Court* (2015) 238 Cal.App.4th 1209, 1227 - "The plain language of section 1170.18, subdivision (k), reflects the voters' intent that the redesignated misdemeanor offense should be treated exactly like any other misdemeanor offense, except for firearm restrictions. Because the

statute explicitly addresses what, if any, exceptions should be afforded to the otherwise all-encompassing misdemeanor treatment of the offense, and because only the firearm restriction was included as an exception, the enactors effectively directed the courts to not carve out other exceptions to the misdemeanor treatment of the reclassified offense absent some reasoned statutory or constitutional basis for doing so.") "[W]hen a statute expresses certain exception to a general rule, other exceptions are necessarily excluded." (*People v. Cardenas* (1982) 31 Cal.3d 897, 914.)

An interpretation that prevents the use of a conviction reclassified to misdemeanor as felony offense for sentencing purposes is also consistent with appellate decisions interpreting convictions reduced to misdemeanors under section 17, subdivision (b). Our Supreme Court recently looked at this issue and held that a felony reduced to a misdemeanor cannot thereafter be used to enhance a sentence unless the Legislature has made it explicitly clear to treat the misdemeanor as a felony for specific purposes. (*People v. Park* (2013) 56 Cal.4th 782.) In *Park,* the defendant had his felony assault with a deadly weapon charge reduced to a misdemeanor pursuant to section 17, subdivision (b)(3). It was then dismissed altogether under 1203.4, subdivision (a)(1). (*Id.* at 787.) The following year, defendant was convicted of attempted voluntary manslaughter and the trial court imposed a five year enhancement under section 667, subdivision (a), for the assault conviction even though it had been reduced to a misdemeanor.

In holding that the enhancement was invalid due to the fact that it had been reduced to a misdemeanor, the court emphasized that "neither the language nor history of section 667, subdivision (a), or of the constitutional amendment that was enacted concurrently with that statutory provision, discloses an intent on the part of lawmakers to limit the effect of a court's exercise of discretion pursuant to 17, subdivision (b)." (*Id.* at 795; see also *People v. Culbert* (2013) 218 Cal.App.4th 184, 193-194 [a felony conviction reduced to a misdemeanor could not subsequently be used as either a section 667, subdivision (a), enhancement, or a felon in possession of a firearm offense].)

Here, not only did the Act not disclose an intent to limit the effect of convictions reduced to misdemeanors, to the contrary, section 1170.18, subdivision (k), requires that a conviction reclassified to a misdemeanor under section 1170.18, subdivision (a), "shall be considered a misdemeanor for all purposes."

Such a limitation on the trial court's use of a Proposition 47-reclassified misdemeanor is also consistent with how appellate courts have treated convictions reduced to misdemeanors by a change in the law. In *People v. Flores* (1979) 92 Cal.App.3d 461 (*Flores*), the defendant was sentenced to prison following his conviction of selling heroin, and his sentence was enhanced by one year pursuant to section 667.5, subdivision (b). The basis for the enhancement was defendant's prior prison term for a felony conviction of possession of marijuana. Subsequent to the marijuana conviction, the legislature changed the law and made simple possession of marijuana a misdemeanor. (*Id.* at 471.) The Legislature also specified that previous felony convictions should not be considered for any purpose. (*Id.* at 472.)

The *Flores* court thus held that defendant's marijuana conviction could not be used as a prison prior enhancement. The court reasoned that "[i]n view of the express language of the statute and the obvious legislative purpose, it would be unreasonable to hold that the Legislature intended that one who had already served a felony sentence for possession of marijuana should be subjected to additional criminal sanction of sentence enhancement." (*Id.* at p. 473.)

The same reasoning in *Flores* applies here. By enacting Proposition 47, the voters expressed the clear intent that defendants convicted of certain non-serious and nonviolent theft and drug offenses were subjected to disproportionately severe sanctions. Those convictions, once reclassified as misdemeanors, should not then be used to satisfy the felonious criminal conduct element in section 186.22, subdivision (a). Such a use defeats both the intent of the Act and the express language contained in section 1170.18, subdivision (k).

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THE PRAYER

Petitioner Luis Valenzuela asks this Court to grant review of the Court of Appeal's decision, and to write an opinion reversing the judgment of the Court of Appeal which resolves the split of authority.

Dated: December 23, 2016

Respectfully Submitted,
STEPHEN P. LIPSON, Public Defender

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CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that by utilization of MSWord word count feature there are 5,390 words in Times New Roman 13 pt. font in this document, excluding Opinion and Declaration of Service.

Dated: December 23, 2016

Jeane Renick
Legal Mgmt. Asst. III

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. LUIS DONICIO VALENZUELA, Defendant and Appellant.	2d Crim. No. B269027 (Super. Ct. No. 2013025724) (Ventura County)

The crime of "street terrorism" requires, inter alia, that a person actively participate in criminal street gang activity and willfully promote, further or assist in any felonious criminal conduct of the gang. (Pen. Code, § 186.22, subd. (a).) [1] The enhancement for the commission of a felony for the benefit of a criminal street gang requires that the underlying crime be a felony. (*Id.*, subd. (b)(1).) Here we resolve an unanticipated consequence of the passage of Proposition 47, i.e., whether a conviction for street terrorism survives after a felony conviction that is based upon the same conduct has been reduced to a misdemeanor. We hold that it does survive because, unlike with a gang enhancement, a street terrorism conviction does not require a felony conviction; it requires only that the conduct that

[1] All further statutory references are to the Penal Code.

resulted in the conviction was felonious at the time it was committed. We therefore affirm the trial court's order denying resentencing on Luis Donicio Valenzuela's street terrorism conviction.

FACTS AND PROCEDURAL HISTORY[2]

In 2013, Valenzuela stole a $200 bicycle from "the person" of the victim and was convicted of grand theft. (Pen. Code, § 487, subd. (c).) In addition, an enhancement of having committed that crime for the benefit of a gang was found to be true. (§ 186.22, subd. (b)(1).) Valenzuela was also convicted of street terrorism (*id.*, subd. (a)), and sentenced to an aggregate term of nine years eight months in prison.

At the time Valenzuela stole the bicycle, taking property from the person of another was classified as grand theft, irrespective of the property's value. Following the passage of section 1170.18 (Proposition 47) by voter initiative in November 2014, theft of money or property worth $950 or less, even if taken directly from another person, is "considered petty theft and . . . punished as a misdemeanor." (§ 490.2, subd. (a).)

After Proposition 47 took effect, Valenzuela successfully petitioned the trial court to reclassify his theft conviction as a misdemeanor. The effect of doing so precluded attachment of the gang enhancement to that count. The trial court, however, denied his motion to dismiss the street terrorism

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[2] We have previously set forth the full facts and procedural history in *People v. Valenzuela* (April 30, 2015, No. B256440 [nonpub. opn.]). We do not repeat them here except as relevant to the issue before us.

conviction, finding that the reclassification of his theft conviction as a misdemeanor did not affect that count.

Valenzuela's appeal concerns the difference between a gang enhancement, which requires a felony conviction (§ 186.22, subd. (b)(1)), and a street terrorism conviction, which requires both the active participation in a criminal street gang and the willful promotion of "felonious criminal conduct" by gang members. (*Id.*, subd. (a).) As we shall explain, the street terrorism conviction did not require a felony conviction; it required only that Valenzuela's conduct (which resulted in the grand theft conviction) was felonious *at the time he engaged in it.*

DISCUSSION

Valenzuela claims the trial court "failed to treat [his] resentencing as a plenary sentencing which required the court to take into account [his grand theft conviction's] reduction to a misdemeanor when resentencing on [the street terrorism conviction]." But the trial court *did* treat the resentencing as a plenary sentencing. It resentenced him to a misdemeanor on the grand theft count and struck the enhancements on that count—including the gang enhancement—that did not apply to a misdemeanor conviction. Valenzuela does not argue that his modified sentence on the street terrorism count was unauthorized for a valid conviction; he contends that the street terrorism conviction itself was invalid after the theft conviction became a misdemeanor. We disagree.

"The gravamen of the [street terrorism offense] is active participation in a criminal street gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 55.) To that end, it requires participation in the "felonious criminal conduct" of at least one other gang member. (§ 186.22, subd. (a); *People v. Rodriguez* (2012)

55 Cal.4th 1125, 1134.) It does not require that anyone sustain a conviction for that conduct. Because the focus is on the commission rather than the conviction of a felony, it is irrelevant that Valenzuela's theft conviction "shall [now] be considered a misdemeanor for all purposes." (§ 1170.18, subd. (k).) Valenzuela's reliance on cases such as *People v. Park* (2013) 56 Cal.4th 782, *People v. Abdallah* (2016) 246 Cal.App.4th 736, and *People v. Flores* (1979) 92 Cal.App.3d 461, is misplaced. Those cases involved sentence enhancements predicated on the felony status of a *conviction.*

Grand theft is generally a "wobbler" (*People v. Ceja* (2010) 49 Cal.4th 1, 7, fn. 6), which "becomes a 'misdemeanor for all purposes' . . . only when the court takes affirmative steps to classify the crime as a misdemeanor." (*People v. Park, supra,* 56 Cal.4th at p. 793; see *People v. Abdallah, supra,* 246 Cal.App.4th at p. 745 [construing "the phrase 'misdemeanor for all purposes' in section 1170.18, subdivision (k), to mean the same as it does in section 17"].) "If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively . . . ." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439, superseded by statute on another ground as stated in *Park*, at p. 789, fn. 4; *People v. Moomey* (2011) 194 Cal.App.4th 850, 857 ["[A] wobbler is a felony at the time it is committed and remains a felony unless and until the principal is convicted and sentenced to something less than imprisonment in state prison (or the crime is otherwise characterized as a misdemeanor)"].)

When Valenzuela stole the bicycle, he engaged in felonious criminal conduct. That is true regardless of his conviction for grand theft and its subsequent reduction to a

misdemeanor. The trial court properly declined to set aside his conviction for street terrorism.

DISPOSITION

The order denying Proposition 47 resentencing on Valenzuela's street terrorism conviction is affirmed.

CERTIFIED FOR PUBLICATION.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Nancy L. Ayers, Judge
Superior Court County of Ventura

Stephen P. Lipson, Public Defender, Michael C. McMahon, Chief Deputy, and William Quest, Senior Deputy Public Defender, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey, Supervising Deputy Attorney General, and Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

DECLARATION OF SERVICE

Case Name: ***The People, Plaintiff and Respondent v. LUIS DONICIO VALENZUELA, Defendant and Appellant.***

Case No. **S_____ from Ct. App. 2/6** B269027 **[Superior Court No. 2013025724)**

On December 23, 2016, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender at 800 South Victoria Ave., Ventura, California, 93009. On this date I personally served the following named person(s), at the place(s) indicated herein, with a full, true and correct copy of the attached **PETITION FOR REVIEW:**

Gregory Totten, District Attorney
Attn: Michelle Contois, Snr DDA
800 South Victoria Avenue, 3rd Floor
Ventura, CA 93009
[Counsel for the People]

Hon. NANCY AYERS, Judge, and
MICHAEL PLANET, Exec. Officer
Superior Court – Hall of Justice
800 South Victoria Ave., 2nd Floor
Ventura, CA. 93009
[Trial Judge]

On this date, I e-filed with the California Supreme Court, and electronically served the attached **PETITION FOR REVIEW,** or served via U. S. mail, as indicated below:

California Court of Appeal, Clerk's Office
Via electronic service to 2nd Dist/Div 6

Kamala Harris, Attorney General
DocketingLAAWT@doj.ca.gov

I also served Luis Donicio Valenzuela, address of record, via U. S. Mail.

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 the above date at San Buenaventura, California.

STEPHEN P. LIPSON, Public Defender

By _____
Jeane Renick, Legal Mgmt. Asst. III