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APPELLATE DEPARTMENT

September 13, 2018

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

RE: Response to Supplemental Briefing Order in *People v. Valenzuela,* (Case No. S239122)

Clerk Navarette,

Appellant Valenzuela respectfully submits this letter brief in response to the Court's August 31, 2018 order in this case, which requested arguments addressing the following question: "[w]hether or not defendant's conviction under Penal Code section 186.22, subdivision (a),[1] is a crime for resentencing in light of this court's recent decisions in *People v. Buycks* (S231765) and in *People v. Page* (2017) 3 Cal.5th 1175, 1184-1185 [*Page*], and if so, whether or not defendant 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."

For reasons discussed below, appellant contends that, 1) his conviction under section 186.22, subdivision (a)[2], is a crime eligible for resentencing given the facts of this case; and 2) he is entitled to retroactive relief.

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

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

## I. Appellant's Penal Code section 186.22, subdivision (a), conviction is eligible for resentencing.

In *People v. Page,* this Court addressed whether Proposition 47 allowed a defendant to obtain a resentencing for a conviction of Vehicle Code section 10851. In holding that a defendant could be eligible for a resentencing, provided the defendant harbored the intent to steal a vehicle worth $950 or less, the Court rejected several arguments in opposition advanced by the Attorney General. (*Page, supra,* 2 Cal.5th at pp. 1184-1185.)

The Court first rejected the notion that because Vehicle Code section 10851 is not included in the list of statutes referenced in section 1170.18, subdivision (a), the voters did not intend to affect punishment for Vehicle Code section 10851 convictions. Rather, this Court 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 Proposition 47 been in effect at the time their offenses) may 'request resentencing in accordance with' the listed sections. (Citations omitted.)" (*Ibid.*)

The Court further rejected the argument that section 490.2 only applies to a grand theft offense. "[S]ection 490.2 plainly indicates that 'after the passage of Proposition 47, "obtaining any property by theft" constitutes petty theft if the stolen property is worth less than $950.'" (Citations omitted.) (*Id.,* at p. 487.) The holding in *Page* supports appellant's appeal in this respect. The fact that section 186.22(a) is not included in the list of statutes in section 1170.18, subdivision (a), is not fatal to whether appellant is entitled to a resentencing on that count. Instead, the issue is whether appellant would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of his initial sentencing. On this dispositive issue, the answer is in the affirmative since appellant's misdemeanor theft could not be used to satisfy the felony offense requirement in section 186.22(a).

Following *Page,* this Court decided *People v. Buycks* (2018) 422 P.3d 531 (*Buycks*). *Buycks* involved three cases with related issues.[3] The Court first addressed whether "Proposition 47's mandate that the resentenced or redisignated offense 'be considered a misdemeanor for all purposes' (§ 1170.18, subd. (k)) permits defendants to challenge felony-based section 667.5 and 12022.1 enhancements when the underlying felonies have been subsequently resentenced or redesignated as misdemeanors." (*Id.,* at pp. 535-536.) The Attorney General argued that Proposition 47 did not retroactively reach back to unravel a felony-based conviction or a felony-based enhancement that had already been imposed before any successful petition for resentencing under section 1170.18, even if that judgment was not final. (*Id.,* at p. 540.)

This Court unanimously rejected that argument. Instead, the Court held that section 1170.18, subdivision (k) "plainly extends the retroactive ameliorative effects of Proposition 47 to mitigate any future collateral consequence of a felony conviction that is reduced under the measure." (*Id.*, at p. 540.) Additionally, "based on established presumptions we apply to measures designed to ameliorate punishment, a successful Proposition 47 petitioner may subsequently challenge, under subdivision (k) of section 1170.18, any felony-based enhancement that is based on that previously designated felony, now reduced to a misdemeanor." (*Ibid.*) The Court concluded that such challenges may occur through either a petition for habeas corpus for those cases not final at the time of the passage of Proposition 47 or under the "full sentencing rule" of a Proposition 47 resentencing. (*Id.,* at p. 550.)

Appellant Valenzuela respectfully submits that *Buycks* clearly supports his position that appellant's section 186.22(a) conviction is eligible for resentencing. First, appellant is factually eligible for a "full resentencing" according to *Buycks.* Appellant successfully petitioned the trial court to resentence on count one - grand theft. That is, the trial court already concluded that appellant did not pose an unreasonable risk as defined under section 1170.18, subdivision (b). Therefore, the trial court, "when it resentences on the eligible felony

[3] *People v. Buycks* was consolidated with *People v. Valenzuela* and *In re Guiomar.*

conviction, must also resentence the defendant generally and must therefore reevaluate the continued applicability of any enhancement based on a prior felony conviction." (*Id.,* at p. 550.) The trial court erred by not reevaluating the continued validity of count two based on the reduction of count one to a misdemeanor.

Further, appellant's section 186.22(a) conviction could not survive once his grand theft conviction was reduced to a misdemeanor. The felonious criminal conduct element under section 186.22(a) requires that two or more gang members commit a felony offense. (CALCRIM No. 1400, element No. 3; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138.) The reduction of the grand theft to a misdemeanor was fatal to count two given that count two was predicated on the underlying felony conviction in count one.

Most importantly, *Buycks* held that the "misdemeanor for all purposes" language in section 1170.18, subdivision (k) applies to collateral consequences. A collateral consequence is "the possibility of increased punishment in the event of a sequent conviction." (*Buycks, supra,* 422 P.3d at 540, *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355.) Under this definition, appellant received additional punishment for count two based on the initial felony conviction in count one. The trial court erred by not affording appellant retroactive collateral relief on the section 186.22(a) conviction based on the reduction to a misdemeanor in count one. Similar to both the defendant in *Buycks,* whose section 12022.1 enhancement was dismissed, and the defendant in *Valenzuela,* whose prison prior enhancement was dismissed, once the underlying felony convictions were reduced to misdemeanors, appellant in this case is entitled to a dismissal on count two after the underlying felony conviction in count one was reduced to a misdemeanor.

## II. Appellant is entitled to retroactive relief under Proposition 47.

Appellant Valenzuela concedes that he is not entitled to retroactive collateral relief under *In re Estrada* because he was currently serving a sentence for an offense - grand theft - and therefore was required to petition for a resentencing under section 1170.18, subdivisions (a) and

(b). (See *People v. Dehoyos* (2018) 4 Cal.5th 594, 604; *People v. Davis* (2016) 246 Cal.App.4th 127, 137.) However, once appellant successfully obtained a resentencing on count one, he was entitled to retroactive collateral relief under the ameliorative provisions of Proposition 47.

In *Buycks,* as discussed *ante,* this Court held that the "for all purposes" provision in section 1170.18, subdivision (k) can have retroactive collateral effect on judgments that were not final when the initiative took effect on November 5, 2015. (*Buycks, supra,* 422 P.3d at p. 543.) A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired. (*People v. Kemp* (1974) 10 Cal.3d 611, 614.) Appellant Valenzuela's judgment was not final when Proposition 47 took effect.[4] However, that does not end the enquiry. In *People v. Dehoyos, supra,* 4 Cal.5th 594, this Court held that a resentencing is available exclusively under section 1170.18, which "conditions relief on the court's assessment of 'whether a new sentence would result in an unreasonable risk of danger to public safety.' (Citations omitted.)" (*Id.*, at p. 600; see also *People v. Davis* (2016) 246 Cal.App.4th 127, 137.) This procedural posture occurred in this case as appellant Valenzuela successfully petitioned the court for resentencing on count one – grand theft. (RT: 73-74.)

Then, at the time of resentencing, the trial court was obligated to reevaluate the applicability of any offense or enhancement within the same judgment at that time, so long as that offense or enhancement was predicated on a felony conviction now reduced to a misdemeanor. (*Buycks, supra,* 422 P.3d at p. 550.) Such an offense, i.e., section 186.22(a) "cannot be imposed because at that point the reduced conviction 'shall be considered a misdemeanor for all purposes.' (§ 1170.18, subd. (k)." (*Ibid.*)

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[4] Appellant respectfully requests that this Court take judicial notice of the prior unpublished opinion in case No. B256440. The Court of Appeal affirmed the underlying judgment of conviction in case No. 2013025724 on April 30, 2015 and appellant's petition for review was denied on July 15, 2015. (See *In re Reno* (2012) 55 Cal.4th 428, 444.)

In sum, the court of appeal's decision should be reversed because the court erred in concluding that appellant's conviction under section 186.22(a) was ineligible for resentencing. The court of appeal decision also erred by concluding that section 1170.18, subdivision (k), did not afford appellant retroactive collateral relief on the section 186.22(a) conviction based on the reduction to a misdemeanor in count one.

Appellant Valenzuela respectfully requests this Court to remand the matter to the court of appeal with instructions to direct the superior court to vacate appellant's sentence on count two.

Sincerely,

William M. Quest
Attorney for Luis Valenzuela

# 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 September 13, 2018, 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 *electronically served, via the California courts system of Truefiling or as indicated,* OR by sealing in an envelope addressed to the person(s) at the address(es) listed below, and placing the envelope for collection in the U. S. Mail following our ordinary business practices, a full, true, and correct copy of the attached **Supplemental Letter Brief:**

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Luis Valenzuela
Address of Record

I declare under penalty 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