SUPREME COURT COPY

Law Offices of Richard Fitzer
6285 East Spring Street, # 276N
Long Beach, CA 90808
(562) 429-4000
roclwyr@aol.com

June 13, 2018

Clerk of the Supreme Court
350 MacAllister
San Francisco, CA 94102

Re: *People v. People v. Stevenson Buycks*
Supreme Court Case # S231765

Request For Supplemental Briefing

Clerk of the Supreme Court,

While counsel for Buycks agrees that, under Penal Code section 1385, a trial court would always have the discretion to dismiss an enhancement at resentencing, he disagrees with the Attorney General's assertion that dismissing the on-bail enhancement in this case was not mandatory. Even if reduction of the primary offense to a misdemeanor does not automatically require that the on-bail enhancement be struck in the secondary case (a point Buycks does not concede), dismissal of the enhancement is still required if the defendant otherwise has to be resentenced in the secondary case.

A. The Attorney General Has Taken Inconsistent Positions.

Through out this case, the Attorney General's Office has taken inconsistent positions. For starters, the Attorney General never filed a petition for review from the published Court of Appeal opinion – this Court granted review on its own motion and designated the Attorney General as respondent. In his opening brief on the merits, the Attorney General argued that the Court of Appeal was wrong and the on-bail enhancement never had to be struck regardless of the procedural posture of the secondary case. Then, the Attorney General filed the concession letter of February 23, 2018, where

it was conceded that the Court of Appeal reached the correct result given the unique procedural posture of the case.

Now, the Attorney General files a supplemental letter brief arguing that this Court's opinion in *Dix v. Superior Court* (1991) 53 Cal.3d 442, as well as Penal Code section 1170.18, subdivision (n), merely permits a sentencing court to reconsider whether to dismiss an on-bail enhancement, under Penal Code section 1385, at the time of resentencing. (Letter Brief, pp. 2 - 3.) According to the Attorney General, nothing in *Dix v. Superior Court* renders the Superior Court "powerless to retain the on-bail enhancement if it determines that striking it under section 1385 would not further the interests of justice." (Letter Brief, p. 3.) The Attorney General is drawing a new distinction, one that was never advanced prior to this Court's request for supplemental briefing.

In his reply brief on the merits, the Attorney General stated that the issue of whether a court would have the discretion, under section 1385, to strike the on-bail enhancement at resentencing was not presently before this Court. (R.B. p. 11, fn. 4.) In the concession letter of February 23, 2018, however, a different deputy Attorney General stated: "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[.]" The original deputy now interprets that letter as only conceding that a court has the discretion to strike an on-bail enhancement during resentencing.[1] How can one concede an issue that one argues is not before the Court? Despite the Attorney General's supplemental letter brief, it is still evident that it was intended to concede that the Court of Appeal correctly held that the on-bail enhancement had to be dismissed because the primary offense was reduced to a misdemeanor prior to the mandatory resentencing in the secondary case. Now, in light of the Court's request for supplemental briefing, the Attorney General's is backing away from that concession by trying to cast its concession letter in a different light.[2]

---

[1]Note, the concession letter never expressly mentioned a court exercising its discretion to dismiss an enhancement under Penal Code section 1385.

[2]Because the Attorney General is reversing the position it took in the concession letter, counsel for Buycks' requests an opportunity to appear before the Court again and argue against the Attorney General's current position.

B. Neither Dix v. Superior Court, Nor Penal Code Section 1170.18, Subdivision (n), Support The Attorney General's Current Position.

In arguing that a court must be allowed to "retain" an on-bail enhancement at resentencing, even though the primary offense has been reduced to a misdemeanor, the Attorney General makes much of the fact that the enhancement was not mentioned in the text of Proposition 47. In *People v. Romanowski* (2017) 2 Cal.5th 903, however, this Court held that the fact that Penal Code section 1170.18 did not specifically mention Penal Code section 484e, subdivision (e) did not preclude a finding that Proposition 47 applies to theft of an access card.

Likewise, in *People v. Dix, supra,* 53 Cal.3d 442, the Attorney General argued that Penal Code 1170, subdivision (d) only permitted a court to recall the sentence, within 120 days, to "eliminate disparity and promote uniformity[,]" as those were the only specific reasons listed in the statute. (*Id.*, at p. 455.) The Court rejected that narrow construction and held that Penal Code section 1170, subdivision (d) "permits recall and resentencing for any otherwise lawful reason, not to simply correct a 'disparate sentence.'" (*Id.*, at p. 460.) Thus, contrary to respondent's argument (Letter Brief, p. 3), the fact that the text of Penal Code section 1170.18 does not specifically mention on-bail enhancements does not preclude this Court from finding that they may be subject to mandatory dismissal in the appropriate circumstance. Indeed, subdivision (k) seems to address this very issue by stating that a reduced conviction is a "misdemeanor for all purposes." Hence, as with the two-item list in section 1170, subdivision (d), the list of applicable offenses found in Proposition 47 is not exclusive.

In arguing that striking the enhancement is not mandatory, the Attorney General ignores the fact that both Proposition 47 and the Court's opinion in *Dix* were focused on eliminating disparities in sentences. The "misdemeanor for all purposes" language of Penal Code section 1170.18, subdivision (k) demonstrates that the public wanted to cast a wide net over those cases which fell within the amelioratory provisions of Proposition 47. Furthermore, as this Court stated in *People v. Romanowski, supra,* 2 Cal.5th 903, "the voters directed that Proposition 47 should be 'broadly construed to accomplish its purposes' and 'liberally construed to effectuate its purposes.' (Ballot Pamp., Gen. Elec. (Nov. 4, 2014) text of Prop. 47, §§ 15, 18, p. 74.)" (*Id.*, at p. 909.) And requiring the dismissal on-bail enhancements, where the primary offense is reduced to a misdemeanor, effectuates the stated purpose of Proposition 47 to ensure that prison funding is spent on serious and violent criminals. (See *Harris v. Superior Court* (2016) 1 Cal.5th 984, 992 ["One of Proposition 47's primary purposes is to reduce the number of

nonviolent offenders in state prisons, thereby saving money and focusing prison on offenders considered more serious under the terms of the initiative."].)

Under *Dix,* once a sentence is properly recalled, "the [trial] court retains jurisdiction to impose any otherwise permissible new sentence, which may include consideration of facts that arose after [the defendant] was committed to serve the original sentence." (*Id.*, at p. 465.) "[T]he resentencing authority conferred by section 1170(d) is as broad as that possessed by the court when the original sentence was pronounced." (*Id.*, at p. 456.) A court conducting a proper resentencing, therefore, is to do so "'*in the same manner as if [the defendant] had not previously been sentenced* . . . .' (Italics added.)" (*Ibid.*) Since the primary offense was reduced to a misdemeanor prior to mandatory resentencing in the secondary case, the on-bail enhancement had to be struck under the holding in *Dix,* as well as under the clear provisions of Penal Code section 12022.1.

Finally, Penal Code section 1170.18, subdivision (n) explicitly provides that the original judgment is "abrogated" when one or more counts are reduced. Here, the reduction of count 3 essentially resulted in a complete reset of Buycks' sentence. Thus, as in *Dix,* the court was required to resentence Buycks entirely anew. This required the court to consider all relevant facts which arose after the defendant was sentenced the first time, including revisiting the validity of the true finding on the on-bail allegation. Because the primary offense had already been reduced to a misdemeanor, subdivision (n) required the on-bail enhancement to be struck in this case.

C. Contrary To The Attorney General's Assertion, There Is A Material Difference Between Penal Code Section 1170.18, Subdivision (k) And Section 17, Subdivision (b).

The Attorney General's letter brief goes on to discuss other authority not specifically raised in the Court's letter. First, respondent argues that, because the provisions of section 1170.18, subdivision (k) are "almost identical" to those found in Penal Code section 17, subdivision (b), they are similarly prospective only. (Letter Brief p. 3.) While the "for all purposes" language in the two Code sections may be similar, the statutes are not "nearly identical," as respondent argues Indeed, it is because of the dissimilarities between the two statutes, that section 17, subdivision (b) is irrelevant to the question of whether section 1170.18, subdivision (k) operates retroactivity.

Penal Code section 17, subdivision provides:

"(b) **When** a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes under the following circumstances:

(1) **After** a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170.

(2) **When** the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor.

(3) **When** the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor.

(4) **When** the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.

(5) **When**, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint." (Pen. Code, § 17, subd. (b) [emphasis added].)

By contrast, section 1170.18, subdivision (k), which follows ten subdivisions that are expressly retroactive, provides:

> "(k) A felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (Pen. Code, § 1170.18, subd. (k).)

Contrary to respondent's assertion, these two subdivisions are not "nearly identical." To begin with, wobblers under section 17, subdivision (b) can still be charged as felonies. Conversely, those crimes falling within the purview of section 1170.18 can no longer be charged as felonies. As such, section 17, subdivision (b) and section 1170.18, subdivision (k) are part of martially different statutory framework and, therefore, should not be construed as if they were part of the same Proposition. (See *People v. Valencia* (2017) 3 Cal.5th 347, 358 [courts must construe a specific provision of a statute in light of the statute as a whole].)

More importantly, section 1170.18, subdivision (k) does not contain any qualifying words like "when" or "after," as found numerous times in section 17, subdivision (b). Subdivision (k) simply says that a conviction reduced to a misdemeanor under Proposition 47 **shall** be a misdemeanor for all purposes. Since there is no qualifying language that indicates a reduced offense is a misdemeanor for all purposes only going forward from the time of resentencing, subdivision (k) is fully retroactive. As such, once a conviction is reduced to a misdemeanor under Proposition 47, it is a misdemeanor for all purposes – both prospectively and retroactively.

D. The Attorney General's Reliance On People v. Park Is Misplaced, As It Also Mandates That The On-Bail Enhancement Be Struck In This Case.

Second, the Attorney General cites this Court's holding in *People v. Park* (2013) 56 Cal.4th 782, for why the dismissal on the on-bail enhancements was not mandatory in this case. (Letter Brief, pp. 3 - 4.) At least in the procedural posture of this case, the holding in *Park* actually supports Buycks' position. Even if subdivision (k) is to be treated exactly the same of subdivision (b) of section 17, this Court's holding in *Park*

still mandates that the on-bail enhancement be struck in this case. In *Park*, the defendant admitted that he had suffered a prior serious felony conviction pursuant to Penal Code section 667, subdivision (a), which had been previously reduced to a misdemeanor pursuant to section 17, subdivision (b)(3). (*Id.*, at pp. 787-788.) In finding that the Superior Court could not impose the enhancement, this Court explained as follows:

> "It is evident from the statutory language that a wobbler becomes a 'misdemeanor for all purposes' under section 17(b)(3) only when the court takes affirmative steps to classify the crime as a misdemeanor. When the court properly has exercised its discretion to reduce a wobbler to a misdemeanor under the procedures set forth in section 17(b), the statute generally has been construed in accordance with its plain language to mean that the offense is a misdemeanor 'for all purposes.'" (*Id.*, at p. 793.)
>
> "Nothing in the language or history of section 667, subdivision (a) signaled an intent to override that general rule." (*Id.*, at p. 799.)

Since the voters are deemed to have been aware of this Court's holding in *Park*, the use of the similar phrase "misdemeanor for all purposes" in section 1170.18, subdivision (k) signaled their desire to have Proposition 47 construed consistent with section 17, subdivision (b). (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1100.) Here, as in *Park*, after Buycks obtained a reduction of his offense in the primary case, section 1170.18, subdivision (k) required the trial court to treat that offense as a "misdemeanor for all purposes" at his resentencing in the secondary case. Thus, "[w]ithout a felony as a primary offense, the court could not reimpose the on-bail enhancement." (*People v. Buycks* (2015) 241 Cal.App.4th 519, 526.) In the peculiar procedure postal of this case, it is irrelevant whether subdivision (k) is prospective only.[3] Under either interpretation of subdivision (k), the enhancement had to be struck.

---

[3]As the Court of Appeal below noted, however, the issue of whether subdivision (k) is prospective only would be relevant to a collateral challenge filed by a defendant whose primary offense was reduced to a misdemeanor but who was not otherwise entitled to be resentenced in the secondary case. (*People v. Buycks, supra,* 241 Cal.App.4th at p. 526, fn. 2.) This is the essence of the broader issue upon which this Court granted review on its own motion.

E. The Attorney General's Claim, That Affirming The Court Of Appeal's Holding Would Cause Endless Confusion, Lacks Merit.

The Attorney General argues that "[e]liminating this distinction between future consequences and past historical fact would cause endless confusion." (Letter Brief, p. 4.) The examples the Attorney General cites for this proposition can only be characterized as "grasping at straws." Upholding the Court of Appeal's opinion would not cause confusion or open the litigation floodgates. The Court of Appeal's opinion is a narrow solution to a very specific problem. It would not result in the unintended consequences listed by the Attorney General in its letter brief.

To begin with, subdivision (n), cited in the Court's request for supplemental briefing, would preclude a defendant from reopening a case where a witness was impeached with a prior conviction which was no longer classified as a felony. (Letter Brief p. 4.) Specifically, Penal Code section 1170.18, subdivision (n) provides: "Resentencing pursuant to this section does not diminish or abrogate the finality of judgments in any case that does not come within the purview of this section." As such, section 1170.18 makes it clear that a prior case could not be reopened simply because a witness' prior conviction, with which he or she was impeached, has now been reduced to a misdemeanor.

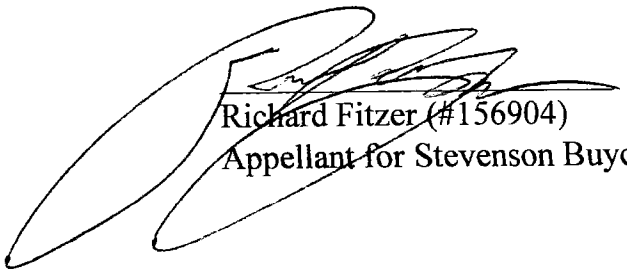
Similarly, subdivision (n) would not require, or even permit, the reversal of a perjury conviction for lying about whether one had suffered a prior felony conviction simply because the prior about which the defendant lied had been reduced to a misdemeanor after the perjury conviction was suffered. (Letter Brief page 4.)

Finally, Buycks agrees that reduction of a felony conviction to a misdemeanor does not impact the statute of limitations. (Letter Brief page 4.) This is true, however, regardless of whether the reduction of an offense to a misdemeanor is retroactive under subdivision (k) or not. Remember, Proposition 47 does not reverse convictions or change the date of conviction, it simply provides for the reduction of certain felony convictions to misdemeanors. Thus, the retroactive application of the reduction to a misdemeanor would not alter the fact that the defendant was properly convicted within statute of limitations applicable at the time.

F. Conclusion.

This Court's holding in *Dix v. Superior Court, supra,* 53 Cal.3d 442; the language of Penal Code section 1170.18, subdivision (n) and the Attorney General's prior concession letter all support the Court of Appeal's disposition below – that striking of the on-bail enhancement during resentencing on the secondary case is mandatory where the primary offense was reduced to a misdemeanor prior to that resentencing. Further, counsel for Buycks continues to maintain that Penal Code section 12022.1, subdivision (g) requires that the on-bail enhancement be struck any time the primary offense is reduced to a misdemeanor, even if resentencing is not otherwise required in the secondary case. (See *In re Jovan B.* (1993) 6 Cal. 4th 801, 814.)

Respectfully submitted,



Richard Fitzer (#156904)
Appellant for Stevenson Buycks

People v. Stevenson Buycks **Supreme Court No. S231765**

Richard Fitzer (#156904)
Attorney at Law
6285 East Spring Street, # 276N
Long Beach, California 90808
(562) 429-4000

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in Los Angeles County with my business address as stated above. I am not a party to this case. On June 13, 2018, I served the **appellant's supplemental letter brief,** a copy of which is attached, by mailing a copy to each addressee named below by regular United States mail at Long Beach, California.

California Appellate Project
520 South Grand Ave.
4th Floor
Los Angeles, CA 90071
(e-served at: gary@lacap.com)

Joshua Klein, deputy
Attorney General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102

Stevenson Buycks
(address unknown)

I declare under penalty of perjury that the foregoing is true and correct. Executed June 13, 2018 at Long Beach, California.

Richard L. Fitzer