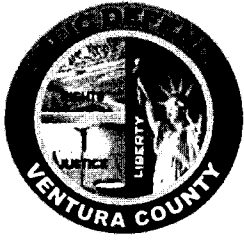


SUPREME COURT COPY

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Manager/Fiscal Admin Services

APPELLATE DEPARTMENT

September 27, 2018

**SUPREME COURT
FILED**

SEP 28 2018

Jorge Navarrete Clerk

Deputy

Clerk Jorge E. Navarrete
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 Navarrete,

Appellant Valenzuela respectfully submits this reply brief in response to respondent's supplemental brief dated September 14, 2018. In their brief, respondent contends that appellant is ineligible for resentencing on count two – the section 186.22, subdivision (a) conviction – on the grounds that the conviction was premised on criminal conduct rather than a criminal conviction.^{1 2} Respondent further avers that *People v. Buycks* (2018) 422 P.3d 531 supports this contention. Respondent is incorrect in both respects.

Respondent argues that because on its face, section 186.22(a) does not expressly state that a felony conviction is required, the reduction to a misdemeanor in count one does not affect the section 186.22(a) offense. However, both statewide jury instructions and this Court have interpreted the felonious criminal conduct element for a section 186.22(a) offense to require the commission of a felony offense.

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

² Hereafter, for brevity, section 186.22(a).



This Court has also rejected the notion that this element can be satisfied by either a misdemeanor conviction or misdemeanor conduct. (See CALCRIM No. 1400, element No. 3; see also *People v. Casteneda* (2000) 23 Cal.4th 743, 749 [“a person who violates section 186.22(a) has also aided and abetted a separate felony offense committed by gang members”]; *People v. Lamas* (2007) 42 Cal.4th 516, 524 [neither a misdemeanor conviction nor misdemeanor conduct satisfies felonious criminal conduct]; *People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138 [“As such, with section 186.22(a), 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.”])

Thus, because the resentencing of count one – the prior underlying felony theft conviction – to a misdemeanor negated the required element that appellant had committed a felony offense, the trial court could not impose count two. A similar result was reached in *Buycks* with respect to the section 667.5 enhancement:

“On its face, section 667.5 subdivision (b) does not expressly state that a prior felony conviction is required. But the provision’s reference to a prior ‘prison term’ necessarily must subsume the existence of a prior felony conviction that justified the imposition of that prison term. Thus in describing the elements required for the imposition of a section 667.5, subdivision (b) enhancement, we have stated it ‘requires proof that the defendant: (1) was previously convicted of a felony . . .’” (*Buycks, supra*, 422 P.3d at p. 547.)

The *Buycks* Court then made the following point: “With this understanding, the resentencing of a prior underlying felony conviction to a misdemeanor conviction negates an element required to support a section 667.5 one-year enhancement.” (*Ibid.*) The same reasoning applies with equal force in this case.

Respondent last argues that a section 186.22(a) offense is similar to a section 1320.5 offense and therefore can still be imposed regardless of whether the underlying felony is reduced to a misdemeanor. This contention lacks merit. 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.) As this Court stated, “[U]nder the 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 misdemeanor . . . shall be considered a misdemeanor for all purposes . . .’ (Citations omitted.) Proposition 47, therefore, ameliorates the collateral effects of felony convictions, not the collateral effects of felony charges.” (*Id.* at p. 548.)

In contrast, this case deals with a felony conviction as opposed to a felony charge in two respects. First, the theft charge in count one did result in a conviction which was then reduced to a misdemeanor at the Proposition 47 resentencing. Appellant Valenzuela was therefore entitled to ameliorate the collateral effect of that conviction at the resentencing. One collateral effect was the dismissal of the section 186.22, subdivision (b)(1) enhancement attached to count one. Another equally collateral effect should have been the dismissal of count two given that the reduction of count one negated an element required to support a section 186.22(a) conviction.

Additionally, section 186.22(a) and section 1320.5 serve different purposes. “[T]he primary purpose of section 1320.5 is to deter the act of jumping bail and that it requires punishment ‘whether or not the defendant ultimately is convicted of the charge for which he or was out on bail when failing to appear in court as ordered.’ (Citations omitted.)” (*Ibid.*) This is in contrast to the purpose of section 186.22(a) which was to “punish gang members who acted *in concert* with other gang members in committing a felony regardless of whether such felony was gang-related. (Citations omitted, emphasis in original.)” (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1138.) In other words, section 186.22(a) requires the commission of a felony offense, not merely being charged with a felony offense. Thus, if the felony offense underlying appellant’s section 186.22(a) conviction is reduced to a misdemeanor, the rationale for punishing appellant pursuant to section 186.22(a) ceases.



People v. Valenzuela (Case No. S239122)

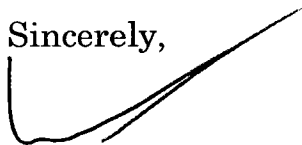
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In sum, the court of appeal's decision should be reversed because the court erred in concluding that appellant's conviction under section 186.22(a) was ineligible for resentencing. The court of appeal decision also erred by concluding that section 1170.18, subdivision (k), did not afford appellant retroactive collateral relief on the section 186.22(a) conviction, based on the reduction of the felony offense 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 27, 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, either 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 Reply Letter Brief**:

Gregory Totten, District Attorney
Michelle.contois@ventura.org
AppellateDA@ventura.org

Hon. Nancy Ayers, and
Ventura County Superior Court
Admin-ucs@ventura.courts.ca.gov

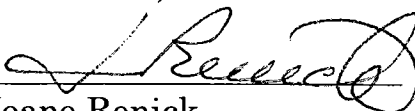
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Luis Valenzuela
Address of Record

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

