SUPREME COURT COPY

XAVIER BECERRA
Attorney General

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CALIFORNIA 94102-7004

Public: (415) 510-4400
Telephone: (415) 510-3919
Facsimile: (415) 703-2552
E-Mail: Joshua.Klein@doj.ca.gov

June 15, 2018

SUPREME COURT
FILED

JUN 15 2018

Jorge Navarrete Clerk

Deputy

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

RE: Reply Letter Brief in 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 regarding the effect of Penal Code section 1170.18, subdivisions (k) and (n), and *Dix v. Superior Court* (1991) 53 Cal.3d 442, pursuant to the Court's May 16 order in this case and in reply to Defendant-Respondent Buycks's May 31 letter brief.[1]

1. The People agree with Buycks's contention (at p. 4) that, when a court has recalled the sentence in a case under Proposition 47, the preservation-of-finality provision in section 1170.18, subdivision (n), does not forbid the court from changing components of the sentence that were not directly imposed for an offense listed in Proposition 47. (See People's June 1 Letter Brief 1-2.) The ability to reconsider all aspects of a sentence in a case being resentenced under Proposition 47 follows by implication from subdivision (n)'s statement preserving the finality of "judgments in any *case* that does not come within the purview of this section." (Italics added.) In a Proposition 47 resentencing, a trial court therefore has discretion to strike an on-bail enhancement under section 1385. The court should strike the enhancement if doing so would "further[]" the interests of "justice" (§ 1385, subd. (a)), and should withhold such relief if striking the enhancement would disserve the interests of justice.

Nothing in *Dix* contradicts this reasoning. As Buycks notes (at p. 4), *Dix* held that, when a court recalls and resentences under section 1170, subdivision (d), the trial court's new sentencing decision "*may* include consideration of facts that arose after [the defendant] was committed to serve the original sentence." (*Dix v. Superior Court, supra,* 53 Cal.3d at p. 465,

[1] Unless otherwise specified, statutory references in this letter are to the Penal Code. AOB refers to the Appellant's Opening Brief filed by the People.

italics added.) The permissive word "may" makes clear that a court proceeding under section 1170, subdivision (d), also may choose not to alter sentencing components in response to subsequent events. For instance, as our previous letter noted (at p. 3), there may be good reason for a trial court not to eliminate the on-bail enhancement—or to strike only the punishment for the enhancement, rather than the enhancement itself, so that the defendant's record will accurately "reflect[] the defendant's criminal conduct" (Cal. Rules of Court, rule 4.428(b)) for the benefit of judges who would need to consider the conditions necessary to protect the public if the defendant is arrested on new crimes in the future.

As Buycks's letter notes (at p. 4, fn. 5), a sentence imposed after recall, like any sentence, must be one that would be "permissible under the Determinate Sentencing Act *if the resentence were the original sentence*." (*People v. Johnson* (2004) 32 Cal.4th 260, 265-266; see *Dix v. Superior Court, supra,* 53 Cal.3d at p. 465 [court has "jurisdiction to impose any otherwise permissible new sentence"].) Nothing in Buycks's new sentence would have been impermissible at his original sentencing, which occurred before Proposition 47's enactment. Indeed, even after a primary offense's reclassification, there is nothing impermissible about an on-bail enhancement imposed on a defendant who committed one felony offense while on bail for another, as long as the defendant was convicted in valid proceedings of both felonies. As the People have explained (see AOB 16-17), where a later conviction is predicated in part on an earlier conviction or sentence, the law does not view the later conviction as invalid merely because the earlier one was eventually reduced or voided as a matter of "'forgiveness or remission of penalty.'" (*People v. Biggs* (1937) 9 Cal.2d 508, 514; see also *People v. Dutton* (1937) 9 Cal.2d 505, 506 [following *Biggs*].) To the contrary, this Court has held that a pardoned conviction may nevertheless "be used to enhance a sentence under a habitual criminal statute"—because "a pardon does not 'wipe out' the existence of the prior crime," and because "the defendant is being punished only for the second offense," not for the one that was pardoned. (*People v. Laino* (2004) 32 Cal.4th 878, 892 [discussing *Biggs*, *Dutton*, and *Carlesi v. New York* (1914) 233 U.S. 51].) These principles dictate the result here. Buycks's primary offense was reclassified not because of actual innocence or any procedural flaw that made his original conviction improper, but rather as an act of forgiveness and remission of penalty. The primary offense's subsequent reclassification did not wipe out the fact that Buycks was properly convicted of it earlier, and the imposition of the on-bail enhancement in his secondary-offense case is part of the punishment not for his reclassified offense but for his later offense of evading a police officer while he was on bail under the court's supervision. Buycks's on-bail enhancement is part of a permissible sentence.

2. Buycks's letter (at p. 1) asserts that reimposition of the on-bail enhancement is barred by the requirement, in section 1170.18, subdivision (k), that a reclassified offense be "considered a misdemeanor for all purposes." But the scope of retroactivity is ultimately a question of the voters' intent. (See *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307.) The voters did not intend subdivision (k) to lead to the result Buycks proposes, as evidenced by their choice of language that, in another common context, leads to precisely the opposite result.

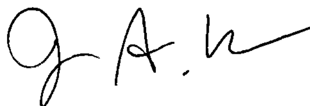
Buycks does not take issue with the People's observation that the "misdemeanor for all purposes" language in section 1170.18, subdivision (k), matches language in section 17,

subdivision (b), regarding reclassified wobbler offenses. Under section 17, after a defendant's conviction of a felony wobbler offense, the court may first grant probation without imposing sentence, then eventually reduce the conviction to a misdemeanor offense sometime "thereafter." (§ 17, subd. (b)(3).) Notwithstanding any later reduction, such a defendant is required to serve the on-bail enhancement unless the enhancement or its punishment is stricken under section 1385. Section 12022.1 provides that the initial "conviction" for the wobbler felony triggers the applicability of the on-bail enhancement. (§ 12022.1, subd. (f)(1).) The enhancement is not stayed, because section 12022.1, subdivision (d), provides for a stay only where the sentencing for the secondary offense occurs "prior to the *conviction* of the primary offense." (§ 12022.1, subd. (d), italics added; see, e.g., *In re Ramey* (1999) 70 Cal.App.4th 508, 510, 512 [stay was entered because the defendant's California secondary-offense sentencing occurred before any conviction for his Colorado primary offense, and stay became permanent because defendant was never convicted of felony primary offense].) And the subsequent reduction of the primary-offense wobbler does not affect the enhancement in the secondary-offense case, because where the secondary-offense conviction occurs after conviction of the primary offense, section 12022.1 requires eliminating or suspending the enhancement only "[i]f the primary offense conviction is reversed on appeal." (§ 12022.1, subd. (g).) In short, the "misdemeanor for all purposes" language in section 17 results in secondary-offense on-bail enhancements not being retroactively stricken upon the reclassification of primary-offense wobblers. In enacting Proposition 47's similar language, the electorate evidently intended a similar result. If retention of the on-bail enhancement would be unjust in a particular case after the primary offense's reduction, the defendant's remedy is to request that the trial court exercise its discretion under section 1385.

* * *

Because the trial court was not required to strike Buycks's sentence for the on-bail enhancement, the court of appeal's decision should be reversed.

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 15, 2018, I served the attached **REPLY LETTER BRIEF IN RESPONSE TO SUPPLEMENTAL BRIEFING ORDER** 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:

Michael C. McMahon
Chief Deputy Public Defender
Ventura County Public Defender's Office
800 South Victoria Avenue, Room #207
Ventura, CA 93009

Richard L. Fitzer
Law Offices of Richard L. Fitzer
6285 East Spring Street, No. 276N
Long Beach, CA 90808

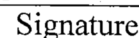
CAP - LA
California Appellate Project (LA)
520 South Grand Avenue, 4th Floor
Los Angeles, CA 90071

The Honorable James D. Otto
Los Angeles County Superior Court
275 Magnolia, Department S24
Long Beach, CA 90802

Jonathan Grossman
Sixth District Appellate Program
95 South Market Street, Suite 570
San Jose, CA 95113

Helen Simkins Irza
Appellate Defenders, Inc.
555 West Beech Street, Suite 300
San Diego, CA 92101

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 15, 2018, at San Francisco, California.



Ryan Carter	
Declarant	Signature

LA2016600307
42008194.docx