# In the Supreme Court of the State of California

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| **PEOPLE OF THE STATE OF CALIFORNIA,**<br>**Plaintiff and Respondent,**<br>**v.**<br>**STEVENSON BUYCKS,**<br>**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

## REPLY BRIEF ON THE MERITS

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## INTRODUCTION

Defendant-Appellant Buycks does not contest the principles of California retroactivity law described by the People, or the People's explanation of how those principles preclude the relief that was ordered by the Court of Appeal. (See Opening Brief on the Merits (OBM) 14-21.) He does not challenge the People's analysis of the text, history, and purposes of Proposition 47 and Penal Code section 12022.1, which confirm that nothing other than these ordinary rules of retroactivity was intended to operate with respect to on-bail enhancements. (See OBM 21-28.)[1] Nor does he disagree with the People's explanation of the flaws in the Court of Appeal's opinion. (OBM 27-32.)

Buycks affirmatively agrees that the Court of Appeal's approach would create significant practical and equitable problems. (See OBM 32-34; Answering Brief on the Merits (ABM) 9, 11-12.) But rather than address such concerns by hewing to ordinary principles of California law and the text and structure of the statutes at issue, Buycks takes another path. He argues that courts must revisit a validly imposed on-bail enhancement whenever *either* the primary offense (the offense for which the defendant was out on bail) *or* the secondary offense (the offense committed while on out on bail) is reduced to a misdemeanor under Proposition 47—a view

[1] All further statutory references in this brief are to the Penal Code unless otherwise noted.

which would extend resentencing to judgments that do not even contain a Proposition 47 offense. (ABM 11, 13.)

This approach should be rejected. Contrary to Buycks' argument, the People's proposal, which solves the practical and equitable difficulties caused by the Court of Appeal's approach, does not create similar problems of its own; rather, it simply preserves the law's traditional limitations on retroactive revision of final judgments, in a manner comporting with the relevant statutes. Buycks' approach, in contrast, cannot be reconciled with the text, structure, or purpose of either section 12022.1 or Proposition 47, and would violate the retroactivity principles of California law.

## ARGUMENT

### I. APPLYING CALIFORNIA'S ORDINARY RULES OF RETROACTIVITY WOULD AVOID THE INEQUITIES CAUSED BY THE COURT OF APPEAL'S APPROACH

Buycks recognizes that the decision below will be "difficult to administer for lower courts and will result in inequitable results." (ABM 9.) As explained in the People's opening brief, the Court of Appeal's approach rests on the theory that a "full resentencing" in a Proposition 47 case requires a previously imposed enhancement, which was valid when first imposed, to be eliminated at the time of resentencing if the primary offense has, in the interim, been redesignated as a misdemeanor. That would perversely favor those who committed *more* crimes over those who committed fewer, and could make the availability of relief dependent, in

some cases, on the order in which an offender committed his crimes. (OBM 33-34).

As the People's opening brief explained, these problems can be avoided by following ordinary principles of California retroactivity law, under which, if an on-bail enhancement was valid when first imposed and has become final on direct appeal, it would not be subject to elimination merely because the primary offense was subsequently reclassified as a misdemeanor. (OBM 14-32.)[2]

Although Buycks agrees that the Court of Appeal erred in its understanding of the "full resentencing" principle (ABM 9 & fn. 3), he takes issue with the People's approach. Noting the People's recognition that this case does not concern the question of whether the on-bail enhancement could be maintained in a case where no felony conviction remains after Proposition 47 resentencing in the secondary-offense case (ABM 10, citing OBM 32, fn. 15), Buycks argues that the People have "subtly admitt[ed]" that an on-bail enhancement can only be a part of a judgment which contains a felony offense (ABM 10). If retained in a judgment which no longer contains a felony conviction, he maintains, the

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[2] Buycks notes another strange result of the Court of Appeal's approach: For some defendants, the elimination of the on-bail enhancement could depend on the order in which the primary- and secondary-offense Proposition 47 petitions are adjudicated. (ABM 11-12.) The People's approach, in contrast, would treat offenders the same regardless of the order of their petitions.

on-bail enhancement "becomes an unauthorized sentence" (ABM 11) because it violates the "rule that an enhancement cannot be imposed nor continue to exist in the absence of a valid, base term for a felony conviction" (ABM 10). As a result, he argues, the People's approach has a "necessary exception" that precludes the imposition of an on-bail enhancement in cases where a Proposition 47 reclassification results in no remaining felony conviction in the secondary-offense case. (ABM 11.)

Even if the People's approach would require elimination of the enhancement in the cases identified by Buycks (which, as the People correctly noted, is not at issue in this case), that would not amount to a problem on the same order as those caused by the Court of Appeal's approach. The Court of Appeal's approach makes the differing availability of relief inequitable and irrational—no reasonable voter or legislator would have cause to withhold relief from a person with only a felony-evading secondary offense while extending relief to a person convicted of that same crime plus multiple additional drug and theft crimes. In contrast, eliminating the enhancement from a sentence where no felony conviction remains while retaining it for those serving a felony sentence would create no inequity; rather, it would reflect the unexceptional principle that someone serving a sentence for a felony conviction may deserve harsher punishment than someone convicted only of a misdemeanor.

## II. SECTION 12022.1 AND SECTION 1170.18 PRECLUDE THE BROADER RELIEF BUYCKS PROPOSES

Buycks further argues that the exception that he alleges is required by the People's approach—eliminating the on-bail enhancement in resentenced cases where no felony remains—undercuts "the ease of administration" concerns which the People raised about the Court of Appeal's approach. (ABM 11.) As a result, he argues, any on-bail enhancement should be automatically stricken as a matter of law whenever *either* a primary offense *or* a secondary offense has been redesignated as a misdemeanor, without regard to whether the judgment is already final. (ABM 11.) But Buycks does not even attempt to explain how such an approach would comport with the principles of California retroactivity law. (See OBM 14-21.) In any case, Buycks' approach directly conflicts with the statutes at issue, and must be rejected on that basis.

### A. Section 12022.1(g) Provides No Basis for Reopening Closed Judgments in the Manner Buycks Advocates

Buycks asks this Court to read an "implied condition" into subdivision (g) of section 12022.1, under which "a statutorily mandated reduction of the primary offense to a misdemeanor" should result in the retroactive elimination of an otherwise final enhancement in the secondary case. (ABM 13-14.) But that provision's language provides no support for any such "implied condition." Section 12022.1, subdivision (g) provides that:

> If the primary offense conviction is *reversed on appeal*, the enhancement shall be *suspended* pending retrial of that felony. Upon retrial and reconviction, the enhancement shall be reimposed. If the person is no longer in custody for the secondary offense upon reconviction of the primary offense, the court may, at its discretion, reimpose the enhancement and order him or her recommitted to custody.

(§ 12022.1, subd. (g), italics added.) The provision is specifically directed to "revers[al] on appeal"—not to other circumstances affecting the primary-offense conviction, such as clemency or legislative reclassification. And its remedy is limited to suspension of the enhancement—not permanent elimination. Buycks' approach, by "'insert[ing]' additional language into a statute 'violate[s] the cardinal rule of statutory construction that courts must not add provisions to statutes.' [Citations]." (*People v. Guzman* (2005) 35 Cal.4th 577, 587.)

Moreover, where an on-bail enhancement was valid when imposed based on the status and conviction of the offender at that time, subsequent elimination of the enhancement based on later changes in the law would amount to retroactive relief. Buycks—who has pointed to no explicit provision in section 12022.1 or section 1170.18 providing such relief, and no legislative history envisioning it—has not made anything approaching the showing that would be required in light of California law's statutorily mandated reluctance to disturb final judgments:

> When the Legislature has not made its intent on the matter [of retroactivity] clear with respect to a particular statute, the Legislature's generally applicable declaration in section 3

> provides the default rule: "No part of [the Penal Code] is retroactive, unless expressly so declared." We have described section 3 ... as codifying "the time-honored principle ... that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature ... must have intended a retroactive application." [Citation.]

(*People v. Brown* (2012) 54 Cal.4th 314, 319.)

### B. Buycks' Broad Proposal Would Violate Proposition 47's Express Limitations

Except for his strained reading of section 12022.1, subdivision (g), Buycks does not identify any procedural mechanism for removing the on-bail enhancement where a primary offense has been reclassified but there has been no reclassification of offenses in the secondary-offense case. Nor would any such remedy be compatible with the voters' expectations when they enacted Proposition 47.

Proposition 47 allows resentencing proceedings only for cases in which the defendant was convicted of specific offenses. (See § 1170.18, subd. (a)). Resentencing in a case whose secondary offenses are unaffected by Proposition 47 would have to occur under a different provision of law. And any such resentencing in cases that do not themselves meet Proposition 47's requirements would violate section 1170.18's instruction that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." (§ 1170.18, subd. (n).).

By asking this Court to expand the circumstances under which a resentencing not covered by Proposition 47 itself could occur, Buycks' proposal would also endanger other limitations enacted by the voters. Proposition 47 allows resentencings only for petitions filed before November 2017, unless the petitioner can show good cause for further delay. (§ 1170.18, subd. (j).) It categorically denies resentencing to offenders with homicide or sexual assault convictions (§ 1170.18, subd. (i)), and permits courts to deny resentencing to other offenders who pose "an unreasonable risk of danger to public safety" (§ 1170.18, subd. (b)). Offenders resentenced under Proposition 47 are, at the trial court's discretion, subject to a year of parole—a safeguard which this Court recently reaffirmed as critical to the Proposition's overall design. (§ 1170.18, subd. (d); see *People v. Morales* (2016) 63 Cal.4th 399.) Buycks' proposal for automatic-resentencing in secondary-offense cases could endanger these limitations, even though they were potentially decisive to many voters' decision to approve Proposition 47 in the first place.[3]

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[3] (Cf. *People v. Morales*, *supra*, 63 Cal.4th at p. 407 ["The initiative's drafters may have included the parole provision to increase the initiative's chances of being enacted. Some voters who were concerned about simply releasing persons who had committed what had been felonies might have been reassured by this promise, a reassurance that might have persuaded them to vote for the proposition."].)

The problem in Buycks' approach is underscored by this Court's recent decision in *People v. Conley* (June 30, 2016, S211275) __ Cal.4th __, concerning the resentencing requirements of the Three Strikes Reform Act. The defendant in *Conley* had received a sentence of 25 years to life under California's Three Strikes Law. (*Id.*, slip opn., p. 5.) While the case was pending on direct appeal, the voters passed the Three Strikes Reform Act (*id.* at p. 6), which reduced sentences for many third-strikers and "established a procedure for 'persons presently serving an indeterminate term of imprisonment' under the prior version of the Three Strikes law to seek resentencing under the Reform Act's revised penalty structure' [Citation.]" (*id.* at p. 4). This Court rejected the defendant's claim that the appellate court should simply have changed his sentence; instead, *Conley* held, the defendant's exclusive remedy was to file a petition under the Reform Act's resentencing provision itself. (*Id.* at p. 2.) The Reform Act "expressly addresses the question [of retroactivity]" in its resentencing provision, "the sole purpose of which is to extend the benefits of the Act retroactively." (*Id.* at p. 9.) The voters had "create[d] a special mechanism for application of the new lesser punishment to persons who have previously been sentenced, and ... expressly ma[de] retroactive application of the lesser punishment contingent on a court's evaluation of the defendant's dangerousness ...." (*Id.* at p. 11.) "[T]o confer an automatic

entitlement to resentencing under these circumstances would undermine the apparent intent of the electorate ...." (*Ibid.*)

The same factors are present here and foreclose Buycks' proposal. The inclusion of section 1170.18 in Proposition 47 shows that voters expressly considered retroactivity. Like the Three Strikes Reform Act, Proposition 47 created a limited mechanism—section 1170.18—under which defendants who had previously been sentenced may seek a "new lesser punishment." (*People v. Conley*, *supra*, slip opn., p. 11). As in *Conley*, that mechanism must be recognized as the exclusive vehicle for Proposition 47 resentencings so that those limitations can be given effect. And that, in turn, means that redesignating a primary-offense as a misdemeanor cannot by itself result in elimination of the on-bail enhancement in another case that is not itself properly subject to Proposition 47 resentencing.

* * *

California's principles of retroactivity provide a straightforward answer which, in contrast to Buycks' approach, is faithful to statutory commands. Where either the primary- or secondary-offense conviction is not yet final on direct appeal, section 12022.1's express provisions govern the on-bail enhancement's suspension and, if appropriate, reimposition. (See § 12022.1, subd. (g).) For convictions no longer on appeal, an enhancement that was validly imposed based on the offender's status at the

time of conviction remains valid notwithstanding later adjustments to that status under Proposition 47. (OBM 16-19.)[4]

## CONCLUSION

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

Dated: July 27, 2016

Respectfully submitted,

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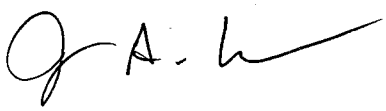

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[4] Buycks additionally argues that, even if an offender in his position is *eligible* to have the on-bail enhancement retained notwithstanding the reclassification of a primary-offense, the trial court should have discretion to strike the enhancement under section 1385. (ABM 14-15.) This Court's January 1, 2016 order granting review stated that the parties' briefing and argument was "limited" to addressing whether the defendant was "eligible" for resentencing on the drug enhancement "even though the superior court had reclassified the conviction for the [primary offense] as a misdemeanor." The People can address the additional question raised by Buycks if the Court so requests; otherwise, we are constrained to go no further than noting the background information we have already provided regarding sentencing judges' discretion to strike or dismiss the enhancement. (See OBM 6-7.)

## CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 2,459 words.

Dated: July 27, 2016

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## DECLARATION OF SERVICE BY U.S. MAIL

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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 July 27, 2016, at San Francisco, California.

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