IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS DONICIO VALENZUELA,

Defendant and Appellant.

S239122

Ct. App. 2/6 B269027

Ventura County
Super. Ct. No. 2013025724

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

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

The Attorney General filed an Answer Brief on the Merits for the People. In this pleading, appellant Valenzuela replies to the answer brief filed on behalf of the People.

I.

At a Proposition 47 resentencing, the court retains jurisdiction to resentence on all counts.

The Attorney General argues that only certain enumerated offenses are subject to resentencing under Proposition 47 (hereinafter the "Act"). Thus, because Penal Code section 186.22, subdivision (a)[1] is not listed as an offense under Penal Code section 1170.18, subdivision (a),[2] Valenzuela was precluded from obtaining a resentencing for that offense. (ABM 17.) The Attorney General's position is wrong and contrary to the case law.

The Act provided a statutory basis for defendants currently serving felony sentences for offenses that the Act had now reduced and reclassified to misdemeanors. (§ 1170.18, subd. (a).) The Act vests the court with jurisdiction to resentence defendants on all counts connected to their cases, even those counts not affected by the Act. (*People v. Sellner* (2015) 240 Cal.App.4th 699, 701 (*Sellner*) ["[W]hen a trial court is called upon to resentence the defendant, it retains jurisdiction over all component parts of the aggregate sentence."]; see also (*In re Guiomar* (2016) 5 Cal.App.5th 265, 273 (*Guiomar*), review granted Jan. 25, 2017, S238888.)

Mr. Valenzuela contends that his conviction for section 186.22(a) - count two - can no longer stand after count one - grand theft of a person - was reduced to a misdemeanor. However, assuming, arguendo, that the reduction on count one had no bearing on count two, the Act still vested the trial court with jurisdiction to resentence Mr. Valenzuela on count two. "Based on the Proposition 47 modification of the principle sentence, the trial court not only was vested with jurisdiction to resentence...it was required to do so." (*Sellner, supra,* 240 Cal.App.4th at p. 601.) "When Proposition 47 applies to any count or related case,

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[1] Hereinafter for ease of reading, and brevity, 186.22(a).

[2] All further statutory references are to the Penal Code unless otherwise specified.

the trial court must reconsider the entirety of the aggregate sentence." (*People v. Mendoza* (2016) 5 Cal.App.5th 535, 538; "[I]f a petitioner is serving any portion of a sentence that included a qualifying felony, a petitioner falls within the scope of subdivision (a)" and the entire sentence may be subject to "recall of sentence." (*People v. Cortez* (2016) 3 Cal.App.5th 308, 314-315.); "In the context of reversal of a conviction underlying a principal term, a trial court on remand may...[modify] the sentences imposed on other convictions." (*People v. Roach* (2016) 247 Cal.App.4th 178, 185.) In sum, once count one was properly reduced to a misdemeanor, the trial court was required to resentence Mr. Valenzuela to an authorized sentence on count two. The Attorney General is wrong to conclude otherwise.

II.

An authorized sentence on count two is not a collateral matter.

The Attorney General next contends that an authorized sentence for count two is a collateral matter at Mr. Valenzuela's resentencing, even though prior to petitioner's resentencing on count two, count one had been reduced to a misdemeanor. (ABM 17.) In support of that position, the Attorney General mistakenly relies on two recent Court of Appeal decisions, *People v. Goodrich* (2017) 7 Cal.App.5th 699 (*Goodrich*) and *In re Guíomar, supra,* review granted Jan. 25, 2017, S238888.

In *Goodrich,* the defendant pled guilty to grand theft in 2007 and was sentenced to prison. After Goodrich completed his sentence in 2008, he was committed to a state hospital after having been determined to be a mentally disordered offender (MDO). Goodrich was recommitted as an MDO every year thereafter until 2015. (*Goodrich, supra,* Cal.App.5th at p. 705.) In 2015, defendant Goodrich successfully filed an application to have his grand theft conviction reclassified as a misdemeanor pursuant to section 1170.18, subdivisions (f) and (g). Then, at a separate recommitment proceeding, defendant

argued that he should not be recommitted on the basis that the grand theft conviction was now a misdemeanor. (*Id.,* at p. 706.)

Division One of the Fourth District disagreed. The court advanced two arguments for its decision. First, at a recommitment hearing, the People must meet the criteria of section 2962: "[T]he three criteria that must be satisfied for a continued treatment [i.e., recommitment] relate, not to the past, but to the defendant's current condition. At an extension proceeding, the questions are: Does the defendant continue to have a severe mental disorder? Is the disorder in remission? Does the defendant continue to represent a substantial danger of physical harm to others? (Citations omitted.)" (*Id.,* at p. 707.) Therefore, because a recommitment hearing did not require the People to prove that Goodrich had suffered a felony conviction, the reduction of the grand theft to a misdemeanor was irrelevant. (*Id.,* at pp. 710-711.) The court also posited that the Act did not operate to retroactively change his collateral initial commitment as an MDO as a result of having reduced his grand theft conviction to a misdemeanor. (*Id.,* at p. 711.)

In contrast, petitioner Valenzuela is not seeking a collateral application of the grand theft reduction to a misdemeanor. In this case, the grand theft constituted not only count one, but also was a required element for count two. In other words, the trial court had to sentence petitioner to an authorized sentence on both count one and count two. The resentencing on count two was not a separate collateral hearing from count one. Further, unlike the case in *Goodrich,* at the resentencing on count two, the trial court was required to find that Mr. Valenzuela had committed a felony offense. *Goodrich* therefore does not help the Attorney General.

In re Guiomar, supra, 5 Cal.App.5th 265 also provides no support. In *Guiomar,* the defendant was sentenced to an aggregate sentence of six years on four cases that resulted in four convictions (one conviction on each case.) One of the convictions was a failure to appear on a felony charge in violation of section

1320.5. (*Id.*, at p. 269.) After the passage of the Act, defendant petitioned for a resentencing and two of his convictions were reduced to misdemeanors; however, the trial court refused to vacate the failure to appear conviction even though the underlying felony conviction had been reclassified as a misdemeanor. The appellate court concurred. The court reasoned that section 1320.5 only requires that at the time of the failure to appear, the defendant is charged with a felony. Section 1320.5 does not require a conviction. "In fact, a defendant may be convicted of violating section 1320.5 even if he or she is not ultimately convicted of 'the charge for which he or she was out on bail when failing to appear in court as ordered. (Citations omitted.)'" (*Id.*, at p. 277.)[3] Therefore, the reduction of defendant's underlying conviction to a misdemeanor did not operate to invalidate the section 1320.5 conviction.

In contrast to a section 1320.5 offense, an authorized section 186.22(a) sentence requires that the defendant commit a felony offense, not merely be charged with a felony offense. Thus, the facts in *Guiomar* are easily distinguished from Mr. Valenzuela's case.

The Attorney General's position that count two was collateral to count one also conflicts with this Court's decisions defining collateral offenses. This Court has stated that a collateral offense refers to a separate offense arising out of a different transaction on a different date. (See *People v. Lane* (1893) 100 Cal. 379, 386, the prosecution improperly introduced evidence of a subsequent collateral offense that involved a different transaction and at a different time than the offense at trial; *People v. Perez* (1967) 65 Cal.2d 615, 621, no error to introduce a collateral offense from a different transaction and date in order to

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[3] In addition to this Court granting review on *In re Guiomar,* this issue is currently pending before this Court in the following cases: *People v. Perez* (2015) 239 Cal.App.4th 24, review granted Nov. 18, 2015, S229046 [briefing deferred pending decision in *People v. Buycks* (2015) 242 Cal.App.4th 519, review granted Jan. 20, 2016, S231765]; see also *People v. Eandi* (2015) 239 Cal.App.4th 801, review granted Nov. 18, 2015, S229305.)

establish a common pattern or modus operandi; *People v. Nye* (1969) 71 Cal.2d. 356, 369-371, it was not error to allow photographs from a collateral stabbing that occurred two weeks subsequent to the charged homicide offense.)

The section 186.22(a) offense was not collateral to the grand theft. Both offenses involved the same course of conduct committed at the same time. The prosecution simply charged two separate, but intrinsically related, offenses for the same conduct. In no shape or form were either offense collateral to the other.

III.

Once Mr. Valenzuela's grand theft offense was reduced to a misdemeanor, the trial court was required to prospectively give effect to that reduction.

The Attorney General argues that once count one was reduced to a misdemeanor any subsequent use of the offense as a misdemeanor would be an improper retroactive application. (ABO 17.) The Attorney General's contention lacks merit because it conflates retroactive application with prospective application.

The plain language of section 1170.18, subdivision (k),[4] directs the court to treat a felony reduced to a misdemeanor under the Act as a "misdemeanor for all purposes" except for firearm restrictions. (*People v. Canty* (2004) 32 Cal.App.4th 1266, 1276, "[i]f the language is clear and unambiguous, [the] court follow[s] the plain meaning of the measure.") In other words, once the felony is reduced to a misdemeanor, the offense is thereafter a misdemeanor for all purposes, except for firearm restrictions. In this case, count one was reduced to a misdemeanor prior to the court addressing count two at the resentencing. Thus, treating count one as a misdemeanor for the purpose of resentencing appellant Valenzuela on count two was consistent with the plain language of the statute and

[4] Hereinafter for brevity and ease of reading, 1170.18(k).

constituted prospective application. To not give effect to the reclassification of the grand theft to a misdemeanor conflicts with the clear language of section 1170.18(k).

The Attorney General's argument that the electorate did not intend for 1170.18(k) to apply to a resentencing fails for the same reason. (See ABM 18.) The Act specifically created a resentencing mechanism for those currently serving a sentence under the prior law to seek resentencing under the new law unless they posed an unreasonable risk of danger to public safety. (See § 1170.18, subds. (a) and (b).) Then, if a conviction is reduced to a misdemeanor pursuant to section 1170.18, subdivision (b), it is a misdemeanor for all purposes. (§ 1170.18, subd. (k).) This interpretation is consistent with the canon of statutory construction that the language must be construed in the context of the statute as a whole and the overall scheme. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83 ["[w]e do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that whole may be harmonized and retain effectiveness."].) It makes little sense that section 1170.18, subdivisions (a), (b), (f), and (g) apply to a resentencing, but not subdivision (k).

The Attorney General's reliance on this Court's decision in *People v. Conley* (2016) 63 Cal.4th 646 is similarly misplaced. In *Conley,* this Court addressed whether those sentenced under the old Three Strikes Law, but whose judgments were not final as of the date of the Reform Act [The Three Strikes Reform Act, or Proposition 36], were entitled to an automatic resentencing or were required to petition for recall of sentence under section 1170.126. This Court concluded that a defendant was not entitled to an automatic resentencing but instead must avail himself of the resentencing mechanism set forth in section 1170.126. (*Id.,* at p. 652.) The opinion does not stand for the proposition that a conviction reduced to a misdemeanor under the Act can thereafter be used to prove up a felony offense requirement.

The Attorney General argues that all of the recent appellate cases that have addressed and rejected the same retroactivity argument under the Act with respect to prison priors are distinguishable from this case. (ABM 31-32; see *People v. Abdallah* (2016) 246 Cal.App.4th 736, 747; *People v. Call* (2017) 9 Cal.App.5th 856, 862; *People v. Kindall* (2016) 6 Cal.App.5th 1199, 1204.) Appellant disagrees.

All three decisions held that a trial court could not impose a prison prior after the underlying felony conviction was reduced to a misdemeanor. To reach this conclusion, all three decisions rejected the notion that such a finding was a retroactive application of section 1170.18(k). (e.g., *Kindall, supra,* at p. 1204: "[s]imply put, at the time of the charged prior's adjudication, defendant had sustained misdemeanor convictions for the three drug charges at issue rather than felonies. There was no need to 'lookback' and read any retrospective effect in to the Proposition 47 reductions . . . ."

The Attorney General's contention that section 1170.18(k) is not retroactive fails for the same reason. (ABO 18.) At the time of Mr. Valenzuela's resentencing for the section 186.22(a) count, he had sustained a misdemeanor conviction for grand theft. There was no need to look back and read any retrospective effect.

Appellant posits, *supra,* that the resentencing on the section 186.22(a) is not a collateral matter to the reduction of the grand theft given that a felony grand theft was a required element for an authorized section 186.22(a) sentence. Assuming, arguendo, that the resentencing on count two was collateral, section 1170.18(k) still prevented the misdemeanor theft conduct in count one from being used to prove the felony offense requirement.

In *People v. Khamvongsa* (2017) 8 Cal.App.5th 1239, the appellate court addressed whether a felony reduced to a misdemeanor pursuant to Proposition 47 could thereafter be dismissed under section 1203.4a. The Attorney General argued that because the offense had at one time resulted in a felony

conviction, the defendant was barred relief under section 1203.4a, even after the offense had been reduced to a misdemeanor under Proposition 47. The court rejected that argument, concluding: "[b]ased on the unambiguous language of section 1170.18, subdivision (k), the court must treat appellant's prior conviction as a misdemeanor for all purposes, including when determining whether she qualifies for relief under section 1203.4a." (*Id.,* at pp. 1244-1245.)

In reaching its conclusion, the court reasoned:

> "[t]he 'for all purposes' language is broad, and there is no suggestion that it encompasses certain collateral consequences of a felony conviction while excluding others, such as relief under section 1203.4a that would be available if the crime were originally designated as a misdemeanor. On the contrary, section 1170.18, subdivision (k), by its terms applies to all such consequences with the sole exception that redesignation 'shall not permit that person to own, possess, or have in his or her custody or control any firearm.'" (Citations omitted.) (*Id.,* at p. 1244.)

In the same manner that a person whose felony is reduced to a misdemeanor is eligible for relief under section 1203.4a, a consequence of having a grand theft reduced to a misdemeanor is that the grand theft cannot thereafter be used to find that petitioner committed a felony offense under section 186.22(a). Section 1170.18(k)'s "all purposes" language is broad and it encompasses all consequences except firearm rights.

As stated in appellant's Opening Brief on the Merits, this Court's interpretation of convictions reduced to misdemeanors under section 17, subdivision (b), is very instructive in analyzing the issues in this case. (See OBM 16; *People v. Park* (2013) 56 Cal.4th 782 (*Park*).) The Attorney General attempts to distinguish *Park* on the basis that in *Park,* the felony was reduced to a misdemeanor under section 17, subdivision (b), before Park committed a new

felony offense, while Mr. Valenzuela had already been sentenced on the 186.22(a) offense before the grand theft was reduced to a misdemeanor. (ABM 23.) Although the sequence of events in this case differ from that in *Park,* the Attorney General's argument is unpersuasive because this case involves a resentencing where the trial court is compelled to evaluate the facts as they existed at that time.

Division Eight of the Second District stated it thus:

> "We recognize in *Park* the defendant's first wobbler offense had been reduced to a misdemeanor before he committed his second offense, whereas here appellant had committed and been convicted of his second offense before he obtained resentencing in both his first and second cases. (Citations omitted.) In that circumstance, *Park* noted, 'There is no dispute that, under the rule in [*Feyrer* and *Banks*][5], defendant would be subject to the 667 [subdivision (a)] enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor.' (Citations omitted.) Had *Park* involved a full resentencing in the second case, as here, however, we think the court would agree that the trial court was required to apply both section 1170.18, subdivision (k), and section 12022.1 to the facts as they existed at that time, just as a court must apply section 17, subdivision (b), to the facts as they exist when the defendant commits and is sentenced to a new offense after his prior wobbler conviction is reduced to a misdemeanor." (*People v. Buycks,* (2015) 241 Cal.App.4th 519, fn. number 2, review granted Jan. 20, 2016, S231765.)

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[5] *People v. Feyrer* (2010) 48 Cal.4th 426; *People v. Banks* (1959) 53 Cal.2d 370.

Appellant Valenzuela agrees with the reasoning in *Buycks*. That is, at the time of the resentencing on count two, his conviction on count one had been reduced to a misdemeanor. Taking the facts as they existed at that time, the trial court was thus precluded from using count one as the felony offense requirement for an authorized section 186.22(a) sentence.

IV.

An authorized sentence for a felony section 186.22(a) offense requires that the defendant commit a felony offense.

The Attorney General disputes that CALCRIM no. 1400, element 3, which requires that the People must prove that the defendant either committed or aided in the commission of a felony offense, is an accurate statement of the law. (ABM 28-29.) Instead, the Attorney General argues that the People need only prove that the defendant "engaged in conduct that amounted to a felony offense." (ABM 29.) The Attorney General misconstrues this Court's interpretation of the necessary elements for section 186.22(a).

CALCRIM no. 1400, element 3, is an accurate statement of the law based on this Court's decisions. The reason this Court and element 3 require the prosecution to prove a defendant must have committed a felony offense with another gang member is to avoid constitutional due process concerns. "The Legislature thus sought to avoid punishing mere gang membership in section 186.22(a) by requiring that a person commit an underlying felony with at least one other gang member." (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1134.) "With *Scales*[6] in mind, the Legislature limited 'liability to those who promote, further, or assist a specific felony committed by gang members and who know of the gang's pattern of criminal gang activity. Thus, a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang

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[6] *Scales v. United States* (1961) 367 U.S. 203 (*Scales*).

members....'" (*People v. Castenada* (2000) 23 Cal. 743, at p. 749.) *Castenada* noted that "[t]hese statutory elements necessary to prove a violation of section 186.22(a) exceed the due process requirement of personal guilt that the United States Supreme Court articulated in *Scales*...." (*Ibid.*)" "We thus rejected the defendant's claim that section 186.22(a) criminalized lawful association since the statute required that 'a defendant "actively participate[]" in a criminal street gang while also aiding and abetting a felony offense committed by the gang's members.'" *(People v. Rodriguez, supra,* 55 Cal.4th at p. 1134, citing *People v. Castenada, supra,* 23 Cal. at p. 751.) In sum, this Court has always been clear that section 186.22(a) requires a finding beyond a reasonable doubt that two gang members commit a felony offense.

Last, the Attorney General argues that this case is distinguishable from the factual scenario where the underlying felony offense for a section 186.22(a) conviction is reversed on appeal. (See *People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1419-1420 (*Sifuentes*).) The Attorney General contends "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." (ABM 33.) That argument misses the mark. Whether there is sufficient proof for an authorized street terrorism sentence is governed at the time of the resentencing, not at the time of the offense. Otherwise, if the latter time controlled, there could never be a resentencing under the Act.

Instead, the issue at the resentencing on count two was whether Mr. Valenzuela had committed a felony offense. Once count one was reduced to a misdemeanor, the answer was no. In *Sifuentes,* the court explained it this way: "To prove this element [felony offense requirement], the prosecutor relied on Sifuentes's alleged firearm possession. Consequently, reversal of Sifuentes's gun possession conviction also requires reversal of Sifuentes's active gang participation conviction." (*Sifuentes, supra,* at p. 1420.) The same reasoning that

required a reversal of the section 186.22(a) offense in *Sifuentes* requires a similar reversal of Mr. Valenzuela's section 186.22(a) conviction.

In short, a felony conviction, once reclassified to a misdemeanor, should not then be used to satisfy the felony offense element in section 186.22(a). Such use defeats both the intent of the Act and the express language contained in section 1170.18(k).

V.

The plain language of section 1170.18(k) prevents a grand theft reduced to a misdemeanor under the Act from thereafter being used to prove up a felony offense requirement for a section 186.22(a) sentence.

Appellant contends, *supra,* that once his grand theft was reduced to a misdemeanor at his resentencing, it was a misdemeanor "for all purposes." (§ 1170.18, subd. (k).) To give effect to that unambiguous language, the misdemeanor could not subsequently be used to prove the felony offense requirement for a section 186.22(a) resentencing. This Court's recent decision in *People v. Valencia* (July 3, 2017) __Cal.5th __, 2017 slp. opn. (*Valencia*) does not alter that contention.

In *Valencia,* this Court addressed whether the Act's definition of "unreasonable risk of danger to public safety" set forth in section 1170.18, subdivision (c), applies also to a resentencing under Proposition 36 – the Three Strikes Reform Act – which was passed in 2012. (*Id.,* at p. 2.) The dispute centered on section 1170.18, subdivision (c)'s phrase "[a]s used throughout this Code" that preceded the subsequent definition of unreasonable risk of danger to public safety. This court considered whether that phrase evidenced an intent by the electorate that the Act's definition of dangerousness was to be used throughout the Penal Code, including at a Proposition 36 resentencing. In a divided opinion,

this Court held that "Proposition 47 did not amend the Three Strikes Reform Act." (*Id.*, p. 4.)

This Court based its decision on the following reasons: (1) the phrase "[a]s used throughout this Code" was ambiguous as to its potential application to Proposition 36 when placed in context with the other provisions of the Act; (2) the ballot materials supplied no notice that the Act intended to amend the resentencing criteria for three-strike inmates; (3) the Act provided no procedural mechanism for the resentencing of three-strike inmates; and (4) under the unique circumstances of the case, the Court declined to follow the legal presumptions normally applied to voters. (*Id.* at pp. 10-11.)

None of the reasons underlying the *Valencia* decision apply to this case. First, section 1170.18(k) unambiguously applies to felony convictions resentenced to a misdemeanor under section 1170.18, subdivision (b). "Any felony conviction that is recalled and resentenced under subdivision (b). . . shall be a misdemeanor for all purposes." Nor is the subdivision ambiguous with other provisions of Proposition 47. To the contrary, reducing a grand theft of an amount under $950 to a misdemeanor and giving full effect to that misdemeanor for all purposes under subdivision (k) is consistent with a new statute defining theft. "What section 490.2 indicates is that after the passage of Proposition 47, 'obtaining any property by theft' constitutes petty theft if the stolen property is worth less than $ 950." (*People v. Romanowski* (2017) 2 Cal.5th 903, 908.)

Second, unlike the lack of notice in the ballot materials that the Act intended to amend the resentencing criteria for Proposition 36, the Act's ballot materials provided ample notice that the voter initiative would reduce a theft under $950 for all purposes. The uncodified sections of "Findings and Declarations" and its "Purpose and Intent" provide that the Act will maximize alternatives for nonserious, nonviolent crimes like petty theft unless the defendant has prior convictions for specified violent or serious crimes such as rape, murder, and child molestation." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) (Voter

Information Guide) text of Prop. 47, §§ 2, 3, p.70.) The sections also authorized a resentencing for any of the offenses listed herein as misdemeanors. (*Id.*, § 3, p. 70.) Allowing a resentencing for a theft under $ 950 - even if committed by two gang members - is consistent with the uncodified sections.

The Act's voter information materials also clearly provided notice to voters that grand theft under $950 would be reduced to a misdemeanor. For example, the Legislative Analyst's Analysis of Proposition 47 listed grand theft as an offense the measure would reduce to a misdemeanor. (Voter Information Guide, *supra,* analysis of Prop. 47, p. 35.) The Legislative Analyst stated that the Act would result in reduced sentences for an estimated 40,000 offenders; one of the offenses included in the estimate was grand theft. (*Id.,* at p. 36.) The voter information materials support rather than conflict with the plain reading of section 1170.18(k).

Last, unlike in *Valencia*, the Act does provide a procedural mechanism for a resentencing of a grand theft conviction. (§ 1170.18, subd. (a).) Thus, because the reasons underlying *Valencia* are not present in this case, the legal presumptions assigned to measures approved by the initiative process apply to this case. The first rule is that voters "must be assumed to have voted intelligently upon an [initiative measure], the whole text of which was supplied each of them prior to the election, and which they must be assumed to have duly considered, regardless of any insufficient recitals in the instructions to voters or the arguments pro and con of its advocates or opponents accompanying the text of the proposed measure." (*Wright v. Jordan* (1923) 192 Cal. 704, 713.) This rule supports giving effect to the plain meaning of section 1170.18(k). That is, a felony reduced to a misdemeanor is a misdemeanor for all purposes, including whether it satisfies the felony offense requirement under section 186.22(a).

The canon of statutory interpretation that the inclusion of one thing implies the exclusion of the other supports the plain meaning. (*In re Lance W.*

(1985) 37 Cal.3d 873.) Section 1170.18(k), specifies a reduced misdemeanor under the Act is a misdemeanor for all purposes except for firearms. "[W]here exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (*Id.*, at p. 888.) Voters in adopting an initiative are presumed to be aware of existing laws at the time of the initiative. (*Id.*, at p. 890, fn. 11.)

For the foregoing reasons, appellant Valenzuela respectfully requests that this Court follow the plain meaning of section 1170.18, subdivision (k), and distinguish this case from *Valencia.*

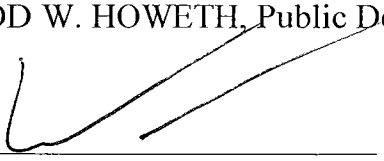
CONCLUSION

Appellant Valenzuela respectfully requests that this Court reverse the judgment of the Court of Appeal and make clear that a reduction of a felony to a misdemeanor pursuant to Proposition 47 means the offense is now a misdemeanor for all purposes. The misdemeanor offense cannot thereafter be used to satisfy the felony offense element for section 186.22(a).

Mr. Valenzuela respectfully requests that this Court reverse and remand the matter to the Court of Appeal with instructions to direct the superior court to vacate his sentence on count two.

Dated: July 7, 2017

Respectfully Submitted,
TODD W. HOWETH, Public Defender

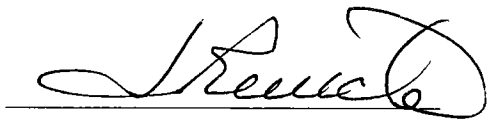
By: 

William Quest,
Senior Deputy Public Defender
Attorney for appellant
LUIS DONICIO VALENZUELA

CERTIFICATE OF WORD COUNT

I do hereby certify that by utilizing the word count feature of MSWord, Times New Roman #13 font, there are 5448 words in this document, excluding Declaration of Service.

July 7, 2017



Jeane Renick
Legal Mgmt. Assistant III

DECLARATION OF SERVICE

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

Case No.: **S239122 (from 2nd Dist./Div. 6 B269027; 2013025724)**

On July 10, 2017, I, Jeane Renick, declare: I am over the age of 18 years and not a party to this action. I am employed in the Office of the Ventura County Public Defender at 800 South Victoria Avenue, Ventura, California 93009. On this date, I personally served the following named persons at the places indicated herein, with a full, true, and correct copy of the attached **Reply Brief on the Merits**:

Gregory Totten, District Attorney
Attn: Michelle Contois, DDA
Hall of Justice, 3rd Floor
800 South Victoria Avenue
Ventura, CA 93009
(Counsel for the People)

Hon. Nancy Ayers and
Ventura County Superior Court
Hall of Justice, 2nd Floor
800 South Victoria Avenue
Ventura, CA 93009
(Trial Court Judge)

On this date, *I electronically served, as indicated,* OR served by placing in a sealed envelope or package addressed to the persons at the addresses listed below, and placed the envelope for collection and mailing, following our ordinary business practices a full, true, and correct copy of the attached **Reply Brief on the Merits:**

Clerk of the Court
Second District Appellate Court,
2d6.Clerk6@jud.ca.gov

Xavier Becerra, Attorney General
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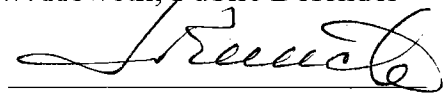
Luis Valenzuela
Address of record

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Todd W. Howeth, Public Defender

By: 

Jeane Renick
Legal Mgmt. Asst. III