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June 1, 2018

Mr. Jorge E. Navarette
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: Response to Supplemental Briefing Order in *People v. Buycks* (Case No. S231765)

Dear Mr. Navarette:

The People of the State of California respectfully submit this letter brief in response to the Court's May 16 order in this case, which requested arguments regarding the effect of Penal Code section 1170.18, subdivision (n), *Dix v. Superior Court* (1991) 53 Cal.3d 442, and Penal Code section 1170.18, subdivision (k).[1]

As explained below, under section 1170.18, subdivision (n), where a case contains an offense eligible for resentencing under Proposition 47, a court may reconsider all components of the sentence in that case, including terms that were not imposed for offenses or enhancements specified in Proposition 47. That power includes the power to strike an on-bail enhancement under section 1385. Where the primary offense for which a defendant was originally on bail has been subsequently reclassified a misdemeanor, a judge may consider the public policy judgments embodied in Proposition 47 as one of the circumstances relevant to exercising her statutory discretion to strike the enhancement. However, neither subdivision (n) nor subdivision (k) of section 1170.18 requires a court to strike the on-bail enhancement if the court determines that striking the enhancement would not further the interests of justice.

1. Effect of section 1170.18, subdivision (n), and *Dix v. Superior Court*

Section 1170.18, subdivision (n), specifies that "[r]esentencing pursuant to this section does not diminish or abrogate the finality of judgments in any *case* that does not come within the

[1] Unless otherwise specified, all further statutory references in this letter are to the Penal Code. Slip opn. refers to the October 20, 2015, Court of Appeal slip opinion as modified on denial of rehearing, November 5, 2015. OBM refers to the People's Opening Brief on the Merits, and ABM refers to Buycks's Answering Brief on the Merits.

purview of this section." (Italics added.) The declaration that resentencing does not affect judgments in a "case" not within the purview of Proposition 47 implies that all sentencing components of a case that is within the purview of Proposition 47 may be reconsidered. Thus, as discussed in our February 23, 2018, letter brief (at pages 5-6), and as the courts of appeal have uniformly held, a court that grants a petition for recall of sentence pursuant to section 1170.18, subdivision (a), and resentences a previous felony conviction as a misdemeanor pursuant to subdivision (b), may, at the same time, adjust other components of the sentence. (See *People v. Mendoza* (2016) 5 Cal.App.5th 535, 538-539; *In re Guiomar* (2016) 5 Cal.App.5th 265, 271-275, review granted; *People v. Cortez* (2016) 3 Cal.App.5th 308, 311-317; *People v. McDowell* (2016) 2 Cal.App.5th 978, 982; *People v. Roach* (2016) 247 Cal.App.4th 178, 185-187; *People v. Sellner* (2015) 240 Cal.App.4th 699.) As further explained below, this means that the trial court, which followed this principle in changing Buycks' sentence for his evading felony (Slip opn., p. 4), would also have had discretion to strike the sentence for Buycks' on-bail enhancement under section 1385, based on the public policy judgments embodied in Proposition 47.

Dix v. Superior Court, supra, 53 Cal.3d 442, concerned the recall provision in section 1170, subdivision (d) (now subdivision (d)(1)), under which a sentencing court may "recall the sentence and commitment previously ordered," "within 120 days of the date of commitment on its own motion," or "at any time upon the recommendation of" certain other authorities. Upon doing so, the court may "resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence." *Dix* reasoned that, because the statute requires resentencing to occur "'in the same manner as if [the defendant] had not previously been sentenced,'" "the resentencing authority conferred by section 1170(d), is as broad as that possessed by the court when the original sentence was pronounced," subject to two limitations that are explicit in the statute: the requirements that the new sentence be no greater than the original sentence, and that credit be given for time served. (*Dix, supra,* 53 Cal.3d at p. 456, italics omitted.) The trial court may thus "recall and reconsider a sentence on individual grounds." (*Id.* at p. 458.) "[T]he factors the court may consider are no more limited than if the resentencing were the original sentencing." (*Id.* at p. 460.) As a result, *Dix* held, at a recall and resentencing under section 1170, subdivision (d), a trial court may consider "circumstances which arose after the original sentencing." (*Ibid.*) The court has "statutory jurisdiction to reconsider its original sentence, even on the basis of subsequent events." (*Id.* at p. 463.)

Section 1170, subdivision (d)(1), and section 1170.18, subdivision (b), are not identical. The latter provision does not specify that resentencing shall occur "in the same manner as if [the defendant] had not previously been sentenced." Nevertheless, section 1170.18, subdivision (b), resembles the earlier provision enough that a court that resentences a defendant under Proposition 47 should take into account "pertinent circumstances which have arisen since the prior sentence was imposed"—a conclusion consistent with "principles generally applicable to resentencing law." (*Dix, supra*, 53 Cal.3d at p. 460.) In a particular case, those circumstances could include efforts at rehabilitation, expressions of remorse, behavior in custody, and progress in identifying programs to assist with substance abuse and other criminogenic factors.

The subsequent circumstances to be taken into account could also include the passage of Proposition 47—both in its effect on the defendant's sentencing exposure on other counts and with respect to the public policy decisions that the Proposition represents in evaluating the seriousness of certain crimes. A defendant facing the imposition of an on-bail enhancement under section 12022.1 has "a right to have [the sentencing court] exercise the discretion it possess[es] under section 1385, prior to imposing sentence on the enhancement." (*People v. Meloney* (2003) 30 Cal.4th 1145, 1165.) Under section 1385, a judge may, "in furtherance of justice, order an action to be dismissed," or "strike the additional punishment for an enhancement." (§ 1385, subds. (a), (c)(1).) The court must consider "'the constitutional rights of the defendant, and the interests of society represented by the People.'" (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, italics omitted.) In exercising its discretion in an individual defendant's case, a trial court could reasonably take into account whether the "interests of society" continue to require imposition of the on-bail enhancement, given the change in society's judgment about the seriousness of the primary offense for which the defendant was originally on bail at the time he or she reoffended. The trial court should also consider whether striking the punishment for the enhancement, rather than striking the enhancement itself, would result in a more "accurate reflection of the defendant's criminal conduct on his or her record" (Cal. Rules of Court, rule 4.428(b)), by retaining information about the defendant's behavior on release that could be useful to judges considering bail or own-recognizance conditions should the defendant be arrested again.

That does not imply, however, that a court is powerless to retain the on-bail enhancement if it determines that striking it under section 1385 would not further the interests of justice. Proposition 47 "address[es] the question of retrospective application in conspicuous detail." (*People v. Dehoyos* (2018) 4 Cal.5th 594, 601.) Section 1170.18, subdivision (a), lists a variety of punishments that are subject to automatic adjustment unless resentencing "would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Punishment for the on-bail enhancement is not included in that list. The voters thus made no categorical determination that the "former penalty [for on-bail enhancements] was too severe." (*In re Estrada* (1965) 63 Cal.2d 740, 745.) As a matter of historical fact, defendants such as Buycks engaged in the act that section 12022.1 proscribed: committing a felony while on-bail in a felony case. If the penalty would be unjust in a particular case, section 1385 provides an appropriate remedy.

2. Effect of section 1170.18, subdivision (k)

Section 1270.18, subdivision (k), specifies that, once reclassified, an offense is a misdemeanor "for all purposes" except firearm prohibitions. Thus, now that Buycks' primary-offense drug charge has been reclassified as a misdemeanor, it cannot be treated as a prior felony in any future prosecution. That does not mean that Buycks can rewrite historical facts—including the fact that he committed and was convicted of a felony crime while on bail in a felony case.

That is consistent with how this Court has applied the "almost identical" (Slip opn., p. 7) language in section 17, subdivision (b). (See OBM 27-28.) 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* (2013) 56 Cal.4th 782, 795, italics added.) The reduction does not, however, "operate retroactively to the time of the crime's commission, the charge, or the adjudication of guilt." (*Id.* at p. 791, fn. 6.)

Eliminating this distinction between future consequences and past historical fact would cause endless confusion. A person whose felony conviction has been reduced to a misdemeanor under Proposition 47 is no longer subject to an automatic bar on employment as a peace officer under Government Code § 1029, subdivision (a)(1); that does not mean that a person who applied for and was denied such a job before the reclassification should be entitled to retroactive appointment. A witness whose felony conviction has been reclassified as a misdemeanor may no longer be impeached with that conviction under Evidence Code § 788; that does not imply that litigants are entitled to relief from enforcement of adverse judgments that resulted from such impeachment before the reclassification. And a person whose felony conviction has been reclassified to a misdemeanor may now truthfully answer under oath that he or she does not have a felony conviction; that does not mean that such an answer made before the reclassification was not perjurious under Penal Code § 118. Nor must a court, when resentencing a defendant on a reclassified offense under section 1170.18, subdivision (b), strike the resulting misdemeanor conviction and sentence altogether if prosecution for the misdemeanor would originally have been barred by a correspondingly shorter statute of limitations. (See *People v. Park, supra,* 56 Cal.4th at p. 791, fn. 6.)

* * *

The court of appeal's decision should be reversed because that court erred in concluding that the trial court was required to strike Buycks' sentence for his on-bail enhancement. The record does not reflect whether the trial court understood its discretion to strike the enhancement under section 1385. (See RT 1-5.) Remand for that determination is unnecessary, however, because Buycks, who has completed serving his sentence (see ABM 6, fn. 2), has already benefitted from the reclassification of his theft offense that a "person who has completed his or her sentence" may receive under section 1170.18, subdivision (f).

Sincerely,

JOSHUA A. KLEIN
Deputy Solicitor General

For XAVIER BECERRA
Attorney General

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Buycks**
Case 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 June 1, 2018, I served the attached **SUPPLEMENTAL LETTER BRIEF** 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 June 1, 2018, at San Francisco, California.

M. Campos
Declarant

M. Campos
Signature

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