XAVIER BECERRA
Attorney General

COPY

State of California
DEPARTMENT OF JUSTICE

600 WEST BROADWAY, SUITE 1800
SAN DIEGO, CA 92101
P.O. BOX 85266
SAN DIEGO, CA 92186-5266

Public: (619) 738-9069
Telephone: (619) 738-99139
Facsimile: (619) 645-2191
E-Mail: Meredith.White@doj.ca.gov

SUPREME COURT COPY

February 23, 2018

SUPREME COURT
FILED

FEB 26 2018

Jorge Navarrete Clerk

Deputy

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

RE: *People v. Valenzuela* (S232900); *People v. Buycks* (S231765); *In re Guiomar* (S238888)

Dear Mr. Navarrete:

Please inform the court that pursuant to California Rules of Court, rule 8.520(d), respondent files this supplemental letter brief to address an opinion of this court issued after briefing was completed — *People v. Superior Court* (*Lara*) (Feb. 1, 2018) __ Cal.5th __ [2018 WL 652425] (*Lara*), and some additional authorities published by the Courts of Appeal after briefing was completed in this case.

Because the Court has ordered the three above-referenced cases consolidated for purposes of oral argument, respondent has filed this supplemental brief in all three matters, although the discussion is not necessarily relevant to all three cases. Briefly, all three cases concern slightly different aspects of the application of Proposition 47, the "Safe Neighborhoods and Schools Act," enacted by the voters in November 2014. Pursuant to Proposition 47, certain crimes were reduced from felonies to misdemeanors, and some defendants previously convicted of those felony offenses are eligible to seek resentencing and reclassification of their prior convictions. (See generally Penal Code[1], § 1170.18, subds. (a)-(f).) *Buycks* concerns the impact of that resentencing/reclassification on a defendant's "out-on-bail" enhancement (§ 12022.1), *Valenzuela* concerns the impact of the resentencing/reclassification provisions on a defendant's previously imposed sentence for a prison prior (§ 667.5, subd. (b)), and *Guiomar* concerns the impact of the resentencing/reclassification provisions on a defendant's prior conviction for failure to appear while on bail for a felony offense (§ 1320.5).

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

I. THIS COURT'S RECENT RELIANCE, IN *LARA*, ON *ESTRADA'S* INFERENCE OF RETROACTIVITY DOES NOT ALTER THE CONCLUSION THE ELECTORATE INTENDED SECTION 1170.18, SUBDIVISION (K) (OF PROPOSITION 47) OPERATE PROSPECTIVELY

Although *Lara* partially alters the retroactivity analysis under *Estrada*, it does not change the result here because like Proposition 36, and unlike Proposition 57 at issue in *Lara*, Proposition 47 contains an express limited retroactivity provision that prevents the broad rule of *Estrada* from applying. Importantly, *Lara* affects only respondent's secondary argument regarding the applicability of *Estrada*.

In *Lara*, this Court addressed the issue of whether Proposition 57 applied retroactively or prospectively. (*Lara, supra*, 2018 WL 652425, at *4-5.) As it has done many times before, the Court reiterated the guiding principle for the determination: "In order to determine if a law is meant to apply retroactively, the role of a court is to determine the intent of the Legislature, or in the case of a ballot measure, the intent of the electorate." (*Ibid.*, citing *People v. Conley* (2016) 63 Cal.4th 646, 659 (*Conley*).) At issue in *Lara* were amendments included in Proposition 57 which eliminated prosecutors' ability to file certain cases against juvenile defendants directly in adult court. (*Lara, supra*, 2018 WL 652425, at p. *3.) Citing *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), this Court reaffirmed the principle that when an amendatory statute lessens punishment, courts will infer the enacting body intended the new lighter punishment apply to as many cases as is constitutionally permissible. (*Lara, supra*, at *4, citing *Estrada, supra*, 63 Cal.2d at p. 745.)

In *Lara*, this Court also reaffirmed an expansion of *Estrada*'s rule found in *People v. Francis* (1969) 71 Cal.2d 66. *Francis* held that *Estrada's* inference of retroactivity was not limited to situations where the Legislature categorically lowered the punishment for a specified crime, but also applied where the Legislature afforded trial courts discretion to impose a lighter sentence, where trial courts had not previously had such discretion, i.e. where "the Legislature has determined that the former penalty provisions *may have been too severe in some cases* and that the sentencing judge should be given wider latitude in tailoring the sentence to fit the particular circumstances." (*Francis, supra*, 71 Cal.2d at p. 76.) With Proposition 57, this Court concluded the amendment eliminating prosecutorial direct filing afforded juvenile defendants a "potential 'ameliorating benefit'" because "a neutral judge, rather than a district attorney," would "determine that [the juvenile] is unfit for rehabilitation within the juvenile justice system." (*Lara, supra*, 2018 WL 652425, at *5.) Accordingly, pursuant to *Estrada* and *Francis*, the Court could infer the electorate intended the "potential ameliorating benefit"

to apply "as broadly as possible," and thus infer that the voters intended the amendment operate retroactively to non-final cases. (*Ibid.*)

In the People's Answer Brief on the Merits in *Valenzuela*, respondent argued several reasons why section 1170.18, subdivision (k), was not intended to operate retroactively. (Valenzuela ABM 14-17.) Respondent's secondary reason for this position was that *Estrada* was inapplicable because section 1170.18, subdivision (k), "does not constitute mitigation of a penalty for a specific crime." (Valenzuela ABM at p. 14.) Accordingly, respondent argued appellant's reliance on the inference of retroactivity announced in *Estrada* was misplaced. (Valenzuela ABM 14-17.) But, contrary to respondent's assertion, this Court concluded in *Lara* that *Estrada's* inference of retroactive application may apply in more circumstances than just a reduction of a penalty for a specified crime. (*Lara, supra*, 2018 WL 652425, at *5.) As this Court explained, *Estrada*'s inference of retroactivity may also apply where a statute ameliorates the "possible" or "potential" punishment for a class of persons. (*Ibid.*) Yet, while respondent was incorrect in asserting *Estrada* was limited to amendatory statutes that mitigate the penalty for a specific crime, respondent's primary arguments remain valid and respondent maintains section 1170.18, subdivision (k), was not intended to operate retroactively. While *Lara* expanded the reach of *Estrada's* inference of retroactive application when ameliorating legislation is silent on its intended application, it reaffirmed the dispositive inquiry on this issue—the enacting body's intent. (*Lara, supra*, 2018 WL 652425, at *4; see also *Conley, supra*, 63 Cal.4th at p. 656.)

For purposes of analyzing the legislating body's intent regarding retroactivity, the most significant difference between Proposition 57 and Proposition 47 is the express language in each statute. As noted in *Lara*, Proposition 57 was silent on the issue of retroactivity (*Lara, supra*, at p. *5), and thus the electorate's intent had to be inferred from the action it took. Proposition 47 does not suffer from the same uncertain silence. As explained in the People's Answer Brief, the electorate's intent with respect to the retroactivity of Proposition 47 was made clear through its enactment of specific provisions delineating the scope and manner of its intended retroactive applicability. (Valenzuela ABM 17-18; citing § 1170.18, subds. (a), (b), (f), and (g); and see *Conley, supra*, 63 Cal.4th at pp. 657-658.) Proposition 47's retroactivity provisions are similar to those included in Proposition 36, which this Court analyzed in *Conley*. There, this Court concluded the enactment of a "'special mechanism' for application of the new lesser punishment to persons who have previously been sentenced," undermines the applicability of the *Estrada* inference that the legislating body intended something different. (*Conley, supra*, 63 Cal.4th at pp. 658-659.) As this Court held in *Lara*, when a statute is silent on the issue, courts apply the reasoning of *Estrada* and presume broad retroactive application. (*Lara, supra*, 2018 WL 652425, at *5; see also *Conley, supra*, 63

Cal.4th at p. 656.) Conversely, when, as in Propositions 36 and 47, the statute "is not silent on the question of retroactivity" and instead "creates a special mechanism for application of the new lesser punishment to persons who have previously been sentenced," the broad presumption of *Estrada* does not apply. (*Conley*, *supra*, 63 Cal.4th at pp. 657–659.) For these reasons, this Court's recent opinion in *Lara* does not impact the analysis of the electorate's intent regarding the retroactivity of Proposition 47 generally, and section 1170.18, subdivision (k), specifically.

Although they predated *Lara*, several Courts of Appeal have published decisions on this issue since the briefing was completed; two courts have adopted respondent's position that section 1170.18, subdivision (k) was not intended to operate retroactively (*People v. Johnson* (2017) 8 Cal.App.5th 111 (*Johnson*), and *People v. Diaz* (2017) 8 Cal.App.5th 812 (*Diaz*)), and one held *Estrada* was applicable, and thus the statute should be applied retroactively to non-final judgments. (*People v. Evans* (2016) 6 Cal.App.5th 894, 902-905.)

The courts in *Johnson* and *Diaz* have the better argument. Consistent with the People's argument in this case, the *Johnson* court held the presumption of prospectivity codified in section 3 had not been rebutted by enactment of Proposition 47. The *Johnson* court recognized that Proposition 47 was "clearly ... intended to lessen punishment for 'nonserious, nonviolent crimes like petty theft and drug possession,'" but determined that nowhere in the legislation's history was there any mention of an intended impact on recidivist enhancements. (*Johnson, supra*, 8 Cal.App.5th at pp. 120-121, citing the Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3.) Indeed, rather than ameliorating the punishment for recidivists, Proposition 47 expressly stated that its purpose was to authorize resentencing only after "a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (*Ibid.*, citing Voter Information Guide, Gen. Elec., *supra*, text of Prop. 47, § 3, subds. (4), (5), p. 70.) The *Johnson* court found automatic reduction of recidivist sentences inconsistent with the assurances to voters in the ballot materials that passage of Proposition 47 "'would keep dangerous criminals locked up (Voter Information Guide, Gen. Elec, *supra*, argument in favor of Prop. 47, p. 38),' and that it would not require automatic release of anyone," because "[a] person who refuses to reform even after serving time in prison is clearly and significantly more dangerous than someone who merely possesses drugs for personal use or shoplifts." (*Johnson, supra*, 8 Cal.App.5th at pp. 120-122.) Accordingly, the *Johnson* court concluded the voters did not intend Proposition 47 "to reach back to ancillary consequences such as enhancements resulting from recidivism considered serious enough to warrant additional punishment," and the default rule of prospective application codified in section 3 was applicable. (*Id.* at p. 122.)

Similarly, in *Diaz*, the court concluded Proposition 47 was not intended to retroactively reduce a recidivist sentence that was properly imposed at the time. Importantly, relying on *Conley*, the *Diaz* court held "[b]y omitting any procedure that would permit Diaz's resentencing, and by providing that its mechanisms [for retroactive resentencing] are exhaustive, Proposition 47 clearly signals that it does not have the retroactive effect Diaz seeks." (*Diaz, supra*, 8 Cal.App.5th at p. 825.)

For the reasons set forth in the People's briefing, and those above, the electorate did not intend section 1170.18, subdivision (k) to operate retroactively.

II. UPON RECONSIDERATION, RESPONDENT AGREES THAT A TRIAL COURT'S AUTHORITY AT A PROPOSITION 47 RESENTENCING HEARING INCLUDES THE ABILITY TO RECONSIDER IMPOSITION OF TERMS ON ENHANCEMENTS

In the People's opening brief in *Buycks*, respondent agreed that trial courts have authority to resentence defendants on convictions affected by Proposition 47's reclassification of certain crimes, but argued the trial court's authority extended only to the resentencing on principal and subordinate terms (as contemplated by section 1170.1, subdivision (a)), and did not include authority to resentence defendants on enhancements, such as the "out-on-bail" enhancement. (*Buycks* OBM at 29-30.) While no published case appears to have addressed this specific contention, several have addressed a related contention, and determined, contrary to respondent's position, that when resentencing a defendant, trial courts have the authority and discretion to reconsider any part of that defendant's aggregate sentence. In light of these more recent authorities, respondent has reevaluated the position advanced in the *Buycks* brief, and no longer agrees that trial courts cannot reconsider imposition of sentence on enhancements when resentencing a defendant pursuant to Proposition 47.

In *People v. Cortez* (2016) 3 Cal.App.5th 308 (*Cortez*), the defendant's principal term was imposed on a felony conviction that was later eligible for reduction to a misdemeanor pursuant to Proposition 47. The defendant was also serving sentences on two misdemeanor convictions not impacted by Proposition 47. Cortez argued, based on the language of sections 1170.1, subdivision (a), and 1170.18, that the trial court could not resentence him on his misdemeanors when it reduced his principal felony term. According to Cortez, Proposition 47 permitted resentencing only on the affected convictions, and trial courts could not alter the sentences imposed on other convictions not affected by Proposition 47. (*Id.* at p. 314.) The court rejected this argument and concluded "[a] close reading of section 1170.18 ... indicates a resentencing encompasses the entire sentence, not merely the portion attributed to the qualifying felony." (*Id.* at p. 316.) Further, the *Cortez* court noted the "sound policy" reasons that supported its

holding: "This rule is justified because an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components." (*Ibid.*) As the *Cortez* court pointed out, the "aggregate length of a term matters," because trial court judges routinely and appropriately base sentencing choices on their "subjective determination of the value of a case and the appropriate aggregate sentence based on the judge's experiences with prior cases and the record in the defendant's case..." (*Id.* at p. 317, citing *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1457.)

Consistent with *Cortez*, the courts in *In re Guiomar* (2016) 5 Cal.App.5th 265 and *People v. Mendoza* (2016) 5 Cal.App.5th 535, reached the same conclusion with respect to the trial court's authority, at a Proposition 47 resentencing, to alter or change the defendant's sentence on felony convictions not impacted by Proposition 47. (*Guiomar*, at pp. 271-275; *Mendoza*, at p. 538.) As the *Mendoza* court explained, trial courts resentencing defendants pursuant to Proposition 47 are not limited to "rigid sentencing options" and "may reconsider any component underlying the sentence." (*Id.* at p. 538.) "When Proposition 47 applies to any count or related case, the trial court must reconsider the entirety of the aggregate sentence." (*Ibid.*)

The reasoning of these cases applies equally to a trial court's consideration of enhancements when resentencing a defendant pursuant to Proposition 47. Upon further reflection, respondent no longer believes trial courts lack authority to reconsider the imposition of a sentence on an enhancement when it is resentencing the defendant under Proposition 47. (See, e.g., *People v. Acosta* (2016) 247 Cal.App.4th 1072, 1076–1077 [at resentencing trial court could properly impose sentence on six prison priors which had been dismissed at original sentencing].)

Respectfully submitted,

MEREDITH S. WHITE
Deputy Attorney General
State Bar No. 255840

For XAVIER BECERRA
Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **In re John Manuel Guiomar on Habeas Corpus**
No.: **S238888**

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 February 23, 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 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Sixth District Appellate Program
Attn: Executive Director
95 South Market Street, Suite 570
San Jose, CA 95113

Sixth Appellate District
Clerk of the Court
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

Jonathan Grossman
Staff Attorney
Sixth District Appellate Program
95 South Market Street, Suite 570
San Jose, CA 95113

County of Monterey
Salinas Division
Superior Court of California
240 Church Street, Suite 318
Salinas, CA 93901

The Honorable Dean D. Flippo
District Attorney
Monterey County District Attorney's Office
P O. Box 1131
Salinas, CA 93902

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 February 23, 2018, at San Diego, California.

B. Romero
Declarant

B. Romero
Signature

SF2017401223
71411378.docx