In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

LUIS DONICIO VALENZUELA,

Defendant and Appellant.

Case No. S239128

Second Appellate District Division Six, Case No. B269027
Ventura County Superior Court, Case No. 2013025724
The Honorable Nancy Ayers, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Does a conviction for active gang participation in violation of Penal Code section 186.22, subdivision (a), which requires that the defendant willfully promote, further, or assist in any felonious criminal conduct of the gang, remain valid when the underlying conduct in question was reduced from a felony to a misdemeanor pursuant to Proposition 47?

INTRODUCTION

Appellant Luis Donicio Valenzuela was convicted of grand theft and street terrorism. After the passage of Proposition 47, he successfully petitioned for reduction of his grand theft conviction to a misdemeanor. He argues here, as he did in the courts below, that his street terrorism conviction must consequently be dismissed because it was predicated upon his felony grand theft conviction, which must now be considered a misdemeanor for all purposes. That argument should be rejected. Proposition 47 provides a limited avenue for sentencing relief whereby certain enumerated felony sentences are reduced to misdemeanors. By its plain language, section 1170.18 does not apply to non-enumerated, collateral offenses such as section 186.22(a), and does not provide a means for retrospectively invalidating such felony convictions even as a collateral consequence of a separate, proper Proposition 47 reduction. Nor does Proposition 47's language providing that reduced convictions shall be considered "misdemeanors for all purposes" serve to indirectly undermine Valenzuela's street terrorism conviction because that language has prospective application only. And in any event, Valenzuela's argument fails on its own terms because his street terrorism conviction was not predicated on the theft conviction's ultimate felony status. Section 186.22(a) neither refers to nor uses the phrase "felony offense"; nor does it require a felony conviction. Rather, the focus of the statute is on "felonious

criminal conduct." Because Valenzuela's conduct at the time of the theft was felonious, the elements of the street terrorism conviction were satisfied, and remain so, irrespective of any subsequent change in the status of the theft conviction.

STATEMENT OF THE CASE AND FACTS

Valenzuela and a younger companion, Timothy Medina, flagged down Manny Ramirez as he rode his black beach cruiser bike in Oxnard. Ramirez stopped and spoke with them. Valenzuela asked Ramirez where he was from, and Ramirez replied that he had just moved from Santa Barbara. Valenzuela asked if Ramirez was from East Side and said he did not like "homies from East Side." East Side Santa Barbara is a Santa Barbara street gang. Ramirez said he was not affiliated with any gang. Valenzuela swung at Ramirez. To avoid being hit, Ramirez stepped back, and away from his bike. Valenzuela grabbed Ramirez's bike and said, "[T]his is my bike now." He also said that if Ramirez wanted the bike, he would need to have an "older homie from the neighborhood vouch" for him. Medina said, "[i]f you want your bike back, you'll have to throw down or fight for it." Ramirez left. Valenzuela walked toward his home with Medina. Sheriff's deputies responded to reports of the theft. They spoke to Ramirez, who described the incident, his bike, and the suspects. Ramirez also expressed fear about getting "jumped or beat up" and being labeled "a rat." The deputies recovered Ramirez's bike from Valenzuela's house. (Case No. B256440 Slip Opn. 1-2.)[1]

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[1] Respondent respectfully requests that this Court judicially notice the prior unpublished opinion in case number B256440, in which the Court of Appeal affirmed the underlying judgment of conviction in case number 2013025724. (See *In re Reno* (2012) 55 Cal.4th 428, 444.)

Based on that incident, Valenzuela was convicted by jury of grand theft (Pen. Code, § 487, subd. (c)[2]), a lesser included offense to second degree robbery (§ 211), and street terrorism (§ 186.22(a)). The jury also found true a "strike" allegation (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a gang enhancement allegation (§ 186.22, subd. (b)), and a prior serious felony conviction enhancement allegation (§ 667, subd. (a)). Valenzuela was sentenced to state prison for a total of nine years and eight months. (1CT 6-7, 10; see Case No. B256440 Slip Opn. 1.)[3]

Subsequently, the voters approved Proposition 47, the "Safe Neighborhoods and Schools Act" ("the Act"), which requires a misdemeanor sentence instead of a felony sentence for certain drug possession and petty theft offenses committed by eligible defendants. (*People v. Diaz* (2015) 238 Cal.App.4th 1323, 1328-1329.) The Act also created section 1170.18 to provide a procedure for persons who are serving a felony sentence for an offense that the Act has reclassified as a misdemeanor to petition for recall of the felony sentence and obtain resentencing to a misdemeanor. (§ 1170.18, subds. (a), (b).) Under Proposition 47, thefts of property worth $950 or less are no longer punishable as felony grand theft, and a prior theft conviction falling into this category may be reduced to a misdemeanor. (§ 1170.18, subds. (a), (b).) When a conviction is reduced under Proposition 47, it shall be considered a misdemeanor "for all purposes," subject to narrow exceptions not relevant here. (§ 1170.18, subd. (k).)

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

[3] At the same time, Valenzuela was sentenced in a separate case to a consecutive eight months in state prison for possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), for an aggregate state prison sentence of 10 years and 4 months. (1CT 6-7, 10.)

Valenzuela filed a petition and motion for resentencing pursuant to section 1170.18, subdivision (b). He argued that if the trial court determined that the felony grand theft count was reducible to a misdemeanor, then the street terrorism conviction (§ 186.22(a)) had to be dismissed for insufficiency of evidence because a necessary element of the substantive offense no longer existed. (1CT 15-21.) Specifically, section 186.22(a) states: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail for a period not to exceed one year, or by imprisonment in the state prison for 16 months, or two or three years." Valenzuela contended that the element of promoting, furthering, or assisting in "felonious criminal conduct" was unsupported once his theft conviction was reduced to a misdemeanor.

The People filed an opposition, arguing that Proposition 47 did not apply to pendent or ancillary offenses such as section 186.22(a). The People also argued that before resentencing, the trial court was required to determine whether Valenzuela posed an unreasonable risk of danger to public safety. (1CT 24-32.) Valenzuela filed a second motion in support of resentencing, arguing that resentencing him would not pose an unreasonable risk to public safety, as defined in section 1170.18, subdivision (c). (1CT 45-60.)[4]

The trial court heard argument on the resentencing motions, and granted reduction as to the grand theft conviction but rejected Valenzuela's

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[4] Valenzuela also filed a third ("supplemental") motion in support of resentencing (1CT 61-66) and an amended supplemental motion in support of resentencing (1CT 67-72).

argument that the reduction of that count required dismissal of the street terrorism conviction. (1CT 75-76; 1RT 73-74.) The trial court ordered Valenzuela to serve a misdemeanor sentence of 365 days in jail, with credit for 365 days actually served, on the theft conviction. (1CT 77, 112.) On the street terrorism conviction, the court resentenced Valenzuela to the low term of 16 months, doubled to 32 months pursuant to the Three Strikes law, plus a consecutive five years pursuant to section 667, subdivision (a). (1CT 77, 112.)

Thereafter, the Court of Appeal decided *People v. Buycks* (2015) 241 Cal.App.4th 519, in which it held that an enhancement for committing an offense while on bail for a separate felony could not be reimposed at resentencing after the underlying felony was reduced to a misdemeanor pursuant to Proposition 47.[5] Based on *Buycks*, Valenzuela filed a motion and request for the court to recall his sentence on the street terrorism count. (1CT 78-94.) The People opposed the motion (1CT 102-104), and the trial court denied it (1CT 110).

Valenzuela appealed, arguing that because the predicate felony theft conviction had been reduced to a misdemeanor pursuant to Proposition 47 his street terrorism conviction could no longer be supported. (1CT 108A.) The Second Appellate District, Division Six, affirmed. (*People v. Valenzuela* (2016) 5 Cal.App.5th 449, review granted March 1, 2017, S239122.) In a published opinion, the court held that reduction of the grand theft conviction to a misdemeanor did not undermine the street

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[5] On January 20, 2016, this Court granted review in *Buycks*, S231765, to decide the following: "Was defendant eligible for resentencing on the penalty enhancement for committing a new felony while released on bail on a drug offense even though the superior court had reclassified the conviction for the drug offense as a misdemeanor under the provisions of Proposition 47?"

terrorism conviction. (*Id.* at p. 452.) It reasoned that the gist of a street terrorism offense is "active participation in a criminal street gang" and the substantive offense of section 186.22(a) "does not require that anyone sustain a conviction for [felonious criminal] conduct." (*Ibid.*, quoting *People v. Albillar* (2010) 51 Cal.4th 47, 55 [street terrorism offense targets *any* crimes committed by gang members, "not merely those that are gang-related"].) The court concluded that, "[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.'" (*Ibid.*, quoting section 1170.18(k).) Further, once the underlying grand theft conviction was reduced to a misdemeanor, the offense was a misdemeanor "'from that point on, but not retroactively.'" (*Id.* at p. 453, quoting *People v. Feyrer* (2010) 48 Cal.4th 426, 439, superseded on another ground as stated in *People v. Park* (2013) 56 Cal.4th 782, 789, fn. 4.) This Court granted Valenzuela's petition for review.

ARGUMENT

I. PROPOSITION 47 DOES NOT OPERATE TO INDIRECTLY UNDERMINE COLLATERAL OFFENSES SUCH AS SECTION 186.22(A)

Proposition 47 is intended to effect the reduction of certain enumerated felonies to misdemeanors, and those enumerated felonies do not include section 186.22(a). Had the electorate intended the Act to operate indirectly to undermine non-enumerated offenses, the statutory scheme would have accomplished that more plainly. Valenzuela is therefore wrong in arguing that the plain language of section 1170.18(a), read in light of the Act's purpose, requires the resentencing court "to take the defendant back to the time of the original sentence and resentence him with a Proposition 47 count as a misdemeanor" (OBM 9) and that once the

theft conviction was reduced to a misdemeanor, the street terrorism conviction had to be invalidated due to the disappearance of the "felonious conduct" element of that offense (OBM 7-12). Section 1170.18(a) does not encompass the dismissal of collateral convictions such as section 186.22(a), which are not among the enumerated felonies to be reclassified as misdemeanors. Nor does section 1170.18 provide for the invalidation of prior felony convictions, but rather provides a means of retrospectively resentencing a felony conviction as a misdemeanor. Valenzuela's contrary interpretation of the statute would produce a result—the elimination altogether of a conviction for a non-enumerated offense—that is far beyond the scope of what Proposition 47 was designed to do.

Reviewing courts independently determine issues of law, such as the interpretation and construction of statutory language. (*Bruns v. E-Commerce* (2011) 51 Cal.4th 717, 724.) "In interpreting a voter initiative like [Proposition 47], [the courts] apply the same principles that govern statutory construction." (*People v. Rizo* (2000) 22 Cal.4th 681, 685.) "'The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.]'" (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) In determining intent, reviewing courts look first to the words of the statute, and if the language is "clear and unambiguous, there is no need for construction." (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1007-1008.)

Section 1170.18(a) states:

> A person who, on November 5, 2014, was 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.

(*Ibid.*, italics added.)

Section 1170.18(a) allows redesignation of only certain enumerated felony drug and theft crimes. (*People v. Montgomery* (2016) 247 Cal.App.4th 1385, 1387.) "As to the crimes listed in section 1170.18, Proposition 47 either amended the statutes of the existing crimes to reflect eligibility for resentencing (§§ 473 [forgery], 476a [check fraud], 496 [receiving stolen property], and 666 [petty theft with a prior theft-related conviction]) or enacted new crimes intended to be subject to Proposition 47 (§§ 459.5 [shoplifting], 490.2 [petty theft repeat offender])." (*People v. Bush* (2016) 245 Cal.App.4th 992, 1004.) The Act has specified which crimes are subject to resentencing, and section 186.22(a) is not one of those crimes. (See *id.* at p. 1005 [holding the Act does not apply to section 368, theft from an elder, as it is not enumerated in section 1170.18]; *People v. Acosta* (2015) 242 Cal.App.4th 521, 526 [plain language of section 1170.18 excludes attempted burglary of motor vehicle from list of reducible offenses]; *People v. Segura* (2015) 239 Cal.App.4th 1282, 1284 [section 1170.18 specified crimes to which it applies and conspiracy is not one of those enumerated offenses].) Elimination of convictions for non-enumerated crimes such as street terrorism is nowhere mentioned in Proposition 47's statutory scheme and would be well beyond the scope of the initiative's purpose to reduce certain low-level offenses to misdemeanors. Valenzuela's interpretation would "violate[] the cardinal rule of statutory construction that courts must not add provisions to statutes." (*People v. Guzman* (2005) 35 Cal.4th 577, 587, internal quotation marks omitted; see also *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852

["The expression of some things in a statute necessarily means the exclusion of other things not expressed"].)

Nor is there any indication that the Act's voters intended for its provisions to have retroactive collateral consequences. (See *People v. Goodrich* (2017) 7 Cal.App.5th 699, 711 [no indication the voters intended Proposition 47 to have the retroactive collateral consequence of changing defendant's initial MDO commitment]; see also *In re Guiomar* (2016) 5 Cal.App.5th 265, 276, review granted Jan. 25, 2017, S238888 ["Proposition 47 did not . . . establish a procedure for redesignation of any other convictions, including convictions that are ancillary or collateral to a redesignated conviction"].) Valenzuela relies on section 1170.18(k) in arguing that Proposition 47 requires a trial court to treat a reduced offense as a misdemeanor at a plenary resentencing following the reduction. (OBM 12-18.) Section 1170.18(k) ("subdivision k") provides: "Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered *a misdemeanor for all purposes* . . . ," except for the right to own or possess firearms. (Italics added.) But subdivision (k) does not call for the kind of retrospective reevaluation Valenzuela suggests; it operates prospectively only.

No part of the Penal Code is retroactive unless expressly so declared. (§ 3.) Section 3 establishes a strong presumption of prospective operation and codifies a principle that absent an express retroactivity provision, a statute will not be applied retroactively "'unless it is very clear from extrinsic sources that the Legislature [or electorate] . . . must have intended a retroactive application.'" (*People v. Brown* (2012) 54 Cal.4th 314, 324 [quoting *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209].) A statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective. (*Ibid.*)

Nothing in the plain language of subdivision (k) speaks to retroactive application. There is no express retroactivity provision in subdivision (k). It states, as noted, that a felony reduced to a misdemeanor under subdivision (b) or (g) is a misdemeanor for all purposes, without ever stating whether the misdemeanor "for all purposes" language should be applied retroactively. (See *People v. Goodrich*, *supra*, 7 Cal.App.5th at p. 711 ["the procedures set forth in section 1170.18 . . . indicate that the electorate intended a specific, limited *prospective* application"].) Thus, nothing in the plain language of subdivision (k) rebuts the presumption under section 3 that the statute operates prospectively, not retroactively.

Further, the Proposition 47 voters delineated the scope and manner of retroactive application by making certain portions of the law expressly retroactive and establishing a procedure by which defendants can petition for reduction of any qualifying convictions to misdemeanors. (§ 1170.18, subds. (a), (b), (f), and (g).) But, tellingly, subdivision (k) includes no express language calling for its retroactive application, and nothing in Proposition 47 establishes a mechanism to achieve retroactive application of the "misdemeanor for all purposes" language. Like the electorate with respect to Proposition 36 (the Three Strikes Reform Act of 2012), the Proposition 47 electorate established the scope and mechanism for the limited retroactive application it sought to achieve. As this Court pointed out in *People v. Conley* (2016) 63 Cal.4th 646, the Proposition 36 voters' decision to enact some provisions with explicit retroactivity language and some provisions with no such language cuts against any inference that the electorate must have intended retroactive application of all of the new law's provisions. (*Id.* at pp. 657-658.)

This same reading is bolstered by a familiar canon of statutory construction. If a provision is included in one part of a statute, but excluded from another, a court should not imply the omitted provision in

the part of the statute that does not contain it. (*Pasadena Police Officers Assn. v. City of Pasadena* (1990) 51 Cal.3d 564, 576.) By making certain portions of Proposition 47 expressly retroactive, the voters indicated an intent to select the specific scope and manner of the new law's retroactive application, just as the voters did with Proposition 36.

There is also nothing in the November 2014 Voter Information Guide regarding Proposition 47 that states that subdivision (k) should be applied retroactively to non-enumerated offenses like section 186.22(a). The fact that the voters generally sought to reduce the costs of incarceration by permitting some crimes to be reduced to misdemeanors does not entail the conclusion that the voters wanted to reduce the costs of incarceration in every conceivable manner. (*People v. Morales* (2016) 63 Cal.4th 399, 408 ["the purpose of saving money does not mean we should interpret [Proposition 47] in every way that might maximize any monetary savings"].) The voters took a measured approach, and sought to reduce spending only by the amount associated with the specific changes made by Proposition 47. This is evidenced in section 1170.18(b), where the voters refused to extend Proposition 47 relief to those defendants found ineligible by virtue of their dangerousness. Had maximum monetary savings been the sole intent of the voters, they would have extended Proposition 47 relief to every possible defendant. They did not. When interpreting a ballot initiative, courts should avoid "interpret[ing] the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

The voters' intent is also evidenced through this Court's previous interpretation of the phrase "misdemeanor for all purposes." The phrase "misdemeanor for all purposes" also appears in section 17, subdivision (b), and this Court previously held that the phrase applied prospectively only.

(*People v. Feyrer*, *supra*, 48 Cal.4th at p. 439; *People v. Banks* (1959) 53 Cal.2d 370, 381-382 [if the judgment is for a misdemeanor, it is deemed a misdemeanor for all purposes thereafter—the judgment does not have a retroactive effect].)[6] "In other words, a court's declaration of misdemeanor status renders an offense a misdemeanor for *all purposes*, not at *all times*." (*In re C.H.* (2016) 2 Cal.App.5th 1139, 1146, review granted Nov. 16, 2016, S237762.) "[A] declaration that a wobbler is a misdemeanor does not 'relate back' and alter that offense's original status as wobbler that is by definition to be treated as a felony unless declared otherwise." (*Ibid.*) The voters are presumed to be aware of this judicial interpretation, and to have intended the same result here by using the same language. (See *People v. Shabazz* (2006) 38 Cal.4th 55, 65, fn. 8; *People v. Abdallah* (2016) 246 Cal.App.4th 736, 745.)

This reading of section 1170.18(k) is reinforced by the convention of statutory construction that "identical language in separate statutory provisions should receive the same interpretation when the statutes cover the same or analogous subject matter." (*People v. Cornett* (2012) 53 Cal.4th 1261, 1269, fn. 6; *People v. Lamas* (2007) 42 Cal.4th 516, 525.) Because subdivision (k) and section 17 both deal with the effect of recalling and resentencing a felony or wobbler to a misdemeanor, the phrase

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[6] Section 17, subdivision (b), in relevant part, states:

> When a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a *misdemeanor for all purposes* under the following circumstances: [¶] (1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. (Italics added.)

"misdemeanor for all purposes" is construed to mean the same thing in both statutes. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100 [section 1170.18(k) does not apply retroactively to change rules applied to determine appellate jurisdiction]; see also *People v. Abdallah*, *supra*, 246 Cal.App.4th at p. 745; *In re C.H.*, *supra*, 2 Cal.App.5th at pp. 1146-1147.) And when enacting initiative measures, voters are presumed to know the law. (*People v. Shabazz*, *supra*, 38 Cal.4th at p. 65, fn. 8.) Thus, because it must be presumed that the voters knew that the phrase "misdemeanor for all purposes" in section 17, subdivision (b), had been interpreted to be prospective only, the voters also intended the phrase "misdemeanor for all purposes" in subdivision (k) to be prospective only. Thus, subdivision (k) should be applied prospectively, consistent with the standard presumption of prospectivity in section 3.

Valenzuela relies on *People v. Rouse* (2016) 245 Cal.App.4th 292, 299-300) in arguing that "'[t]he 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.'" (OBM 9.) But the question considered in *Rouse* was whether "a postconviction resentencing hearing on a petition under [Proposition 47] is a 'critical stage' of a criminal prosecution to which the Sixth Amendment right to counsel attaches." (*Rouse*, *supra*, 245 Cal.App.4th at p. 297.) *Rouse* did not consider the issue presented here: whether Proposition 47 extends indirectly to offenses excluded from the enumerated offenses in section 1170.18. (See *People v. Lonergan* (1990) 219 Cal.App.3d 82, 93 ["A case does not stand as precedent for an issue not considered by it"].) While *Rouse* noted that a defendant is entitled to counsel at a Proposition 47 resentencing proceeding because that proceeding "is akin to a plenary sentencing hearing," that case did not involve, and the court there said nothing about, the extent to which the resentencing court must reduce or eliminate other

convictions as a collateral consequence of the Proposition 47 reduction, as opposed to simply recalculating the sentence.

Indeed, *Rouse* emphasized the narrowness of its holding—that when Proposition 47 requires the reduction of enumerated felony convictions to misdemeanors, but other non-enumerated felony counts remain, the court should conduct a plenary resentencing at which the defendant is entitled to counsel. (*Rouse*, *supra*, 245 Cal.App.4th at pp. 299-300.) But *Rouse*'s reference to "tak[ing] the defendant back to the time of the original sentence and resentenc[ing] him with the Proposition 47 count now a misdemeanor" (*Rouse*, *supra*, 245 Cal.App.4th at p. 300), is not availing to Valenzuela. *Rouse* referred strictly to the reduction of enumerated counts, and its analysis was keyed to the time of the original sentencing; it did not implicate collateral effects on non-enumerated convictions, and did not envision taking the defendant back to the time when the crime was committed. Thus, *Rouse* does not imply that a Proposition 47 reduction can have the collateral consequences Valenzuela seeks here. Rather, it merely holds that when some counts are reduced, and others are not, a plenary resentencing should take place—or, more accurately, if the sentencing court chooses to undertake such a resentencing, the Sixth Amendment and Due Process provide a right to counsel.

Valenzuela's reliance on *People v. Park*, *supra*, 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 is also misplaced because he overlooks the legal significance of a crucial aspect of timing—whether the redesignation occurred before or after the crime was committed. (OBM 16-17.) Valenzuela argues that interpreting the phrase "for all purposes" in subdivision (k) to include the theft conduct at issue in section 186.22(a) comports with the voters' intent to apply the Act to all collateral consequences except firearm possession. (OBM 15-16, quoting *People v. Evans* (2016) 6 Cal.App.5th, review granted Feb. 22, 2017, S239635.) He

argues that his interpretation of section 1170.18(k) is consistent with this Court's interpretation of convictions reduced to misdemeanors under section 17, subdivision (b), as stated in *People v. Park*, *supra*, 56 Cal.4th at page 799 ["we conclude that when a wobbler has been reduced to a misdemeanor the prior conviction does not constitute a prior felony conviction within the meaning of section 667(a)"].)

In *Park*, the defendant's sentence for his current crimes was enhanced by five years under section 667, subdivision (a), based on his prior conviction of a serious felony. *Prior* to the defendant's commission of his current crimes, however, the trial court had reduced the prior offense to a misdemeanor under section 17, subdivision (b), and then dismissed it pursuant to section 1203.4, subdivision (a)(1). (*People v. Park*, *supra*, 56 Cal.4th at p. 787.) *Park* concluded that once the conviction had been reduced to a misdemeanor, it could no longer serve as the basis for the enhancement under section 667, subdivision (a). (*Id.* at pp. 787, 799.) This Court noted, however, that "there is no dispute that . . . defendant would be subject to the section 667(a) enhancement had he committed and been convicted of the present crimes *before* the court reduced the earlier offense to a misdemeanor." (*Id.* at p. 802.)

Park is distinguishable from the present case because the reduction of Valenzuela's grand theft conviction to a misdemeanor occurred after he was tried and sentenced on the substantive terrorist street gang offense. Indeed, under the logic of *Park*, because Valenzuela's conviction for grand theft was a felony when he was sentenced, the conviction properly served as the basis for the "felonious criminal conduct" element of the substantive terrorist street gang offense. Valenzuela engaged in felonious criminal conduct when he stole the $200 bicycle from "the person" of the victim, and "[t]hat is true regardless of his [felony] conviction . . . and its

subsequent reduction to a misdemeanor." (*Valenzuela*, *supra*, 5 Cal.App.5th at p. 453.)

Valenzuela also argues that the phrase "for all purposes" in subdivision (k) is equivalent to the specific statutory restriction against the use of a past marijuana conviction in *People v. Flores*, *supra*, 92 Cal.App.3d 461. (OBM 17.) In *Flores*, the Legislature reduced the crime of marijuana possession, which served as the basis for the defendant's prior prison term enhancement, to a misdemeanor *before* the defendant committed, and was convicted of, the later offense that was the subject of appeal. (*People v. Flores*, *supra*, 92 Cal.App.3d at pp. 464, 470.) In *Flores*, as in *Park*, the current offense was committed *after* the earlier offense had already been reduced to a misdemeanor, in contrast with the present case. Here, as stated above, the grand theft conviction was still a felony when it was used as the basis for the "felonious criminal conduct" in the terrorist street gang offense. Thus, Valenzuela's reliance on *Flores* is no more availing than his reliance on *Park*.

As explained above, the sequence of events is critical to the analysis. When sentence was imposed in Valenzuela's case in 2014, the requirements of section 186.22(a) were met. The fact that his felony grand theft conviction has since been reduced to a misdemeanor does not alter the lawful imposition of his sentence in 2014 unless the voters, in passing Proposition 47, intended the reduction of his grand theft conviction to a misdemeanor to also operate to require striking the substantive gang offense. The voters could have signaled this intent by making subdivision (k) retroactive since that would necessarily call for application of subdivision (k)'s "misdemeanor for all purposes" language to past events. But, as explained, the voters had no such intention and expressed no desire that subdivision (k) operate retroactively. In short, subdivision (k) has prospective application only and has no application here.

II. SECTION 186.22 (A) REQUIRES "FELONIOUS CRIMINAL CONDUCT," NOT A FELONY CONVICTION; THEREFORE, THE REDUCTION OF THE UNDERLYING FELONY CONVICTION TO A MISDEMEANOR DOES NOT REQUIRE STRIKING THE STREET TERRORISM COUNT

Regardless of whether Proposition 47 could operate generally to undermine collateral, unenumerated offenses, street terrorism convictions like Valenzuela's are not affected by reduction of any predicate offense. Section 186.22(a) neither refers to nor uses the phrase "felony offense," nor requires a felony conviction. Rather, the statute focuses on "felonious criminal conduct." This focus does not change, regardless of whether the felony predicate conviction is subsequently redesignated as a misdemeanor. If the conduct occurred before Proposition 47 and was at that time felonious, then section 186.22(a)'s "felonious criminal conduct" requirement is met regardless of whether the predicate conviction is later reduced to a misdemeanor.

To support a charge of street terrorism, there must be a showing that the defendant "actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in *any felonious criminal conduct* by members of that gang." (§ 186.22(a), italics added.) Section 186.22(a) "is a substantive offense whose gravamen is the *participation in the gang itself*." (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467, italics in original, disapproved on other grounds in *People v. Mesa* (2012) 54 Cal.4th 191, 199; see also *People v. Albillar*, *supra*, 51 Cal.4th at p. 55 ["The gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang" and does not require that the crime be "gang-related"].) The elements of the offense are evaluated at or reasonably near the time of the offense. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

As this Court has held, section 186.22(a) "is not facially ambiguous" and when statutory language is not ambiguous, the plain meaning controls. (*People v. Albillar*, *supra*, 51 Cal.4th at p. 55.) One of the "plainly worded requirements" of section 186.22(a), is "willful promotion of a felony." (*People v. Castenada* (2000) 23 Cal.4th 743, 752.) Notably, this Court did not state in *Albillar* that a "felony conviction" is one of the requirements of the substantive crime of street terrorism. Rather, "[t]he plain language of the statute . . . targets felonious criminal conduct." (*Albillar*, *supra*, 51 Cal.4th at p. 55; see also *Albillar*, *supra*, at p. 56 [construing section 186.22(a) to require "*any* felonious criminal conduct by gang members"]; accord, *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1131 [section 186.22(a) plainly and unambiguously "targets *any* felonious criminal conduct"].)

This Court further observed in *Albillar* that "[t]he Legislature clearly knew how to draft language limiting the nature of the *criminal conduct* promoted, furthered, or assisted and could have included such language had it desired to so limit the reach of section 186.22(a). Indeed, the Legislature did exactly that in the subdivision immediately following—i.e., section 186.22(b)(1), which provides for an enhanced sentence for 'any person who is *convicted of a felony* committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . .'" (*Albillar*, *supra*, at p. 56, italics added.) """[W]hen different words are used in contemporaneously enacted, adjoining subdivisions of a statute, the inference is compelling that a difference in meaning was intended."""" (*Ibid.*, quoting *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 343.) Thus, had the Legislature intended to limit section 186.22(a) to *felony convictions*, as opposed to *felonious criminal conduct*, it would have done so.

Instead, nowhere does section 186.22(a) require that the defendant be *convicted* of a felony. Rather, he or she must promote, further or assist gang members in committing felonious criminal *conduct*. (*People v. Burnell* (2005) 132 Cal.App.4th 938, 944-945 ["furthering any felonious criminal conduct will do"].) Indeed, it has been well-established that section 186.22(a) "reflects the Legislature's carefully structured endeavor to punish active participants for commission of *criminal acts* done collectively with gang members." (*People v. Rodriguez*, *supra*, 55 Cal.4th at p. 1139, italics added.) And since Proposition 47 operates only to reduce a conviction to a misdemeanor, it does not have the time-traveling effect of transforming conduct that was felonious at the time into something else. Valenzuela's proposed construction of section 186.22(a) would effectively negate the requirement of a criminal act or conduct and replace it with a requirement found nowhere in the statute: the requirement of a felony conviction.

Valenzuela argues that "[t]he opinion's reliance on the distinction between felonious conduct and a felony conviction with respect to the necessary elements for a section 186.22(a) conviction is a *distinction without meaning*." (OBM 4, italics added.) To the contrary, there is an obvious distinction between "conduct" and "conviction": the term "conduct" refers to "active and passive behavior" (Evid. Code, § 125) while the term "conviction" refers to a verdict, guilty plea, or pronouncement of judgment (*People v. Park*, *supra*, 56 Cal.4th at p. 799). Moreover, his argument ignores the basic rules of statutory construction set forth above, that where the language of a statute is not ambiguous, the plain meaning controls; and the plain language of section 186.22(a) targets "felonious conduct," not a "felony conviction." (*Albillar*, *supra*, 51 Cal.4th at pp. 55-56.)

Valenzuela also contends that CALCRIM No. 1400, element 3, provides that the People must prove that the defendant engaged in "felonious criminal conduct" by "committing a felony offense," and that "the Fifth Amendment's due process clause requires proof beyond a reasonable doubt of each element of a substantive offense." (OBM 4.)[7] But an instruction is not a statute; the statute is what controls as a matter of law. (See *People v. Brown* (2004) 33 Cal.4th 382, 391.) And in any event,

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[7] CALCRIM No. 1400, Active Participation in Criminal Street Gang, provides in part:

> To prove that the defendant is guilty of this crime, the People must prove that:
>
> 1. The defendant actively participated in a criminal street gang;
>
> 2. When the defendant participated in the gang, (he/she) knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;
>
> AND
>
> 3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:
>
> a. directly and actively committing a felony offense;
>
> OR
>
> b. aiding and abetting a felony offense
>
> * * *
>
> *Felonious criminal conduct* means committing or attempting to commit [any of] the following crime[s]: _____ <insert felony or felonies by gang members that the defendant is alleged to have furthered, assisted, promoted or directly committed>.
>
> [To decide whether a member of the gang [or the defendant] committed _____ <insert felony or felonies listed immediately above> , please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s].]

CALCRIM No. 1400 does not call upon the jury to find that the defendant sustained a particular "felony conviction," but only that he engaged in *conduct* that amounted to a "felony offense." Valenzuela's due process argument fails because on July 14, 2013, when he stole Ramirez's bicycle, the conduct was felonious, and the jury was properly so instructed. Valenzuela does not attempt to show constitutionally insufficient evidence of grand theft as to the conviction. Instead, his argument improperly assumes that the Act retrospectively made the underlying conduct into something less than a felony.

Valenzuela further argues that "this Court has always held that the third element in section 186.22(a) is satisfied only by the finding beyond a reasonable doubt that a defendant committed a felony offense." (OBM 4-5, citing *People v. Rodriguez*, *supra*, 55 Cal.4th at page 1138.) Valenzuela misreads *Rodriguez*. The issue in *Rodriguez* was whether a gang member violates section 186.22(a) if he commits a felony, but acts alone. (*Rodriguez*, *supra*, 55 Cal.4th at p. 1128.) This Court observed that the statute "has been the object of much appellate parsing" and "[a]s a result, certain words and phrases in the third element of section 186.22(a) have already been judicially construed[,]" including the phrase, "any felonious criminal conduct." (*Id.* at p. 1131, citing *Albillar*, *supra*, 51 Cal.4th at p. 51.) "The plain unambiguous language of the statute targets *any* felonious conduct, not felonious gang-related conduct." (*Ibid.*, citing *Albillar*, *supra*, at p. 55, see also p. 1137 [section 186.22(a) requires "promotion or furtherance of *specific conduct* of gang members"].) In addressing whether section 186.22(a) applies to a lone gang member, this Court stated, "the Legislature sought to punish gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang related." (*Id.* at p. 1138.) *Rodriguez* supports respondent's argument that section 186.22(a) requires only felonious "conduct."

Rodriguez had no occasion to consider whether a felony conviction was required to be found beyond a reasonable doubt.

Valenzuela also relies on *People v. Lamas*, *supra*, 42 Cal.4th 516, to argue that, assuming the commission of a felony offense is distinguishable from a felony conviction, the reclassified misdemeanor theft conviction still does not qualify as felonious criminal conduct. (OBM 6.) In *Lamas*, this Court "consider[ed] the interplay" between section 186.22(a) and section 12031, subdivision (a)(2)(C), which elevates the misdemeanor offense of carrying a loaded firearm in public to a felony if committed by "an active participant in a criminal street gang as defined in section 186.22[](a)," and specified the sequence in which those provisions were to be applied. (*Lamas*, *supra*, 42 Cal.4th at pp. 519-520.) *Lamas* held that "misdemeanor conduct—being a gang member who carries a loaded firearm in public—cannot satisfy section 186.22(a)'s third element, felonious conduct . . . ," and thus cannot "be used to elevate the otherwise misdemeanor offense to a felony." (*Ibid.*)

Lamas does not assist Valenzuela. In considering whether it was harmless error for the trial court to instruct the jury that "felonious criminal conduct" could be satisfied by misdemeanor gun possession violations, this Court found the error was prejudicial because "there was no evidence before [the jury] that suggested defendant engaged in any *felonious conduct, either concurrently with, or prior to*, his misdemeanor gun offenses." (*Lamas*, *supra*, 42 Cal.4th at p. 526, italics added.) In other words, this Court considered the nature of the conduct *at or before* the time of the substantive criminal street gang offense. *Lamas* does not support Valenzuela's contention that it is the subsequently "reclassified" offense that must satisfy the third element of "felonious conduct." (See also *People v. Infante* (2014) 58 Cal.4th 688, 694 ["felonious criminal conduct" is established "independently" of section 186.22(a)]; *People v. Rodriguez*,

supra, 55 Cal.4th at p. 1137 [section 186.22(a) requires "the promotion or furtherance of *specific conduct* of gang members and not inchoate future conduct"].)

Valenzuela's reliance on *People v. Green* (1991) 227 Cal.App.3d 692 is similarly misplaced. (See OBM 6-7.) In *Green*, the Court of Appeal held that section 186.22(a) is not unconstitutionally vague or overbroad, but, as relevant here, found that the phrase "'felonious criminal conduct' . . . . does, indeed, impart some uncertainty," and therefore the phrase should be construed to cover only "*conduct* which is clearly felonious." (*Id.* at p. 704, italics added.) Not only is the finding of ambiguity at odds with this Court's holding that section 186.22(a) is not ambiguous (*People v. Albillar*, *supra*, 51 Cal.4th at p. 55), but *Green* did not resolve that supposed ambiguity by interpreting section 186.22(a) to require a felony conviction. Properly read, *Green* is perfectly consistent with *Albillar*'s interpretation: "The plain language of the statute thus targets felonious criminal conduct . . . ." (*Ibid.*) In any event, *Green* was concerned with whether section 186.22(a) could be construed so as to unconstitutionally "impinge on *protected conduct*." (*Green*, *supra*, 227 Cal.App.3d at p. 704, italics added.) The emphasis in *Green* was on constitutionally "protected conduct," and not on the requirement for a felony conviction. *Green* is not "settled law," as Valenzuela argues, for a proposition it never considered. (See *People v. Lonergan*, *supra*, 219 Cal.App.3d at p. 93 ["A case does not stand as precedent for an issue not considered by it"].)

Valenzuela also cites three recent Proposition 47 cases discussing the Act's application to section 667.5, subdivision (b) prior prison term enhancements: *People v. Abdallah*, *supra*, 246 Cal.App.4th at p. 747; *People v. Kindall* (2016) 6 Cal.App.5th 1199, 1204; and *People v. Call* (2017) 9 Cal.App.5th 856, 862. He argues that "[i]n the same manner that a Proposition 47 reduction removed an essential element for a prison prior

enhancement, the reduction in count one removed an essential element for section 186.22(a), i.e., that Valenzuela had committed a felony offense." (OBM 10-11; see also OBM 14-15.) These cases are inapplicable. Section 667.5, subdivision (b) *requires*, inter alia, proof that the defendant was previously *convicted of a felony*. (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) In all three cases, the prior prison term enhancements were predicated on enumerated felony convictions which had been reduced to misdemeanors by operation of the Act. The present case does not involve a resentencing court's refusal to strike an enhancement where the Act reduced the underlying felony conviction to a misdemeanor. Indeed, here Valenzuela's resentencing court conceded that the gang enhancement that was predicated on the theft conviction no longer applied. (See 1RT 71.) However, the Act did not redesignate the section 186.22 offense as a misdemeanor. Not only did it remain a felony after the Act, but a felony conviction was never an element of the stand alone gang offense. Thus, the reduction of the theft conviction to a misdemeanor did not retrospectively eliminate the evidence supporting the gang offense's "felonious conduct" element, which is analyzed at or near the time of the offense, not at the time of sentencing. (*People v. Garcia*, *supra*, 153 Cal.App.4th at p. 1509.) As the Court of Appeal found, "When Valenzuela stole the bicycle, he engaged in felonious criminal conduct," regardless of whether the Act reduced his grand theft conviction to a misdemeanor. (*Valenzuela*, *supra*, 5 Cal.App.5th at p. 453.)

Finally, Valenzuela argues "that a Proposition 47 resentencing is very similar, if not identical, to the factual scenario where the underlying felony offense on a [section] 186.22(a) conviction is reversed on appeal." (OBM 11, citing *People v. Sifuentes* (2011) 195 Cal.App.4th 1410.) In *Sifuentes*, a jury found the defendant guilty of possession of a firearm (§ 12021, subd. (a)(1)) with a gang enhancement (§ 186.22, subd. (b)). The jury also found

the defendant guilty of street terrorism (§ 186.22(a)). (*Sifuentes*, *supra*, 195 Cal.App.4th at p. 1413.) The street terrorism and gang enhancement were both based on the firearm possession charge, which in turn was based on the theory of constructive possession. (*Ibid.*) The Court of Appeal reviewed the evidence adduced at trial, and found it insufficient to show that the defendant knowingly exercised a right to control the firearm. (*Id.* at p. 1417.) In turn, both the gang enhancement and the substantive gang offense were reversed, as both were based on the now-overturned firearm possession count. (*Id.* at pp. 1419-1420.) As relevant here, the *Sifuentes* court based its decision on an analysis of the facts occurring *at the time of the offense*. (*Id.* at pp. 1417-1418.) Valenzuela's case is distinguishable because his section 1170.18(a) petition did not call upon the resentencing court to determine whether there was sufficient evidence at the time of the offenses to support the street terrorism count. Rather, as the Court of Appeal understood, the Act tasks a resentencing court with conducting an inquiry that is keyed to the date of sentencing and limited to reducing enumerated felony convictions to misdemeanors. It does not authorize resentencing courts to invalidate prior collateral convictions. Accordingly, when the court examined Valenzuela's conduct at the time of the offense, it properly concluded he engaged in "felonious criminal conduct," regardless of the subsequent reduction of the felony grand theft to a misdemeanor. (*Valenzuela*, *supra*, 5 Cal.App.5th at p. 453.)

CONCLUSION

Respondent respectfully requests that the decision of the Court of Appeal be affirmed.

Dated: June 2, 2017

Respectfully submitted,

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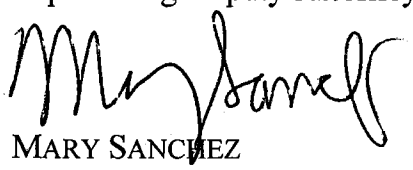

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,566 words.

Dated: June 2, 2017

XAVIER BECERRA
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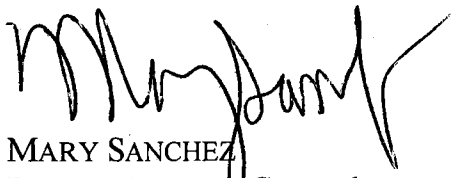

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DECLARATION OF SERVICE

Case Name: ***People v. Luis Donicio Valenzuela*** No.: **S239122**

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 June 2, 2017, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On June 2, 2017, I caused original and eight copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by **FedEx Priority Overnight, Tracking #** 8664 7214 1638.

On June 2, 2017, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be submitted electronically to the California Supreme Court by using the Supreme Court's Electronic Document Submission system.

On June 2, 2017, I caused one electronic copy of the **ANSWER BRIEF ON THE MERITS** in this case to be served electronically on the California Court of Appeal by using the Court's Electronic Service Document Submission system.

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 June 2, 2017, at Los Angeles, California.

M. O. Legaspi
Declarant

Signature

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