In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

STEVENSON BUYCKS,

Defendant and Appellant.

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

PEOPLE'S ANSWER TO THE AMICUS BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY

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INTRODUCTION

The People have demonstrated that neither California's principles of retroactivity law nor the text, history, and purposes of Proposition 47 and Penal Code section 12022.1 support retroactive relief from a properly imposed on-bail enhancement merely because the primary-offense crime was subsequently designated a misdemeanor. (See Opening Brief on the Merits (OBM), pp. 14-21; Reply Brief on the Merits (RBOM), pp. 5-11.)[1] The Court of Appeal's contrary view not only misapplies the governing statutes, but also creates serious practical and equitable problems. (OBM, pp. 32-34; RBOM, pp. 2-4.)

Amici The California Public Defenders Association et al. raise several new arguments, none of which successfully defends the judgment below. The rule of lenity has no application in Proposition 47 resentencings, because the requirement to give fair notice of the consequences of criminal acts is not at issue where the initial judgment is unchallenged and the courts are construing an unforeseeable act of mercy. Nor, contrary to amici's claim, does a special rule of narrow construction apply to section 12022.1; instead, courts construe that statute like others, in light of its language and purpose. The People do not seek to expand upon the enumerated exception to Proposition 47's "misdemeanor for all

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

purposes" provision; rather, the People urge adherence to the proper, prospective scope of the statute's initial application, which excludes Buycks' claim before any exceptions are taken into account. The People's approach would not require unfairness towards those who are deemed actually innocent of a primary offense in habeas corpus proceedings. And Buycks has no "good cause" to withdraw his admission to the enhancement under section 1018 — an issue that this Court should, in any event, refuse to consider, given how far afield it is from the parties' arguments, the record, and this Court's briefing order in this case. Finally, amici repeat several arguments from the Court of Appeal's opinion and the defendant's brief, without addressing the fatal shortcomings in those arguments that the People's prior briefing identified.

ARGUMENT

I. THE RULE OF LENITY DOES NOT APPLY, AND SECTION 12022.1 IS NOT CONSTRUED ACCORDING TO SPECIAL RULES

Amici claim that the rule of lenity requires striking Buycks' on-bail enhancement. (Amicus Brief, pp. 17-18.) But the rule of lenity exists to ensure that "criminal statutes provide fair warning of what behavior is considered criminal and what the punishment for that behavior will be." (*People v. Story* (2009) 45 Cal.4th 1282, 1294.) Those purposes are not at issue here. When Buycks committed the crimes of theft and eluding police, the law was clear that, given Buycks' on-bail status, conviction on either

count would enhance his resulting sentence by two years. The same was true when he pled guilty to those crimes and was sentenced. He makes no claim that at either of those times he expected voters to later reduce his primary-offense drug conviction to a misdemeanor. Nor would reliance on such a belief have been reasonable.

There likewise is no merit to amici's claim (pp. 17-18) that section 12022.1 has historically been interpreted narrowly. Courts have not applied some special rule of construction in construing section 12022.1. Instead—as with other statutes—courts interpreting section 12022.1 have sought to discern, from the statutory language, "what the Legislature intended." (*People v. Walker* (2002) 29 Cal.4th 577, 581.)

For example, in *In re Jovan B.* (1993) 6 Cal.4th 801, this Court held that the on-bail enhancement was properly imposed on a juvenile who committed a secondary offense while released on "pretrial 'house arrest.'" (*Id.*, at pp. 814-815.) That result was not compelled by section 12022.1's literal text, which mentions only crimes committed while a person is released on "bail" or on his or her "own recognizance [O.R.]." (§ 12022.1, subd. (a)(1).) Yet *Jovan* upheld imposition of the enhancement because, like defendants released on bail or O.R., a juvenile who commits a crime while on house arrest "*personal*[ly] breach[es] ... the juvenile court's trust." (*Jovan*, *supra*, 6 Cal.4th at p. 815, original italics.) Rather than simplistically interpret section 12022.1 as narrowly as possible, *Jovan*

adopted the construction most consistent with the Legislature's intent in passing section 12022.1—to punish "opportunistic recidivism." (*Ibid.*)[2]

II. SUBSECTION (K)'S EXPRESS EXCEPTION FOR FIREARMS CASES DOES NOT CHANGE THE PROSPECTIVE NATURE OF THE "MISDEMEANOR FOR ALL PURPOSES" CLAUSE

Section 1170.18, subdivision (k) provides that felony convictions recalled under the initiative's resentencing provisions "shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or" preclude him or her from being convicted of crimes that prohibit the possession of firearms by felons. (§ 1170.18, subd. (k).) Amici argue that the existence of a specific firearms-exception to subdivision (k)'s "misdemeanor for all purposes" language implies that no other exceptions exist. (Amicus Brief, pp. 21-22.) But the People do not request an exception to subdivision (k). Rather, the People urge adherence to limits in the subdivision's initial application. (OBM, pp. 27-28.)

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[2] In support of their narrow-construction rule, amici cite *People v. Hernandez* (2009) 177 Cal.App.4th 1182 and *People v. Ormiston* (2003) 105 Cal.App.4th 676. But those opinions, like *Jovan*, construed the statute in light of its purposes—not to be as narrow and formalistic as possible. They withheld application of the enhancement from those whose crimes were committed while on a form of release that was neither bail, nor O.R., nor the "functional equivalent" of bail or O.R. (*Hernandez, supra*, 177 Cal.App.4th at pp. 1185, 1192; *Ormiston, supra*, 105 Cal.App.4th at pp. 679, 692.)

Section 1170.18, subdivision (k), commands that a conviction "shall be considered a misdemeanor for all purposes." As the People have demonstrated, that language is nearly identical to the language in section 17, subdivision (b). (OBM, pp. 27-28.) As the People have further shown, this Court has construed section 17's language as having only *prospective* effect. (*Ibid.*; see *People v. Feyrer* (2010) 48 Cal.4th 426, 438-439 [under section 17, "[i]f ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively"]; *People v. Park* (2013) 56 Cal.4th 782, 791, fn. 6, 795; see also *In re C.H.* (Aug. 30, 2016, A146120) ___ Cal.App.5th ___ [2016 WL 4529205, *2] ["In other words, a court's declaration of misdemeanor status renders an offense a misdemeanor for *all purposes*, but not at *all times*."], original italics.) Amici and the defendant, who do not take issue with these foundational points, propose no reason why section 1170.18's language should be given a different interpretation than the longstanding near-identical language in section 17.

Such a prospective reading of section 1170.18, subdivision (k)'s command does not deprive the firearms-exception of meaning. To the contrary, the firearms exception will function as a true exception, in cases where subdivision (k)'s prospective command would otherwise apply. Thus, if Buycks is charged and convicted of new crimes, then the reclassification of the earlier drug and theft offenses under Proposition 47

can be given proper prospective effect, subject to the exception. If Buycks' new crime does not involve a specified firearms offense, then the earlier crimes will be treated as misdemeanors, in a proper prospective application; if the new crime is covered by the firearms exception, however, then the prior convictions will not be given even prospective effect, due to the exception. Proposition 47's choice to state a general rule copied from section 17, plus a special firearms exception to that rule, indicates that that is the outcome intended.

III. THE PEOPLE'S APPROACH FULLY PROTECTS THOSE WHOSE PRIMARY OFFENSE CONVICTION WAS IMPROPER TO BEGIN WITH

Like Buycks, amici assert that section 12022.1(g) should be read as requiring suspension of an otherwise final on-bail enhancement whenever the Legislature subsequently reduces the primary offense to a misdemeanor. (Amicus Brief, p. 22.) But as the People have shown, subdivision (g)—which explicitly provides for suspension of the enhancement in cases of appellate reversal—makes no provision for eliminating the enhancement based on later legislative reclassification of the underlying offenses. (See RBOM, pp. 5-7.)

Amici argue that the People's position would result in unfairness by requiring that the on-bail enhancement be maintained even for defendants whose primary-offense conviction was vacated through habeas corpus. (Amicus Brief, p. 22.) But no such result is required by the People's

approach. Convictions that are later determined to be void *ab initio* because of factual innocence or procedural error are subject to less stringent rules of finality than convictions that are ameliorated through acts of mercy. (OBM, pp. 16-17.) As a result, enforcing longstanding limits on revisiting enhancements that were proper when imposed would not preclude this court from fashioning an appropriate remedy if presented with a case where the enhancement was wrong when imposed. (Cf. *In re Harris* (1993) 5 Cal.4th 813, 839 [defendant may file habeas petition to challenge improper imposition of enhancements].)

IV. PROPOSITION 47'S ENACTMENT IS NOT "GOOD CAUSE" TO PARTIALLY WITHDRAW A DEFENDANT'S PLEA UNDER SECTION 1018

Finally, amici claim that Proposition 47's reduction of Buycks' primary offense to a misdemeanor provides "good cause" for him to withdraw his admission to the enhancement under section 1018. (Amicus Brief, p. 19.) But section 1018 was neither considered by the courts below nor discussed by the parties—and Buycks never requested that the trial court allow him to withdraw his admission. This Court does not "ordinarily consider questions not raised by the appellate record and put forward only by an amicus curiae." (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 82, fn. 7; see, e.g., *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1047, fn. 12 [refusing to address amicus' arguments, because issue was not raised by the parties].) There is good

reason to follow that practice here. Amici's argument to expand "good cause" for plea withdrawals under section 1018, a statute not previously at issue in this case, could have implications in a variety of other plea-withdrawal contexts and goes far beyond the limitations this Court imposed on the parties' briefing. (See Order Granting Review, Jan. 20, 2016 ["The issue to be briefed and argued is limited to the following: 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?"].)

In any event, amici's assertion lacks merit. Section 1018 allows a defendant to withdraw a guilty plea "for a good cause shown." (§ 1018.) To show "good cause," a defendant must prove that his plea was entered based on "'[m]istake, ignorance or any other factor overcoming the exercise of free judgment ....' [Citation]." (*People v. Johnson* (2009) 47 Cal.4th 668, 679.) None of those criteria applies here. Buycks' admission to the on-bail enhancement was not due to any mistake about whether he had committed and been convicted of a felony in his first case. Nor could he

claim ignorance of the consequences of admitting the enhancement, or assert that his will was overborne when he made the admission.[3]

V. AMICI'S REMAINING ARGUMENTS HAVE BEEN REFUTED BY THE PEOPLE'S PRIOR BRIEFING

Amici's remaining arguments repeat the defendant's or the Court of Appeal's contentions without responding to the shortcomings that the People have identified in those arguments. Although amici assert (pp. 14-17) that Proposition 47 should be interpreted to save as much money as possible, this Court has rejected that approach. (*People v. Morales* (2016) 63 Cal.4th 399, 408; see OBM, pp. 30-32 [noting that the voters sought to save money through specific changes to the Penal Code, none of which addressed the section 12022.1 enhancement].) Although amici argue (p. 18) that Proposition 47 requires "resentencing rather than a limited modification to an otherwise final sentence," that reformulation of the Court of Appeal's "full resentencing" approach has no application to an on-bail enhancement, which is neither a "principal" nor a "subordinate" term.

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[3] Courts have rejected claims of "good cause" to withdraw a plea even where the defendant had specific reasons to expect "lenient treatment." (*Mendieta v. Municipal Court* (1980) 109 Cal.App.3d 290, 294; see, e.g., *People v. Fratianno* (1970) 6 Cal.App.3d 211, 222 [defendant could not withdraw his guilty plea under section 1018 because of a trial court's decision to deny probation, even if the prosecutor promised not to object to imposition of probation].) *A fortiori*, Buycks cannot establish "good cause" based on what could only have been, at the time of his plea, pure speculation that the voters might someday reduce his primary offense conviction to a misdemeanor.

(OBM, pp. 29-30; see *People v. Anderson* (2009) 47 Cal.4th 92, 118 ["[A]n enhancement cannot be equated with an offense."].)

Finally, although amici request that this Court should "stress[]" that trial courts retain the discretion to strike the enhancement (pp. 20-21), that issue is beyond the briefing limitations in the Court's order granting review. (OBM, pp. 6-7; RBOM, p. 11, fn. 4.) What amici portray as a simple request in fact raises complex questions — not only about the degree of such discretion, but also about whether discretion to strike a previously imposed enhancement would be matched by discretion to reimpose a previously stricken enhancement so long as the offender's total sentence is not increased (cf. *People v. Cortez* (Sept. 14, 2016, G052158) ___ Cal.App.5th ___ [2016 WL 4791904, *4]) . If this Court wishes to resolve those questions, it should do so where they have been properly raised and briefed by the parties.

CONCLUSION

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

Dated: September 29, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PEOPLE'S ANSWER TO THE AMICUS BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AND THE PUBLIC DEFENDER OF VENTURA COUNTY** uses a 13 point Times New Roman font and contains 2,276 words.

Dated: September 29, 2016

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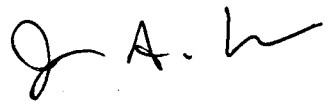

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Buycks***
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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.

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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 September 29, 2016, at San Francisco, California.

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