

SUPREME COURT COPY



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September 27, 2018

SUPREME COURT
FILED

SEP 28 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. Luis Donicio Valenzuela*
Supreme Court of the State of California, Case No. S239122

Dear Mr. Navarrete:

Respondent submits the following reply to appellant Luis Donicio Valenzuela's supplemental letter brief. Valenzuela contends (1) that his conviction under Penal Code¹ section 186.22, subdivision (a), street terrorism, is a crime eligible for resentencing given the facts of this case and (2) he is entitled to retroactive relief. (Appellant's Letter at 1.) Valenzuela's first contention must be rejected because he fails to consider that under the reasoning in *People v. Buycks* (2018) 5 Cal.5th 857, a street terrorism conviction does not require an underlying felony conviction, and therefore section 1170.18, subdivision (k) does not apply. Accordingly, there is no need to reach the second contention. Assuming that this Court reaches the second contention, the parties agree that Valenzuela's sole remedy is through section 1170.18.

Valenzuela argues that *Buycks* supports his position that his section 186.22, subdivision (a) conviction is eligible for resentencing. (Appellant's Letter at 3.) Although Valenzuela acknowledges that *Buycks* consolidated three different cases with related issues (*Buycks*, *Valenzuela*, and *Guiomar*), Valenzuela ignores *Buycks*' holding that a "very different result" obtains for those, like the defendant in *Guiomar*, who are convicted of crimes that do not require a prior felony conviction as an element of the offense. (*Buycks, supra*, 5 Cal.5th at p. 891.) In *Guiomar*, the defendant was convicted of bail jumping under section 1320.5. The fact that Proposition 47 reduced to a misdemeanor the felony narcotics offense for which the defendant was on bail had no collateral effect on the section 1320.5 conviction. As the Court explained, because section 1320.5 did not "require the bail jumper's felony *charge* to have resulted in a felony *conviction*," section 1170.18, subdivision (k)'s language that a "felony *conviction* . . .

¹ All further statutory references are to the Penal Code.

shall be considered a misdemeanor for all purposes” does not apply. (*Buycks*, at p. 891.) Valenzuela is silent on this aspect of the *Buycks* case, and makes no attempt to explain why *Guiomar* is not dispositive against him.

Valenzuela also argues that his section 186.22, subdivision (a) conviction could not survive once his grand theft conviction was reduced to a misdemeanor, because “felonious criminal conduct” is an element of street terrorism. (Appellant’s Letter at 4.) But, the *Guiomar* holding in *Buycks* directly refutes Valenzuela’s attempt to equate “conduct” with “conviction.” Proposition 47 reduces only the latter to misdemeanors. With street terrorism, the Legislature chose to focus on conduct, rather than convictions. (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)].) Accordingly, for the reason explained in *Buycks*, Valenzuela’s conviction for street terrorism is ineligible for resentencing under Proposition 47.

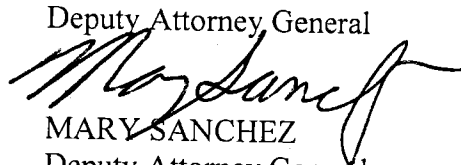
Valenzuela also contends that *People v. Page* (2017) 3 Cal.5th 1175 supports his appeal, arguing that the dispositive issue in his case, like in *Page*, is whether he would have been guilty of a misdemeanor had Proposition 47 been in effect at the time of his initial sentencing. (Letter at 2.) *Page*, however, was concerned with a *conviction* 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. In *Page*, the different statute was the initiative’s newly-enacted section 490.2, modifying the definition of petty theft. (*Page, supra*, 3 Cal.5th at p. 1185.) *Page* 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.)

Mr. Jorge E. Navarrete
September 27, 2018
Page 3

Thus, for all the reasons stated in this reply and respondent's initial supplemental letter brief, Valenzuela's conviction under section 186.22, subdivision (a) is ineligible for resentencing under Proposition 47. Were the Court to reach a contrary conclusion, the parties agree that Valenzuela's sole remedy is to petition for relief under section 1170.18. (Appellant's Letter at 4-5.)

Sincerely,

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

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 collecting and processing electronic and physical correspondence. 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. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On September 27, 2018, I electronically served the attached **Letter Brief** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on September 27, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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

On September 27, 2018, I served the attached **Letter Brief** by transmitting a true copy via electronic mail to:

David Russell
Deputy District Attorney

On September 27, 2018, I caused one copy of the **Letter Brief** in this case to be served electronically on the California Court of Appeal by using the Court's TrueFiling system.

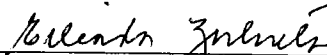
DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *People v. Luis Donicio Valenzuela*
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A copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 27, 2018, at Los Angeles, California.

Erlinda Zulueta
Declarant


Signature

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