SUPREME COURT COPY

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May 31, 2018

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

SUPREME COURT
FILED
JUN 01 2018
Jorge Navarrete Clerk
Deputy

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

Request For Supplemental Briefing

Clerk of the Supreme Court,

Counsel for Stevenson Buycks files this supplemental letter brief in response to the Court's letter dated May 16, 2018, in which it requested the parties address the following: "Should Penal Code section 1170.18, subdivision (k) require striking defendant Buycks' two-year enhancement under Penal Code section 12022.1 despite the fact that his judgment was final (*In re Estrada* (1965) 63 Cal.2d 740), because the trial court sentenced defendant anew after he had successfully petitioned for reduction of his Penal Code section 666, subdivision (a) conviction to a misdemeanor?" The short answer to the Court's question is, yes.

Secondly, this Court requested the parties to specifically address whether Penal Code section 1170.18, subdivision (n) and/or the Court's prior holding in "*Dix v. Superior Court* (1991) 53 Cal.3d 442 support the Court of Appeal's conclusion that in resentencing defendant Buycks, the trial court was required to reevaluate the applicability of the enhancement at that time?" Before addressing section 1170.18, subdivision (n) and *Dix v. Superior* Court, both of which support Mr. Buycks' position, it is important to note that the Attorney General's office has already conceded that the Court of Appeal below correctly determined the Superior Court had to reevaluate the on-bail enhancement at the time Buycks was resentenced on the secondary case.

A. The Attorney General's Letter Of February 23, 2018.

Just two weeks before oral argument, the Attorney General filed an unsolicited letter brief in which it addressed two issues before the Court in the consolidated oral argument to be held in *People v. Buycks, People v. Valenzuela* and *In re Guiomar*.[1] While the first issue did not pertain to *Buycks,* the second appeared to be a concession that the Court of Appeal properly determined that the Superior Court could not reimpose the on-bail enhancement during the otherwise required resentencing on the secondary case.[2] The heading of the second issue necessarily leads one to such a conclusion:

> "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"[3]

In the body of the letter, the Attorney General wrote: "respondent has reevaluated the position advanced in [its] Buycks brief, and no longer agrees that trial courts cannot reconsider imposition of sentence on enhancements when resentencing a defendant pursuant to Proposition 47." (February 23, 2018 letter, p. 5.) The Attorney General then quoted *People v. Mendoza* (2016) 5 Cal.App.4th 535, 538 as follows: "When Proposition 47 applies to any count or related case, the trial court must reconsider

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[1]The letter was filed by Meredith S. White from the San Diego office of the Attorney General. Ms. White was not the attorney who filed the People's brief nor the attorney who argued all three cases on March 6, 2018.

[2]On May 30, 2018, deputy Attorney General Joshua Klein was kind enough to inform counsel for Buycks that he did not view his office's letter of February 23, 2018 as a concession that the Court of Appeal correctly determined that the on-bail enhancement had to be struck under the peculiar facts of Buycks' case. Like at oral argument, Counsel for Buycks is confused as to whether the Attorney General is conceding anything and, if so, what exactly is the Attorney General conceding. Counsel for Buycks brought his confusion to this Court's attention during oral argument. At that time, the Court had no questions regarding counsel's interpretation of the "concession" letter. If the Attorney General is now backing away from the position it took in that letter, counsel for Buycks' requests an opportunity to appear before the Court again and argue against the Attorney General's exact position – whatever that position is currently.

[3]While the Attorney General's Office was originally deemed petitioner in *Buycks,* it was deemed respondent for purposes of the consolidated oral argument.

the entirety of the aggregate sentence." (February 23, 2018 letter, p. 6.) This is exactly what the Court of Appeal below held in its published opinion.[4]

B. The Court Of Appeal Opinion Below.

The Court of Appeal held that Penal Code section 1170.18, subdivision (k) precluded the trial court from reimposing an on-bail enhancement when the primary offense had been reduced to a misdemeanor prior to mandatory resentencing in the secondary case. (*People v. Buycks* (2015) 241 Cal.App.4th 519, 524.) In reaching this conclusion, the Court of Appeal relied upon the Couzens & Bigelow, Proposition 47, memo which opined:

> "'Because the Proposition 47 count is part of a multiple-count sentencing scheme, changing the sentence of one count fairly puts into play the sentence imposed on non-Proposition 47 counts, at least to the extent necessary to preserve the original concurrent/ consecutive sentencing structure. The purpose of section 1170.18 is to take the defendant back to the time of the original sentence and resentence him with the Proposition 47 count now a misdemeanor.' (italics added) . . . 'If the petitioner is resentenced as a misdemeanor on an eligible count, but will remain sentenced as a felon on one or more other counts, the court should resentence on all counts.'" (*People v. Buycks, supra*, 241 Cal.App.4th at p. 524, citing Couzens & Bigelow memo, at p. 59; cf. Pen. Code, § 1170.18, subd. (b).)

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[4]It should be noted that the Attorney General did not petition for review from the Court of Appeal's opinion. This Court granted review on its motion so that the parties could address the broader issue of whether defendants whose primary offense is reduced to a misdemeanor under Proposition 47 are entitled to have the on-bail enhancement struck in the secondary case even if the defendant were not otherwise entitled to be resentenced. Counsel for Buycks is still of the opinion that the on-bail enhancement must be struck whenever the primary offense or secondary offense is reduced to a misdemeanor. (See e.g., Pen. Code, § 12022.1, sub. (g).)

C. Penal Code Section 1170.18, Subdivision (n).

Penal Code section 1170.18, subdivision (n), cited by this Court in its letter, supports the Court of Appeal's holding. 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." Clearly, this case does come within the purview of section 1170.18. Buycks had his primary offense (Superior Court case number BA418285) reduced to a misdemeanor under Proposition 47. Thereafter, a different trial court reduced count 3 in the secondary case (number NA097755) to a misdemeanor. The second reduction necessitated a resentencing on the remaining felony counts. As such, the case presently before this Court clearly comes within the purview of Penal Code section 1170.18 and, therefore, the prohibition of subdivision (n), against altering the finality of non-qualifying judgments, does not apply. By eliminating the double negative found in the wording of subdivision (n) (i.e., the use of the word "not twice"), the language of the subdivision clearly recognizes that the finality of judgments will be impacted when the provisions of Proposition 47 do apply – which is exactly the case here.

D. Dix v. Superior Court.

In *Dix v. Superior Court, supra*, 53 Cal.3d 442, this Court held that, under Penal Code section 1170, subdivision (d), a trial court need only recall the sentence, not recall and resentence, within 120 days. (*Id.*, at p. 464.) The Court found that there was no time limit for when resentencing, after a timely recall, must occur. (*Ibid.*) Finally, the Court concluded that "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."[5] (*Id.*, at p. 465.) This language clearly supports the Court of Appeal's opinion in this case – that the on-bail enhancement had to be struck in the secondary case because, at the time of that mandatory resentencing, the primary offense had been reduced to a misdemeanor. Under this Court's opinion in *Dix*, the fact that the primary offense was reduced to a misdemeanor, after the

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[5]In *People v. Johnson* (2004) 32 Cal. 4th 260, this Court cited *Dix v. Superior Court* in holding that Penal Code section 1170, subdivision (d) "allows the trial court to reconsider its original sentence and *impose any new sentence that would be permissible under the Determinate Sentencing Act* if the resentence were the original sentence so long as the new aggregate sentence does not exceed the original sentence." (*Id.*, at pp. 265 - 266 [emphasis added].)

sentence was originally imposed in the secondary case, does not preclude the Superior Court from striking the enhancement when it subsequently resentences the defendant in the secondary case. In short, this Court's opinion in *Dix* supports the Court of Appeal's opinion below.

E. Consequences Of Concluding Otherwise.

Finally, to conclude that Penal Code section 1170.18, subdivision (k) did not require the on-bail enhancement to be struck in Mr. Buyck's case would call into question numerous opinions which have held that, at resentencing, the Superior Court can reconsider the entire sentence. Among such opinions are *People v. Acosta* (2016) 247 Cal.App.4th 1072, 1076 - 1077 [at resentencing the trial court may properly impose sentence on six prison prior allegations which had been dismissed at the time of original sentencing]; *People v. Mendoza, supra*, 5 Cal.App.5th at p. 538 ["When Proposition 47 applies to any count or related case, the trial court must reconsider the entirety of the aggregate sentence."]; *People v. Cortez* (2016) 3 Cal.App.5th 308, 316 [a "close reading of section 1170.18 . . . indicates a resentencing encompasses the entire sentence, not merely the portion attributed to the qualifying felony."], all of which were cited by respondent in its partial concession letter of February 23, 2018. Concluding otherwise would also call into question the continued validity of many other opinions, including: *People v. Burns* (1984) 158 Cal.App.3d 1178, 1184 ["On remand, the trial court is entitled to reconsider its entire sentencing scheme."]; *People v. Calderon* (1993) 20 Cal.App.4th 82, 88 ["A determinate sentence is one prison term made up of discrete components. When one of them is invalid, the entire sentence is infected."]; and *People v. Burbine* (2003) 106 Cal.App.4th 1250, 1259 ["[U]pon remand for resentencing after the reversal of one or more subordinate counts of a felony conviction, the trial court has jurisdiction to modify every aspect of the defendant's sentence on the counts that were affirmed, including the term imposed as the principal term."].

F. Conclusion.

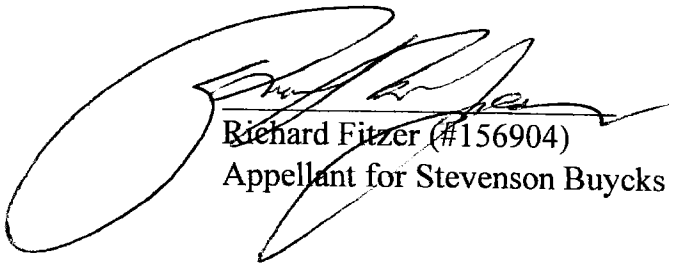
This Court's holding in *Dix v. Superior Court*; the language of Penal Code section 1170.18, subdivision (n) and the Attorney General's prior concession letter all support the Court of Appeal's disposition below – that striking of the on-bail enhancement during resentencing on the secondary case is mandatory where the primary offense was reduced to a misdemeanor prior to that resentencing. Beyond that, 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 [a conviction for a felony charge on the primary offense is an essential prerequisite to the imposition of an on-bail enhancement]; (*People v. Vasilyan* (2009) 174 Cal.App.4th 443, 449 - 450 [felony enhancements cannot exist separate and apart from the felony base term].)

In sum, the Court of Appeal below got it right when it opined:

> "[I]t is reasonable to conclude that the voters intended to treat a defendant whose primary offense is reduced to a misdemeanor under Proposition 47—which thereafter 'shall be considered a misdemeanor for all purposes' (§ 1170.18, subd. (k))—like the other categories of defendants excluded from the on-bail enhancement based on the disposition of their offenses, and thereby exclude them from eligibility for the on-bail enhancement at resentencing on the secondary offense." (*People v. Buycks, supra*, 241 Cal.App.4th at p. 528.)

Respectfully submitted,



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

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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 May 31, 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.

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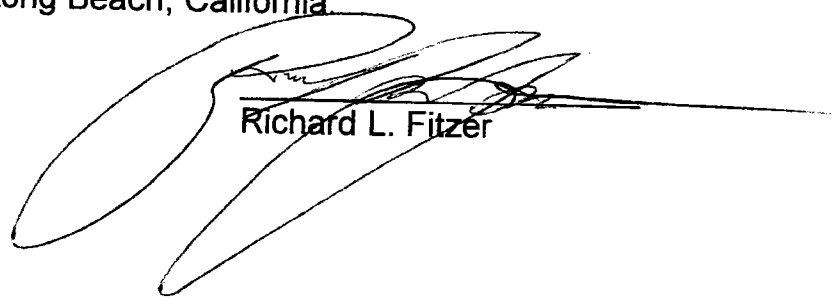
I declare under penalty of perjury that the foregoing is true and correct. Executed May 31, 2018 at Long Beach, California.



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