In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **STEVENSON BUYCKS,** **Defendant and Appellant.**	Case No. S231765

Second Appellate District, Division Eight, Case No. B262023
Los Angeles County Superior Court, Case No. NA097755
The Honorable James Otto, Judge

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

This Court granted review on its own motion, limiting briefing to the following issue: "Was defendant eligible for resentencing on the penalty enhancement for committing a new felony while released on bail on a drug offense even though the superior court had reclassified the conviction for the drug offense as a misdemeanor under the provisions of Proposition 47?"

INTRODUCTION

Defendant-Appellant Stevenson Buycks was convicted of two felony offenses—theft and evading—that he committed while he was released pending sentencing on a felony drug charge. The sentencing judge in the theft and evading case imposed a two-year sentencing enhancement under Penal Code section 12022.1—the "on-bail" enhancement statute—consecutive to Buycks' other sentences in both cases.[1] After the convictions in both cases became final, the voters passed Proposition 47, changing specified felony crimes into misdemeanors and creating a specific procedural vehicle for offenders to receive resentencing on the reduced crimes. Buycks claims that because he received relief under Proposition 47

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[1] All further statutory references in this brief are to the Penal Code unless otherwise noted. CT and RT refer, respectively, to the trial court's one-volume Clerk's Transcript and one-volume Reporter's Transcript in Case No. NA097755. 1 ACT refers to the Augmented Clerk's Transcript that was filed on May 22, 2015, and 2 ACT refers to the Augmented Clerk's Transcript filed on August 14, 2015.

in both cases—converting his drug conviction in the earlier case, and his theft conviction (but not the evading conviction) in the second case, into misdemeanors—the two-year enhancement under section 12022.1 could not be maintained incident to his remaining felony evading conviction.

That contention is wrong. In determining whether a legislative change in the classification or punishment of a crime requires changes to related sentences, California law implements three general principles. First, more effect is given to changes that reflect a void conviction than to changes reflecting mercy and forbearance. Second, an offender who violates a prohibition related to his legal status is not excused from the consequent punishment merely because the underlying legal status is later changed. And third, those whose cases have become final do not receive the benefit of such changes absent specific legislative provision.

Proposition 47 and section 12022.1 deviate from these principles only in specific and limited ways, none of which apply here. Although the on-bail enhancement may not be imposed unless the offender has been properly convicted of both the crime for which he was on release and his newer felony, the law provides no mechanism for eliminating an enhancement based on later changes in the law. Proposition 47 does not create any avenue of direct relief, because Proposition 47 makes no mention of revisiting on-bail enhancements. And although Proposition 47 instructs that where a resentencing petition has been granted the reclassified

offense should be treated as a misdemeanor for all purposes, that instruction must be understood—consistent with the similarly worded provision that has long applied to so-called "wobbler" offenses—as having only forward-looking effect, rather than as entitling an offender to collateral reconsideration of an already imposed punishment.

The Court of Appeal's opinion requiring elimination of the enhancement in Buycks' case rested on two errors. It misconstrued the "full resentencing" principle as requiring that all developments postdating the original sentence be given nunc pro tunc effect, rather than as simply requiring that the remaining felony charge (here, evading) be substituted as the principal term when the original principal term was downgraded to a misdemeanor; and it required that adherence to the relevant statutes' express terms be subordinated to a desire to maximize accomplishment of what the court viewed as their purposes. The Court of Appeal's theory would expand the lower courts' already heavy burden in deciding Proposition 47 petitions, and would create confusion about the extent to which Proposition 47 requires revisiting sentencing components that were not expressly included in Proposition 47's text. Moreover, the Court of Appeal's view would give rise to more inequality than it would correct, because, in effect, it would specially benefit some offenders simply for committing more crimes, and would privilege other offenders based on the

order in which they committed their crimes. The Court of Appeal's decision should be reversed.

BACKGROUND

A. Statutory background

This case concerns two statutes: the resentencing provisions of Proposition 47, and the sentencing enhancement under section 12022.1 for offenses committed while released on bail or on one's own recognizance.

1. Proposition 47's resentencing provisions

Proposition 47, the "Safe Neighborhoods and Schools Act," was enacted on November 4, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) For offenders meeting statutory criteria, Proposition 47 converted certain drug and theft-related offenses that had previously been designated as either felonies or "wobblers" into misdemeanors. (*Id.* at p. 1091.)[2]

Proposition 47 also added to the Penal Code section 1170.18, which governs the retroactive applicability of this change to those sentenced before Proposition 47's enactment. As relevant here, Proposition 47 permits a defendant "currently serving" a felony sentence to petition for resentencing if the felony would have been a misdemeanor had Proposition

[2] A "wobbler" is a crime that can be punished as either a felony or a misdemeanor. (See generally *People v. Statum* (2002) 28 Cal.4th 682, 685.)

47 "been in effect at the time of the offense." (§ 1170.18, subd. (a); see § 1170.18, subds. (a)-(e).)[3] When such a person petitions for resentencing, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Section 1170.18 further provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) ... shall be considered a misdemeanor for all purposes" except those relating to eligibility to possess or own firearms. (§ 1170.18, subd. (k).)

The voters' intent in enacting Proposition 47, as stated in section three of the Proposition, was to "[e]nsure that people convicted of murder, rape, and child molestation will not benefit from this [A]ct;" "[c]reate the Safe Neighborhoods and Schools Fund" with savings caused by the Act; "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes;" "[a]uthorize consideration of resentencing for anyone who is currently serving a

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[3] A separate provision of section 1170.18 permits a defendant who has "completed his or her sentence" for a felony conviction, but whose offense would have been a misdemeanor had Proposition 47 been in effect at the time of the offense, to have the felony conviction redesignated as a misdemeanor. (§ 1170.18, subd. (f).)

sentence for any of the offenses" reclassified by the Proposition; "[r]equire 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;" and "save significant state corrections dollars on an annual basis."

2. Section 12022.1's enhancement for offenders who commit a new felony while released on a pending felony case

Section 12022.1 "increases the period of imprisonment for a felony if the offender committed it while free on bail or his own recognizance (O.R.) pending resolution of earlier felony charges of which he is ultimately found guilty." (*In re Jovan B.* (1993) 6 Cal.4th 801, 807.)

The statute, which was originally enacted in 1982 and has been occasionally amended, provides that:

> Any person arrested for a secondary offense that was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years, which shall be served consecutive to any other term imposed by the court.

(§ 12022.1, subd. (b).) A "primary offense" is a felony offense "for which a person has been released from custody on bail or on his or her own recognizance prior to the judgment becoming final." (§ 12022.1, subd. (a)(1).) A "secondary offense" is a felony offense "alleged to have been committed while the person is released from custody for a primary offense." (§ 12022.1, subd. (a)(2).) As with many other enhancements, the

trial judge has discretion either to strike or dismiss the enhancement itself, or to "strike the additional punishment for that enhancement in the furtherance of justice." (§ 1385, subd. (c).)

Section 12022.1 has been interpreted as requiring that the on-bail enhancement not be given effect until the offender has been convicted of both the primary and secondary offenses. (See *People v. McClanahan* (1992) 3 Cal.4th 860, 869.) The statute provides specific mechanisms for imposing and (if necessary) staying execution of the enhancement, depending on the order in which the defendant's primary and secondary cases are resolved and become final on appeal.

- Where the Primary-Offense Case Is Resolved First. If the defendant is convicted in his primary-offense case first, then when the defendant is later sentenced in his secondary-offense case, the court in that case may either strike the enhancement under section 1385 or impose it, with the secondary-offense sentence running "consecutive to the primary sentence" (§ 12022.1, subd. (e)) and any enhancement running "consecutive to any other term imposed by the court" (§ 12022.1, subd. (b)).
- Where the Secondary-Offense Case Is Resolved First. If the defendant is sentenced in the secondary-offense case before the primary-offense case is resolved, then the secondary-offense court (if it does not strike the enhancement altogether under section 1385) must stay the

imposition of the enhancement "pending imposition of the sentence for the primary offense." (§ 12022.1, subd. (d).) "If the person is acquitted of the primary offense," then the stay becomes "permanent." (*Ibid.*) But if there is a conviction and sentencing for the primary offense, then "[t]he stay shall be lifted by the court hearing the primary offense at the time of sentencing for that offense and shall be recorded in the abstract of judgment." (*Ibid.*) The defendant is then returned to the secondary-offense court, which may decide whether to "strike the enhancement." (*People v. Meloney* (2003) 30 Cal.4th 1145, 1149-1150.)

- Effect of Appeal. If the primary offense conviction is reversed on appeal, then the on-bail enhancement in the secondary-offense case is suspended "pending retrial of that felony." (§ 12022.1, subd. (g).) If a retrial results in reconviction of the primary offense, then "the enhancement shall be reimposed." (*Ibid.*)

Section 12022.1 was enacted "'"to meet public concern over offenders who are arrested [and] then allowed back on the street a short time later only to commit more crimes."' [Citations.]" (*People v. McClanahan*, *supra*, 3 Cal.4th at p. 867.) The enhancement reflects multiple concerns. It "'deter[s] the commission of new felonies by persons released from custody on an earlier felony.'" (*Id.* at pp. 868-869, quoting *People v. Watkins* (1992) 2 Cal.App.4th 589, 593.) It punishes the defendant's "'"*breach* of the terms of his *special custodial status.*"'

[Citation.]" (*In re Jovan, supra,* 6 Cal.4th at p. 813.) And it reflects the Legislature's view that criminals who commit new crimes while released on bail for a previously charged felony are "particularly deserving of increased punishment for their on-bail recidivism." (*People v. Walker* (2002) 29 Cal.4th 577, 583-584; see also *People v. McClanahan, supra,* 3 Cal.4th at p. 868 [section 12022.1's purpose is "to penalize *recidivist* conduct with increased punishment"].)

B. Buycks' convictions and initial sentences

This appeal arises out of two of Buycks' convictions and accompanying sentences, each of which was originally imposed prior to the passage of Proposition 47.

In the first case (Case No. BA418285), Buycks pleaded guilty on November 19, 2013, to felony possession of narcotics, in violation of Health and Safety Code section 11350, subdivision (a). (1 ACT 1-4; October 20, 2015, Court of Appeal slip opinion as modified on denial of rehearing, November 5, 2015 (Slip opn.), p. 3.) This served as the "primary offense" for purposes of Buycks' later on-bail enhancement. After the plea, the trial court ordered Buycks to enroll in a one-year, live-in drug treatment program, and released him on his own recognizance. (1 ACT 1-4.) The trial court advised Buycks that if he failed to complete the program or was arrested on a new charge, the court would impose a state prison sentence. (1 ACT 2-3.) Buycks subsequently abandoned the drug treatment program,

and on December 26, 2013, the trial court sentenced Buycks to three years in state prison. (1 ACT 5-7; Slip opn., p. 3.)

The second case (Case No. NA097755) arose from Buycks' conduct while on release in the first case. On December 16, 2013, a Home Depot employee, who was familiar with Buycks from a recent shoplifting incident, saw him once again leave the store with stolen goods. (CT 10-24.) Two loss-prevention officers confronted Buycks. Buycks responded by striking one of the officers in the face, and in the ensuing struggle Buycks pulled out an unopened folding knife. (CT 21-24.) When the employees seized the knife, Buycks yelled that he had a gun, causing the employees to let him run away to his van. (CT 25-26.) A police officer who saw Buycks driving nearby activated his emergency lights and siren. (CT 30-32.) Instead of pulling over, Buycks led police on an eight-minute chase, during which he ran red lights, made an illegal U-turn, and drove above the speed limit in a school zone and around pedestrians. (CT 32-38.) Buycks was stopped only when his van was rammed by a police car. (CT 34-35, 38.)

Buycks was charged with two counts of second degree robbery in violation of section 211, one count of petty theft by a person with three prior convictions in violation of section 666, subdivision (a), and one count of evading a police officer in violation of Vehicle Code section 2800.2, subdivision (a). (CT 44-51.) The information alleged that, at the time he

committed these offenses, Buycks was released on bail or on his own recognizance in the first case. (CT 48.) As a result, these new offenses served as "secondary offenses" under the on-bail enhancement statute.

On August 8, 2014, the robbery charges were dismissed under a plea agreement, and Buycks pleaded no contest to the theft and evading felonies. (CT 83-85; Slip opn., p. 3.) Buycks admitted that he committed those offenses while released on bail in the earlier case, and that he had served two prior prison terms. (CT 84; Slip opn., p. 3.) The trial court imposed an aggregate sentence of seven years and eight months in state prison. (CT 84-85, 87; Slip opn., p. 3.) In arriving at that sentence, the court treated the theft charge as the principal term under California's Determinate Sentencing Act, and imposed an upper term of three years on that count.[4] The evading charge was treated as a subordinate term, receiving a sentence of eight months, or one-third of the evading offense's middle term. Buycks also received a two-year enhancement under section 12022.1 for committing his new felonies while on release in his earlier case, and

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[4] Under the Determinate Sentencing Act, where a person is convicted of multiple felonies and given consecutive sentences, "the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional terms imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1" (§ 1170.1, subd. (a).) The "principal term" is the "greatest term of imprisonment imposed by the court for any of the crimes." (*Ibid.*) Any "subordinate term ... shall consist of one-third of the middle term of imprisonment" for the corresponding offense. (*Ibid.*)

received two one-year enhancements under section 667.5, subdivision (b), for his prior prison terms. (CT 84-87; Slip opn., p. 3.)

C. Buycks' Proposition 47 resentencings

After Proposition 47 passed, Buycks petitioned for resentencing in both cases.

In the first case, the trial court granted Buycks' petition for resentencing on January 8, 2015. Buycks' felony narcotics conviction was reduced to a misdemeanor, and he was resentenced to 360 days in jail. (1 ACT 8-11; Slip opn., p. 3.) Buycks received 360 days of credit for time served, and was ordered released as to that conviction. (1 ACT 9.)

In the second case, Buycks' petition for resentencing was granted on January 28, 2015. (CT 92-95; Slip opn., p. 3.) The trial court reduced Buycks' theft conviction from a felony to a misdemeanor, and changed his sentence on this count from three years to six months. (CT 92-93, 95; RT 1-2, 3; 2 ACT 3, 5; Slip opn., p. 3-4.) Because the theft term was now a misdemeanor, it could no longer serve as the "principal term" under the Determinate Sentencing Act. (See § 1170.1, subd. (a).) As a result, the court treated the evading count as the principal term, increasing the sentence on that count to a full base term of three years. (CT 93, 95; RT 3; Slip opn., p. 4.) The court retained the previously applied enhancements: one year for each of Buycks' two prior prison terms, under section 667.5, subdivision (b); and the two-year on-bail enhancement under section

12022.1. (CT 93, 95; RT 2-3; Slip opn., p. 4.) Buycks objected that the on-bail enhancement could not be applied because his narcotics conviction in the first case had been reduced to a misdemeanor. The trial court rejected that argument, reasoning that because Buycks' felony evading charge was not subject to reclassification under Proposition 47, the voters had not intended Proposition 47 to affect Buycks' sentence (including the section 12022.1 enhancement) for that charge. (RT 2-3; see *ibid.* [reasoning that the charge in the first case "was a felony at the time … , so it was applicable," and "the intention of Prop 47 was not to release people who committed crimes that are not subject to Prop 47 out early or diminish their sentence"]; Slip opn., p. 4.)

D. The Court of Appeal's opinion

On appeal, Buycks again contended that, because his conviction in the first case had been reduced to a misdemeanor, it was improper for the trial court in the resentencing on the second case to retain the on-bail enhancement. (Slip opn., pp. 2-3, 5.) The Court of Appeal agreed. (Slip opn., pp. 4-10.) The court reasoned that, when Buycks' Proposition 47 petition was granted in his second case, he was "subject to a *full* resentencing" in that case (Slip opn., p. 5) and the trial court "was required to reevaluate the applicability of section 12022.1 *at that time*" (Slip opn., p. 6). By then, the court noted, Buycks' felony "in the first case had been reduced to a misdemeanor." (Slip opn., p. 6.) Accordingly, because

section 12022.1 "required that both the primary and secondary offenses be felonies in order for [Buycks] to incur the additional penalty," the trial "court could not reimpose the section 12022.1 enhancement." (Slip opn., p. 6.) The court therefore modified the judgment below by striking the on-bail enhancement, and otherwise affirmed. (Slip opn., p. 10.)

This Court ordered review on its own motion.

ARGUMENT

I. A PROPOSITION 47 RESENTENCING DOES NOT AUTHORIZE THE COURT TO SET ASIDE AN ON-BAIL ENHANCEMENT THAT WAS PROPERLY IMPOSED AT THE ORIGINAL SENTENCING

A. Under ordinary rules of California law, a properly imposed enhancement is not subject to revision based on subsequent reclassification of an underlying conviction

Neither Buycks nor the Court of Appeal's opinion contest that, under the plain text of section 12022.1, the on-bail enhancement was properly charged and imposed in the original proceedings on Buycks' secondary offense. Buycks was "arrested for" theft, robbery, and evading—all "felony offense[s] alleged to have been committed" during the pendency of Buycks' prior case, which included another "felony offense for which [he] ha[d] been released from custody on bail or on his ... own recognizance prior to the judgment becoming final." (§ 12022.1, subds. (a)(1), (a)(2), (b).) As a result, the on-bail enhancement statute made Buycks "subject to" a two-year enhancement, "consecutive to any other term imposed by the court." (§ 12022.1, subd. (b).) Furthermore, Buycks does not—and could

not—allege that the statute required the enhancement to be stayed when originally imposed because of any lack of finality in his primary-offense case.[5] Had Buycks challenged the enhancement when it was first imposed, the challenge would have been rightly recognized as frivolous.

Moreover, Buycks' conduct was precisely the type of conduct the Legislature intended to deter and punish when it passed section 12022.1. After his guilty plea in the first case, Buycks was released on his own recognizance in order to take advantage of a residential drug-treatment program. (1 ACT 1-4; Slip opn., p. 3.) The judge warned Buycks not to commit new crimes while on release. (1 ACT 2-3.) Instead of heeding that admonition, Buycks committed significant crimes. (See pp. 10-11, *supra.*) His convictions for those crimes proved a "'"*breach* of the terms of his *special custodial status*"' [citation]" and directly implicated the Legislature's '"concern over offenders who are *arrested* [and] then allowed back on the street a short time later to commit more crimes."' [Citations]." (*In re Jovan, supra,* 6 Cal.4th at p. 813.)

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[5] Because Buycks was "convicted of a felony for the primary offense" and "sentenced to state prison for the primary offense" before being "convicted of a felony for the secondary offense," his two sentencings were conducted under section 12022.1, subdivision (e), and he was not subject to the special stay-of-imposition provisions in subdivision (d).

Buycks claims, and the Court of Appeal determined, that the judge who resentenced him under Proposition 47 for one of his secondary offenses was nevertheless required to retroactively annul the original on-bail enhancement. But that position runs counter to several well established principles.

Where a conviction or sentence is voided by judicial or executive action, the effect on subsequent proceedings or sentencings in other matters depends on whether the voiding was based on a deficiency in the original conviction. Section 12022.1 itself demonstrates how the law may refuse to give effect, in subsequent proceedings, to a charge or conviction that was later deemed void *ab initio* based on factual innocence or procedural error. (See pp. 7-8, *supra* [discussing statutory mechanism for suspending enhancements based on primary charges that are overturned on direct appeal.) In contrast, this Court has held that a sentencing enhancement based on a prior conviction is not barred merely because the prior conviction was subsequently reduced or voided as a matter of "'forgiveness or remission of penalty,' [citation]" such as a pardon. (*People v. Biggs* (1937) 9 Cal.2d 508, 514.) This is because "a pardon of a convicted felon ... 'does not restore his character,' and 'does not obliterate the act itself.'" (*Ibid.*; see *ibid.* ["We are unable to see how the pardon, relieving the offender from the effects or disabilities of his first crime, can in addition

prevent the normal application of the statute punishing him for a subsequent offense."].)[6]

Where an enhancement or crime punishes a defendant's decision to engage in particular conduct while subject to a particular legal status, the defendant cannot attack the conviction or enhancement because of a later change in that status. Thus, a felon in possession of a firearm cannot halt prosecution for that crime by attacking the validity of the underlying felony, because the offense is based on that person's status at the time of the possession. (See *People v. Harty* (1985) 173 Cal.App.3d 493, 499-500 [construing former section 12021: "the possible invalidity of an underlying prior felony conviction provides no defense to possession of a concealable weapon by a felon"].) And a person convicted of an out-of-state sex offense who fails to register as a sex offender in California will not have his California failure-to-register conviction set aside merely because the out-of-state conviction was eventually set aside. (See *In re Watford* (2010) 186 Cal.App.4th 684, 694.)[7] Allowing the defendant to challenge his status post

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[6] Federal courts applying federal enhancements based on past convictions have similarly distinguished between later decrees which declare a person innocent of charges, and those which merely forgive the transgression. (See, e.g., *United States v. Norbury* (9th Cir. 2007) 492 F.3d 1012, 1015.)

[7] Here, too, federal law recognizes a similar distinction. (See, e.g., *United States v. Yepez* (9th Cir. 2012) 704 F.3d 1087, 1090 (en banc) (per curiam) [U.S. Sentencing Guidelines provision that assigns two criminal (continued...)

hoc would undercut the purpose of such status-based prohibitions: to punish a defendant's intentional decision to engage in conduct at a time when that conduct was prohibited because of a status he was aware of. (Cf. *Walker v. City of Birmingham* (1967) 388 U.S. 307, 320 [under collateral bar rule, party "could not by-pass orderly judicial review of the injunction before disobeying it"].)

Finally, when the Legislature enacts a statute reducing the sentence for a crime, the effect of that change on a previously imposed sentence depends on whether the conviction has become final on direct appeal. The Legislature may be presumed to have intended such changes to apply to cases in which "the judgment convicting the defendant of the act is not final." (*In re Estrada* (1965) 63 Cal.2d 740, 745.) That limitation is one this Court has repeatedly stressed. (See *People v. Brown* (2012) 54 Cal.4th 314, 324 ["Accordingly, *Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in [Penal Code] section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative

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(...continued)
history points to defendants who commit a crime "'while under any criminal justice sentence' [citation]" requires court to "look to a defendant's status at the time he commits the federal offense"; post-offense adjustments in that status, even if putatively made nunc pro tunc, are irrelevant to the enhancement's applicability].)

act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments."]; *People v. Nasalga* (1996) 12 Cal.4th 784, 789 (plur. opn.) [granting a reduced punishment retroactive effect as to "a defendant, whose conviction is not final at the time the law changed"]; *id.* at p. 793 [explaining that *People v. Kirk* (1965) 63 Cal.2d 761 applied sentence reduction retroactively where "'[t]he statute imposing the penalty for issuing the checks was amended *prior to final judgment* by ameliorating the punishment'"] (italics added).)[8]

These principles require maintaining the on-bail enhancement in this case. Buycks sought elimination of the enhancement long after both his cases became final.[9] He makes no claim that his convictions or sentences were improper when imposed, either because of factual innocence or because of procedural defects. Rather, his only claim is that the voters subsequently decided to reduce the punishment for various offenses (though not, notably, for on-bail enhancements). Like the pardon in *People v. Biggs*, this was a change that was not based on factual

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[8] Section 3, referred to in *People v. Brown*, states that "[n]o part of [the Penal Code] is retroactive, unless expressly so declared." (§ 3.)

[9] (See California Rules of Court, rule 8.308, subd. (a) [notice of appeal is due 60 days after judgment]; *People v. Nasalga*, *supra*, 12 Cal.4th at p. 789, fn. 5 [noting cases holding that "for the purpose of determining retroactive application of an amendment to a criminal statute," a judgment becomes final when "the time for petitioning for a writ of certiorari in the United States Supreme Court has passed"].)

innocence, did not "'obliterate the act'" for which those sentences were imposed, and did not "'restore [Buycks'] character.'" (*People v. Biggs*, *supra*, 9 Cal.2d at p. 514.) And like other status-based sentencing enhancements, section 12022.1 targets a defendant's decision to engage in particular conduct while subject to a particular legal status (being "released from custody on a primary offense"). (§ 12022.1, subd. (b).) Subsequent adjustments to the classification and status of the primary offense do nothing to alter Buycks' status when he committed the crime. Nor do they reduce Buycks' culpability for consciously abusing the privilege of having been released to attend drug treatment as an alternative to incarceration. Under these principles, the trial court properly denied Buycks' request to retroactively benefit from the subsequent reclassification of his original offense.

The Court of Appeal drew the opposite conclusion based on its misimpression that Buycks' case was "analogous" to *People v. Park* (2013) 56 Cal.4th 782. (See Slip opn., p. 6.) In *Park*, this Court held that a trial court erred in imposing a sentence enhancement under section 667, subdivision (a), based on a prior conviction for a wobbler offense that had been reduced from a felony to a misdemeanor. (56 Cal.4th at p. 795.) In *Park*, however, the prior offense was reduced to a misdemeanor *before* Park committed the second offense (*id.* at pp. 787-788)—a fact that was crucial to *Park*'s holding that the enhancement did not apply. Indeed, the Court in

Park considered it beyond dispute that the defendant "would be subject to the section 667(a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Id.* at p. 802.) Far from strengthening Buycks' claim for relief, the reasoning in *Park* precludes it.[10]

B. Nothing in section 12022.1 or Proposition 47 requires a different result

For Buycks to prevail, he must show that these ordinary rules do not apply because either the Legislature in enacting section 12022.1, or the voters in enacting Proposition 47, intended to adopt a different scheme. (See *Biggs*, *supra*, 9 Cal.2d at p. 514 ["[T]he legislature could doubtless make an exception in favor of persons pardoned .... It has not seen fit to do so and unless it does, this court cannot usurp the legislative function ...."].)

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[10] The court below also rested in part on a Court of Appeal opinion, *People v. Flores* (1979) 92 Cal.App.3d 461, which held that a sentencing enhancement under section 667.5 could not be imposed based on a felony marijuana possession conviction, where marijuana possession had been subsequently changed by statute into a misdemeanor offense. (*Id.* at 470.) But that case also concerned a defendant who committed and was convicted of his second offense after the statutory punishment for his first offense was changed. (*Id.* at pp. 464, 471.) Moreover, the punishment-reducing statute in *Flores* contained an extraordinary provision allowing for the "destruction of all records of arrests and convictions" for the crime at issue, and stating that any such records which were not destroyed "'*shall not be considered to be accurate, relevant, timely, or complete for any purposes by any agency or person.*' [Citation.]" (*Id.* at p. 471.) Proposition 47 contains no such evidence of a legislative intent to wipe away all evidence of the prior conviction.

This Court reviews issues of statutory interpretation de novo (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332), with the ultimate goal of effectuating the lawmakers' intent (*People v. Jones* (1993) 5 Cal.4th 1142, 1146; *Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 901). To discern that intent, the Court begins with the plain language of each statute. (*Robert L., supra,* 30 Cal.4th at p. 901.) If the text's plain meaning is insufficient to resolve the question of its interpretation, the Court may turn to other aids, including "rules or maxims of construction," "the legislative history of the enactment" (*Mejia v. Reed* (2003) 31 Cal.4th 657, 663) and, in the case of ballot initiatives, "'"other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet."' [Citations.]" (*Robert L., supra*, 30 Cal.4th at p. 901.) Here, neither the text of section 12022.1 and Proposition 47 nor any other indication of legislative or voter intent indicates that either statute was intended to alter the ordinary rules of retroactivity in the manner Buycks claims. (See § 3 ["No part of [the Penal Code] is retroactive, unless expressly so declared."].) As a result, Buycks' claim must fail.

1. Section 12022.1 does not require striking the enhancement, because Buycks was on release for a felony when he committed the secondary offense

Under section 12022.1, Buycks was "subject to a penalty enhancement of an additional two years" if he was "arrested for a secondary offense" that he "committed" while "released from custody for a

primary offense." (§ 12022.1, subds. (b) & (a)(2).) The statute looks to the defendant's status at the time he or she commits the secondary offense. (See *People v. Walker*, *supra*, 29 Cal.4th at 589 [section 12022.1 "punishes the defendant for his or her status as a repeat offender while on bail"].) The enhancement thus "go[es] to the nature of the offender," not the crime. (*People v. Tassell* (1984) 36 Cal.3d 77, 90, overruled on other grounds by *People v. Ewoldt* (1994) 7 Cal.4th 380.) This Court's observation about other such "status" enhancements applies with full force: The "'increased penalties ... are attributable to the defendant's status as a repeat offender and arise as an incident of the subsequent offense.' [Citations.]" (*People v. Jackson* (1985) 37 Cal.3d 826, 833, overruled on other grounds as recognized by *People v. Burton* (1989) 48 Cal.3d 843, 863.)

As a matter of the statute's plain text, subsequent changes in the classification of Buycks' primary offense do not alter Buycks' status at the moment he "committed" the secondary offense, and thus do not affect whether he is "subject to" the enhancement. (§ 12022.1, subd. (b).) Section 12022.1 has been interpreted as requiring convictions on both offenses before the enhancement may be *imposed*. But this requirement does not change the statute's focus on the defendant's status at the time he or she commits the secondary offense. Instead, the conviction requirement operates to ensure that a person is not subjected to increased penalties in the second case because of a previous arrest on charges that were never

ultimately substantiated. It is meant to ensure that the enhancement is imposed only where it has been "establish[ed] with judicial certainty that the charges leading to release on bail or O.R. were valid." (*In re Jovan*, *supra*, 6 Cal.4th at p. 814; see *id.* at p. 814, fn. 8 ["The focus of the enhancement" has always been "the bail/O.R. status of the offender at the time he committed the later felony, and the function of 'convictions' was simply to ensure that both the 'bailed' and 'while-on-bail' charges were valid."].) That concern is not at issue here. The charge for which Buycks was released (his "bailed" charge, in the language of *Jovan*) was indeed valid, as indicated by his plea and failure to appeal, which subsequent events have done nothing to undermine.

Moreover, this interpretation of section 12022.1 is consistent with the statute's purposes. Section 12022.1 was enacted to "penalize *recidivist* conduct with increased punishment." (*People v. McClanahan, supra,* 3 Cal.4th at p. 868.) The voters' subsequent downgrading of Buycks' earlier offense does nothing to undermine the earlier judgment that Buycks was a recidivist. Nor does the subsequent downgrading change the fact or blameworthiness of Buycks' decision to "'*breach* ... the terms of his *special custodial status*'" rather than abide by the judge's specific warning not to commit new crimes (*In re Jovan, supra,* 6 Cal.4th at p. 813; see also *People v. McClanahan, supra*, 3 Cal.4th at p. 871 [similar]; *People v. Juarez* (1993) 21 Cal.App.4th 318, 322 [similar].) Courts should not

undermine these purposes by allowing an offender to escape the status-based enhancement because the crimes for which he was accorded (and then abused) the privilege of bail or O.R. release were later changed from felonies to misdemeanors. (See *Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 ["[W]e '"must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute ...."' [Citations.]"].)

The Court of Appeal believed that a contrary conclusion follows from the fact that the statute's structure "exempt[s] at least four categories of defendants from the on-bail enhancement based on the disposition of the underlying offenses." (Slip opn., p. 8.)[11] But the Court of Appeal, which did not maintain that any of these exemptions directly applied to Buycks' case, drew the wrong inference from the exemptions' existence. """Under the maxim of statutory construction, *expressio unius est exclusio alterius,* if

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> (1) As a sentencing *enhancement*, rather than a substantive offense, [section 12022.1] exempts defendants who are not convicted of an underlying offense. [Citation.] (2) Because it is limited to primary and secondary felony offenses, it exempts defendants convicted of misdemeanors. (3) It exempts defendants who are not ultimately convicted of the primary offense. [Citation.] (4) And it exempts defendants whose primary offense conviction is reversed on appeal and not retried. [Citation.]

(Slip opn., p. 8.)

exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary.'" [Citations.]" (*People v. Palacios* (2007) 41 Cal.4th 720, 732.) There is no indication, much less a "clear intent," that section 12022.1 was intended to include a silent fifth exemption requiring reconsideration of the on-bail enhancement when, after both the primary and secondary offenses resulted in felony convictions that became final on appeal, the primary offense was later legislatively changed to a misdemeanor.

2. Proposition 47 does not provide for retroactive nullification of Buycks' on-bail enhancement

Proposition 47 similarly does not require or permit elimination of the enhancement. Section 1170.18's retroactivity provision entitles a person "currently serving a sentence for a conviction ... of a felony ... who would have been guilty of a misdemeanor" under Proposition 47 to be "resentenced to a misdemeanor pursuant to" the statutory sections added or amended by Proposition 47. (§ 1170.18, subds. (a) & (b).) The trial court fulfilled that requirement with respect to Buycks' 2013 case by resentencing Buycks to a misdemeanor sentence on his narcotics count, which had previously been a felony. The trial court similarly fulfilled that requirement with respect to the 2014 case when it resentenced Buycks to a misdemeanor sentence on his theft count. The provision says nothing about

removing enhancements in general, or the section 12022.1 enhancement in particular.

Section 1170.18 also specifies that each resentenced offense "shall be considered as a misdemeanor for all purposes." (§ 1170.18, subd. (k).) But refusing to strike the on-bail enhancement in the 2014 case based on the reclassification of the conviction in the earlier case does not amount to a failure to "consider [the 2013 case's charge] a misdemeanor" for any purpose that remains open for consideration or adjustment. Rather, it reflects adherence to the general principle that, once a conviction has become final on direct review, subsequent developments do not entitle the offender to reopen otherwise final matters in which that charge may have played a role, absent some specific legal provision to the contrary.[12]

Other than serving to reduce the base sentence for an offense that is reclassified to a misdemeanor, the effects of Proposition 47 are wholly forward-looking. As the Court of Appeal noted, Proposition 47's "shall be considered a misdemeanor" provision is "almost identical" to the language

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[12] A contrary rule would lead to endless reconsideration of settled matters. For instance, suppose that instead of pleading guilty in his second case, Buycks had gone to trial and had his testimony impeached with the fact of his prior conviction in the earlier case. An open-ended construction of the requirement to treat the earlier conviction as "a misdemeanor for all purposes," without regard for normal principles of finality, might require examination of whether the conviction should be vacated because the trial verdict was secured by relying on the then-felonious nature of the impeaching offense.

used in section 17, subdivision (b), to describe what happens when a wobbler offense is judged a misdemeanor. (Slip opn., p. 7.) In that context, there is a "long-held, uniform understanding that when a wobbler is reduced to a misdemeanor ... the offense *thereafter* is deemed a 'misdemeanor for all purposes'...." (*People v. Park, supra,* 56 Cal.4th at p. 795, italics added; see also *id.* at p. 791, fn. 6 [citing with approval "the related rule that if the court exercised its discretion by imposing a sentence other than commitment to state prison, the defendant stood convicted of a misdemeanor, but only from that point forward; classification of the offense as a misdemeanor did not operate retroactively to the time of the crime's commission, the charge, or the adjudication of guilt"].) Thus, "[i]f ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively." (*People v. Feyrer* (2010) 48 Cal.4th 426, 439; see also *People v. Banks* (1959) 53 Cal.2d 370, 381 [same].) Section 1170.18, subdivision (k), should be construed, consistent with this precedent, as giving full prospective effect to a Proposition 47 reclassification, but not retrospectively calling into question any otherwise final determination that was properly made based on the previous classification of the offense.

C. Elimination of the enhancement is not required to satisfy the "full resentencing" principle or to fulfill Proposition 47's purposes

In granting Buycks a retroactive benefit that was required neither under general principles of law nor under the relevant statutes, the Court of Appeal relied on two erroneous theories.

First, the Court of Appeal believed that a "*full* resentencing in the second case" required the trial court to "reevaluate the applicability of section 12022.1 *at that time*"—meaning after Buycks' felony in the first case had been reduced to a misdemeanor. (Slip opn., p. 6.) But the "full resentencing" principle did not require reevaluation of the enhancement in this case. Under the Determinate Sentencing Act, "when a defendant is sentenced consecutively for multiple convictions, whether in the same proceeding or in different proceedings, the judgment or aggregate determinate term is to be viewed as interlocking pieces consisting of a principal term and one or more subordinate terms." (*People v. Begnaud* (1991) 235 Cal.App.3d 1548, 1552.) Accordingly, if a conviction is reversed or a sentence modified on appeal, the entire matter must be remanded for a full resentencing, to allow the trial court to "exercise its sentencing discretion in light of the changed circumstances." (*People v. Navarro* (2007) 40 Cal.4th 668, 681.)

The reason the full-resentencing principle frequently applies to defendants resentenced under Proposition 47 is that "[i]f the Proposition 47

offense is the principal term in a consecutive sentence, it will be necessary for the court to resentence the case with the offense now being a misdemeanor and determine a new principal term." (Couzens & Bigelow, Proposition 47 The Safe Neighborhoods and Schools Act (February 2016), p. 62.) But the on-bail enhancement is neither a "principal" nor a "subordinate" term. Rather, it is imposed as the last step in sentencing on the entire *case*, not as part of the sentence for any particular charge. (See *People v. Tassell, supra*, 36 Cal.3d at 90 [section 12022.1 enhancements, because they "go[] to the nature of the offender," "have nothing to do with particular counts but, since they are related to the offender, are added only once as a step in arriving at the aggregate sentence."].)[13] Buycks received a full resentencing when the trial court converted his evading charge to a principal term. The full-resentencing principle does not go further; it does not allow an end-run around specific statutory requirements and the ordinary rules of retroactivity.

Second, the Court of Appeal maintained that its interpretation of Proposition 47 was consistent with the initiative's purpose of "'ensur[ing]

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[13] That rule benefits defendants by permitting a court to impose only one two-year enhancement per primary case, no matter the number of crimes the defendant is convicted of in the secondary case. (See *People v. Augborne* (2002) 104 Cal.App.4th 362, 376 [where a defendant is on release in one case, and commits multiple new crimes, only one section 12022.1 enhancement is proper].)

that prison spending is focused on violent and serious offenses, to maximize alternatives for nonserious, nonviolent crime, and to invest the savings generated from this act into prevention and support programs in K-12 schools, victim services, and mental health and drug treatment.' [Citation.]" (Slip opn., p. 9.) But "no legislation pursues its purposes at all costs." (*Rodriguez v. United States* (1987) 480 U.S. 522, 525-526.) The voters chose particular ways to achieve their money-saving goals, and a court may not override those choices simply because it believes that more money could be saved by disregarding those limits. If reconsideration of properly imposed enhancements were truly something the voters intended to require, they could have included a provision relating to enhancements in the Proposition's text. They did not, and the voter guide likewise contains nothing that voters would have understood as mandating such reconsideration.[14] The Court of Appeal was wrong to disregard the express terms of the initiative in order to maximize realization of what it perceived to be the Proposition's underlying goals. "[T]he voters should get what

[14] (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) pp. 34-37.) The voter guide enumerates the crimes for which the Proposition would provide "reduced penalties." (*Id.* at p. 35.) That list includes neither the on-bail enhancement, nor the offense of evading. The voter guide likewise says nothing about reducing penalties in one final case based on a Proposition 47 adjustment to the conviction in another case.

they enacted, not more and not less." (*Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.)

II. THE PEOPLE'S INTERPRETATION IS MORE ADMINISTRABLE AND MORE FAIR THAN THE COURT OF APPEAL'S RULE

Finally, the People's interpretation is easily administered and leads to fair results. Trial courts, already burdened by the volume of Proposition 47 proceedings, would have an easily defined task: to grant full relief on Proposition 47 offenses, without reviewing collateral matters. Offenders such as Buycks, who are being resentenced in a case with one Proposition 47 felony and one non-Proposition 47 felony, would have their Proposition 47 felony reduced to a misdemeanor, have the non-Proposition 47 felony treated as the principal term, and would remain subject to any enhancement previously imposed.[15] With respect to their Proposition 47 offenses, such offenders would receive a clear benefit; and with respect to any on-bail enhancement, an offender who committed both Proposition 47 secondary offenses and non-Proposition 47 secondary offenses would be treated no better and no worse than an offender who committed only non-Proposition 47 secondary offenses.

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[15] This case does not present the question whether an on-bail enhancement should be maintained in a case where no felony conviction remains after the Proposition 47 resentencing. Here, Buycks' evading offense remained a felony regardless of Proposition 47.

The Court of Appeal's construction, in contrast, would grant offenders who committed more crimes—a Proposition 47 offense in addition to a non-Proposition 47 offense—a special procedural advantage. Proposition 47 includes a procedural mechanism for reducing the sentences of defendants currently serving a sentence for felonies reduced under that provision. (§ 1170.18, subd. (a).) It does not, however, create a mechanism for obtaining resentencing on a felony not affected by Proposition 47 just because an offense underlying one of its enhancements is so affected. Under the Court of Appeal's view, if Buycks had been convicted in the second case *only* of the evading charge (which was not reduced under Proposition 47), he could not have sought a sentence reduction in that case, would not have been entitled to any kind of resentencing, and thus would have had no mechanism for reconsidering the on-bail enhancement.[16] The Court of Appeal's theory gives special advantage to those who committed more crimes. But voters would hardly have intended to treat more culpable offenders more favorably than less culpable offenders. (See *People v. Montes* (2003) 31 Cal.4th 350, 356

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[16] The question whether section 1170.18 is the exclusive means for Proposition 47 relief is also related to the issues before this Court in *People v. DeHoyos*, No. S228230, and *People v. Valenzuela*, No. S232900. As the People explain in those cases, the express limits in section 1170.18's retroactivity provision rebut any aspects of the *Estrada* presumption that would negate those limits.

[courts must "'avoid any interpretation that would lead to absurd consequences. [Citations.]'"].)

Relatedly, the Court of Appeal's theory gives inordinate consequence to the order in which a defendant commits his crimes. A defendant whose primary offense was not a Proposition 47 offense, but whose secondary offense was, can seek resentencing in the second case under section 1170.18; because that case is the one which includes the enhancement, the Court of Appeal's theory would result in the enhancement's elimination. But a defendant who committed the same crimes in the opposite order could only seek section 1170.18 relief in the primary case, leaving the offender without any procedural vehicle to request elimination of the enhancement that was imposed in the secondary case. It is not possible to "'think of [any] explanation why the [voters] could have desired'" such a result, and this Court must "reject [the] statutory construction that would produce it." (*People v. Mendoza* (2000) 23 Cal.4th 896, 911, citations omitted.)

CONCLUSION

The Court of Appeal's modification to Buycks' sentence should be reversed, and the Superior Court's judgment should be affirmed.

Dated: May 23, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **OPENING BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 8,162 words.

Dated: May 23, 2016

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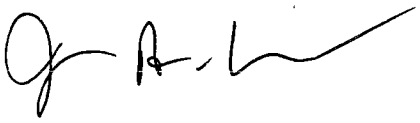
Attorney General of California



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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Buycks***
No.: **S231765**

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 May 23, 2016, I served the attached **OPENING BRIEF ON THE MERITS** 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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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 May 23, 2016, at San Francisco, California.

Elza Moreira
Declarant

Signature

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