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September 14, 2018

Mr. Jorge E. Navarrete
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *People v. Luis Donicio Valenzuela*
Supreme Court of the State of California, Case No. S239122

Dear Mr. Navarrete:

This Court has requested supplemental letter briefs addressing whether appellant Luis Donicio Valenzuela's conviction under Penal Code section[1] 186.22, subdivision (a), street terrorism, is a crime eligible for resentencing under Proposition 47 in light of this Court's recent decisions in *People v. Buycks* (2018) 5 Cal.5th 857 and *People v. Page* (2017) 3 Cal.5th 1175, 1184-1185, and, if so, whether or not Valenzuela is entitled to retroactive relief under the authority of *In re Estrada* (1965) 63 Cal.2d 740, as applied in *People v. DeHoyos* (2018) 4 Cal.5th 594, and *People v. Davis* (2016) 246 Cal.App.4th 127.

Buycks and *Page* support Respondent's position that Valenzuela is not eligible for resentencing for his section 186.22, subdivision (a) conviction. That conviction was premised on criminal *conduct*, not a criminal *conviction*, a distinction identified in *Buycks* as proscribing Proposition 47 relief in *In re Guiomar* (S238888). And, contrary to *Page*'s holding, no other enumerated statutory provision encompassed the essential elements of Valenzuela's street terrorism offense. Even if this Court disagrees, section 1170.18's resentencing provisions would provide Valenzuela his sole remedy. *In re Estrada* provides no alternative avenue for relief under the plain application of *DeHoyos* and *Davis*.

As described in Respondent's Answer Brief on the Merits, which is incorporated here in full, Valenzuela filed a petition and motion for resentencing pursuant to section 1170.18, subdivision (b). He argued that if the trial court determined that his felony grand theft count was reducible to a misdemeanor, then the street terrorism conviction had to be dismissed for

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

insufficiency of evidence because a necessary element of the substantive offense no longer existed. (1CT 15-21.) Section 186.22, subdivision (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." The trial court granted reduction of the grand theft conviction but rejected Valenzuela's argument that the reduction of that count required dismissal of the street terrorism conviction. On appeal, the Court of Appeal held that reduction of the grand theft conviction to a misdemeanor did not undermine the street terrorism conviction, because the focus of the offense is on "active participation in a criminal street gang" and it does not require that anyone sustain a *conviction* for felonious criminal conduct. (*People v. Valenzuela* (2016) 5 Cal.App.4th 449, 452, review granted March 1, 2017, S239122.) *Buycks* vindicates the Court of Appeal's decision.

In *Buycks*, this Court consolidated three cases to resolve similar issues concerning Proposition 47's effects on felony-based enhancements in resentencing proceedings under section 1170.18. (*Buycks*, *supra*, 5 Cal.5th at p. 871.) *People v. Buycks* (S231765) addressed whether Proposition 47 requires the dismissal of a two-year sentencing enhancement for committing a felony offense while released on bail for an earlier felony offense (§ 12022.1, subd. (b)) when that earlier felony offense is reduced to a misdemeanor under section 1170.18. *People v. Valenzuela* (S232900) addressed whether Proposition 47 requires the dismissal of a section 667.5, subdivision (b), one-year enhancement for serving a prior prison term when the felony on which that prison term was based has been reduced to a misdemeanor under section 1170.18. And *In re Guiomar* (S238888) addressed whether Proposition 47 requires the dismissal of a failure-to-appear-for-a-felony charge under section 1320.5, when the underlying felony has subsequently been reduced to a misdemeanor under the initiative. (*Buycks*, *supra*, 5 Cal.5th at p. 871.)

This Court concluded that Proposition 47 permitted the defendants in *Buycks* and *Valenzuela* to challenge their felony-based enhancements (§§ 667.5, subd. (b); 12022.1) when the underlying felonies had been subsequently resentenced or redesignated as misdemeanors. (*Buycks*, *supra*, 5 Cal.5th at p. 871.) Significantly, those felony-based enhancements required *convictions*. (*Id.* at pp. 889 [§ 667.5(b) requires proof that the defendant was previously convicted of a felony]; 890 [§ 12022.1 requires proof that the defendant was convicted of both the prior felony and the new felony while released on bail].)

But this Court emphasized that a "very different result" obtains for those, like the defendant in *Guiomar*, who had been convicted under section 1320.5, because a felony conviction was not an element of the bail-jumping offense. (*Buycks*, *supra*, 5 Cal.5th at p. 891.) The fact that Proposition 47 reduced to a misdemeanor the felony narcotics offense on which the defendant had been jailed had no collateral effect on the section 1320.5 conviction. As this Court explained:

> Under section 1320.5, "[e]very person who is *charged with* or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony." (§ 1320.5, italics added.) Under a plain reading of the statute, a section 1320.5 conviction does not require the bail jumper's felony charge to have resulted in a felony *conviction*. This defeats petitioner Guiomar's claim for relief under Proposition 47. The measure mandates that a "felony *conviction* that is recalled and resentenced . . . or designated as a misdemeanor ... shall be considered a misdemeanor for all purposes . . . ." (§ 1170.18, subd. (k), italics added.) Proposition 47, therefore, ameliorates the collateral effects of felony convictions, not the collateral effects of felony charges.

(*Id.* at p. 891.) Because the statute did not require the bail jumper's felony charge to result in a conviction, the fact that Guiomar successfully petitioned to have his narcotics offense reduced to a misdemeanor under Proposition 47 did not have any collateral effect on his section 1320.5 conviction. "Under section 1170.18, subdivision (k), Guiomar's 'felony conviction' for his narcotics offense became 'a misdemeanor for all purposes,' but that did not alter the fact that he had been charged with a felony when he failed to appear while on bail for that felony charge. Accordingly, under these circumstances, Guiomar's conviction for section 1320.5 does not qualify for resentencing under Proposition 47." (*Id.* at p. 892.)

Like Guiomar, the fact that Valenzuela's grand theft conviction became "a misdemeanor for all purposes" under section 1170.18, subdivision (k), does not alter the other fact that he had been engaged in "felonious criminal conduct" at the time of the offense (§ 186.22, subd. (a)). And just as section 1320.5 does not require a felony conviction, neither does section 186.22, subdivision (a). (See *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1139 [§ 186.22(a) "reflects the Legislature's carefully structured endeavor to punish active participants for commission of *criminal acts* done collectively with gang members" (italics added)].) Valenzuela's street terrorism conviction was not predicated on any separate felony conviction that was subsequently reduced to a misdemeanor, but on conduct that was felonious at the time it was committed. Accordingly, under the reasoning in *Buycks*, Valenzuela's conviction under section 186.22, subdivision (a), is ineligible for resentencing under Proposition 47.

This Court's decision in *Page*, *supra*, 3 Cal.5th at pages 1184 to 1185, supports this result, even though *Page* was concerned with a circumstance different from Valenzuela's — whether a conviction for violating Vehicle Code section 10851, taking or driving a vehicle, is reducible to petty theft under section 490.2. *Page* reasoned that section 1170.18, subdivision (a) "does not say that only those defendants who were convicted under the listed sections are eligible for resentencing. The statute instead says that those who are eligible (i.e., defendants serving a felony sentence who would have only been guilty of a misdemeanor had Prop 47 been in effect at the time of their offenses) may 'request resentencing in accordance with' the listed sections. (§ 1170.18, subd. (a).)" (*Id.* at p. 1184.) It followed that "obtaining an automobile worth $950 or less by theft constitutes petty theft under section 490.2 and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged." (*Id.* at p. 1187.)

Thus, *Page* was concerned with *convictions* for an offense which is not listed in section 1170.18, subdivision (a), but which is subject to Proposition 47 resentencing under a different statute. (*Page*, *supra*, 3 Cal.5th at p. 1185.) *Page*, therefore, did not address a situation like Valenzuela's in which there is no alternative statutory provision providing for misdemeanor sentencing for his criminal conduct. Section 186.22, subdivision (a) is not a theft-based offense that could be resentenced under section 490.2: "The gravamen of the substantive offense set forth in section 186.22(a) is active participation in a criminal street gang." (*People v. Albillar* (2010) 51 Cal.4th 47, 55; see also *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467.)

In conclusion, Valenzuela's conviction under section 186.22 is ineligible for resentencing in light of either *Buycks* or *Page*. But assuming this Court disagrees, Valenzuela is not entitled to any relief other than the procedures already in place under the proposition. As stated in *Davis*, *supra*, 246 Cal.App.4th at page 137, for persons currently serving a sentence or having completed a sentence for a felony reduced to a misdemeanor under Proposition 47, "the electorate made clear its intent as to the nature and extent of the retroactive application of the amendments. For those persons, there is no need, and no place, for inferences about retroactive application, and therefore no basis for invoking *Estrada*." (See also *DeHoyos*, *supra*, 4 Cal.5th at pp. 598, 603 [resentencing provisions of section 1170.18 are the sole avenue for resentencing of persons who had been sentenced before act's effective date].)

Sincerely,

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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 September 14, 2018, I served the attached **SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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Senior Deputy Public Defender
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Ventura, CA 93009

David Russell
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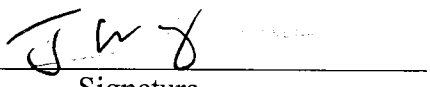
Michael D. Planet
Court Executive Officer
To be delivered to
Hon. Nancy Ayers, Judge
Ventura County Superior Court
Hall of Justice
800 S. Victoria Avenue
Ventura, CA 93009

California Appellate Project
520 South Grand Avenue, 4th Floor
Los Angeles, CA 90071

Additionally, on September 14, 2018, I caused one copy of the **SUPPLEMENTAL LETTER BRIEF** in this case to be served electronically on the California Court of Appeal by using the Court's TrueFiling 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 September 14, 2018, at San Francisco, California.

J. Wong
Declarant


Signature