IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. STEVENSON BUYCKS, Defendant and Appellant.	S231765 Ct.App. 2/8 B262023 (Los Angeles County Superior Court No. NA097755)

JOINT APPLICATION TO APPEAR AS AMICI CURIAE IN SUPPORT OF DEFENDANT AND APPELLANT STEVENSON BUYCKS AND BRIEF OF *THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION* AND *THE PUBLIC DEFENDER OF VENTURA COUNTY*

STEPHEN P. LIPSON, Public Defender
Michael C. McMahon, Chief Deputy
SBN 71909
State Bar Certified Specialist - Criminal Law
State Bar Certified Specialist - Appellate Law
800 S. Victoria Avenue
Ventura, California 93009
(805) 477-7114
michael.mcmahon@ventura.org
Attorneys for amici curiae
CALIFORNIA PUBLIC DEFENDERS ASSOCIATION and PUBLIC DEFENDER OF VENTURA COUNTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES
FOR APPLICATION TO APPEAR AS AMICI CURIAE

Codes and Statutes

TABLE OF AUTHORITIES

FOR BRIEF IN SUPPORT OF THE DEFENDANT

Other:

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The CALIFORNIA PUBLIC DEFENDERS ASSOCIATION (CPDA) and the PUBLIC DEFENDER OF VENTURA COUNTY (Stephen P. Lipson) apply for permission to file the accompanying amici curiae brief in SUPPORT OF DEFENDANT AND APPELLANT STEVENSON BUYCKS.

On January 20, 2016, the court granted review on its own motion in the instant case (*People v. Buycks*, S231765). On February 24, 2016, the court designated *Buycks* to be the lead case and deferred further action in similar cases pending consideration and disposition of related issues in *Buycks* or pending further order of the court. (Cal. Rules of Court, rule 8.512(d)(2).)

This application summarizes the nature and history of your amici, and our interest in the issues presented in this case. It also demonstrates a likelihood that our joint brief will assist the court in the analysis and consideration of the issues presented.

A. The California Public Defenders Association is the largest and most influential association of criminal defense attorneys and public defenders in the State of California. Our collective experience regarding the law and our appellate advocacy on criminal justice issues puts us in a unique position to assist the court in this case.

CPDA's membership of some 4,000 public defenders and attorneys in private practice exceeds that of our comparable sister association, California Attorneys for Criminal Justice. We are an important voice of the criminal defense bar.

CPDA has been a leader in continuing legal education for defense attorneys for almost 40 years and is recognized by the California State Bar as an approved provider of Mandatory Continuing Legal Education, Criminal Law Specialization Education, and Appellate Law Specialization Education. The CPDA is one of only two organizations deemed by the Legislature to be an "automatically" approved legal education provider. (Bus. & Prof. Code, § 6070, subd. (b).)

The courts have granted CPDA leave to appear as amicus curiae in many California cases which culminated in published opinions. We believe that our participation has been helpful in many important cases. (See, e.g., *Harris v. Superior Court* (*People*) S231489; *People v. Morales* (2016) 63 Cal.4th 399 [excess credits does not reduce the Prop 47 term of misdemeanor parole]; *People v. Sasser* (2015) 61 Cal.4th 1[limitation on status-based enhancements]; *People v. Robey* (2013) 56 Cal.4th 1218 [warrant requirement for seized shipment]; *People v. Beltran* (2013) 56 Cal.4th 935 [heat of passion analysis]; *People v. Albillar* (2010) 51 Cal.4th 47 [sufficiency of the evidence in a gang-related prosecution]; *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [post-trial discovery]; *Galindo v. Superior Court* (2010) 50 Cal.4th 1 [pre-prelim discovery]; *People v. Lenix* (2008) 44 Cal.4th 602 [comparative juror analysis for first time on appeal], *People v.*

Nelson (2008) 43 Cal.4th 1242 [DNA evidence in a cold-hit case]; *Chambers v. Superior Court* (2007) 42 Cal.4th 673 [*Pitchess* procedures]; *People v. Sanders* (2003) 31 Cal.4th 318 [search could not be a reasonable "parole search" without knowledge of the suspect's parole status]; *Manduley v. Superior Court* (2002) 27 Cal.4th 537 [no separation of powers violation by the direct filing of juvenile cases in the criminal court]; *Morse v. Municipal Court* (1974) 13 Cal.3d 149 [mandate issued to compel consideration of diversion].)

CPDA has also served as amicus curiae in the United State Supreme Court in numerous cases resulting in a decision on the merits. (See, e.g., *Gonzales v. Duenas-Alvarez* (2006) 549 U.S. 1076 [generic "theft offenses" under the Immigration and Nationality Act]; *California v. Trombetta* (1984) 467 U.S. 479 [the duty to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense]; *Monge v. California* (1998) 524 U.S. 721 [double jeopardy clause does not bar retrial of a prior conviction allegation after an appellate finding of evidentiary insufficiency] *United States v. Knights* (2001) 534 U.S. 112 [parole searches]; *Lockyer v. Andrade* (2003) 538 U.S. 63 [recidivist sentencing and the Eighth Amendment].)

The author of this amici brief is a California State Bar Certified Specialist in both Appellate Law and Criminal Law, a past-president of CPDA, and Co-Chair of the CPDA Amicus Committee. I have authored briefs and argued cases in the California courts (see, e.g., *Packer v. Superior Court* (2014) 60 Cal.4th 695 [recusal procedures]; *Kling v. Superior Court* (2010) 50 Cal.4th 1068 [criminal SDT procedures]; *People v. Salazar* (2005) 35 Cal.4th 1031 [*Brady* duties re expert witnesses]; *People v. Loyd* (2002) 27 Cal.4th 997; *Albertson v. Superior Court* (2001) 25 Cal.4th 796; *People v. Douglas* (1999) 20 Cal.4th 85) and in the United States Supreme Court. (See, *Samson v. California* (2006) 547 U.S. 843; *United States v. Knights* (2001) 534 U.S. 112.) As an adjunct professor of law at two schools, I have taught classes on Advanced Evidence, Trial Practice,

Moot Court, and Criminal Law.

CPDA is also involved in legislative solutions, as noted by the court in *People v. Wagner* (2009) 45 Cal.4th 1039 [1971 amendments to sentencing scheme]. Members of the CPDA Legislative Committee and our paid lobbyists attend key state Senate and Assembly committee meetings on a weekly basis and take positions on hundreds of bills relating to the topics of constitutional rights, criminal discovery, evidence, criminal procedure, and the fair administration of justice.

In summary, CPDA and its legal representatives have the necessary experience, collective wisdom, and interest in matters of criminal justice reform, state ballot initiatives, statutory construction, and appellate review to serve this court as amici curiae in this case. Our broad, statewide perspective can be helpful when the court is confronted by a controversy that arises out of the fact-bound background of a single trial.

B. The Ventura County Public Defender's office is established pursuant to Government Code sections 27700-27712 to provide quality legal representation to indigent persons in the courts of Ventura County. Historically, the Public Defender is well-versed on all issues relating to California's criminal justice system and often provides amicus services to the California courts on issues of statewide significance.

Stephen P. Lipson is the Public Defender of Ventura County. Each year, the Public Defender provides a defense in nearly 16,000 new misdemeanor cases and over 3,500 new felonies. We represent 80% of persons prosecuted in our county. Recently, many of our cases also have involved the Safe Neighborhoods and School Act. Our collective trial and appellate experience well equips us to assist this court on the issues presented in this case.

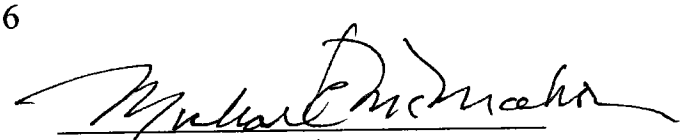
The Public Defender of Ventura has been permitted to appear as amicus in our state Supreme Court since 1969. In 2005, that court also allowed the author of this brief to present oral argument as an amicus in *People v. Salazar* (2005) 35 Cal.4th 1031.

The public defender takes an active presence in our courts of review as a party, an attorney for a party, or in the role of amicus. (See, e.g., *Erwin v. Appellate Dept.* (1983) 146 Cal.App.3d 715 [public defender as petitioner].) The author of this brief has worked for the Ventura County Public Defender for 17 years and is the Chief Deputy responsible for our appellate practice and training.

The Prayer

Based upon this application and the accompanying brief, the California Public Defenders Association and the Public Defender of Ventura apply for an order granting permission to file our amici curiae brief in support of the defendant. Our brief is combined and bound with this application.

Dated: August 25, 2016



Michael C. McMahon
Attorney for the
The California Public Defenders Association and
The Public Defender of Ventura County,
Applicants for amici curiae status
in support of defendant and appellant Buycks

Our Discussion and Observations

This appeal involves the effect of Proposition 47 (Prop 47) on certain inmates whose original sentence included additional time for an on-bail enhancement imposed under Penal Code, section 12022.1.[1] As you know, section 12022.1 provides for a longer period of incarceration for those convicted of a felony committed while released from custody pending trial of a previous felony. The sentence enhancement under section 12022.1, for one who commits a felony while released on bail, or own recognizance, pending final resolution of an earlier felony charge, cannot be executed unless the defendant ultimately stands convicted of *both felonies.* (*In re Jovan B.* (1993) 6 Cal.4th 801, 809.) Without need of judicial construction or interpretation, by its plain text and meaning the statute contemplates that the sentence on an on-bail enhancement will never be executed unless the defendant ultimately is convicted of both the primary and secondary *felony* offenses. (See generally *People v. Walker* (2002) 29 Cal.4th 577, 586; *People v. McClanahan* (1992) 3 Cal.4th 860, 869- 870; see also subd. (g) of § 12022.1.]

The question presented here is whether the enhancement may be imposed at a resentencing when the earlier offense has become a misdemeanor *for all purposes* except firearm possession.

This is an unusual case in that both parties criticize the opinion of the Court of Appeal. In his answer brief on the merits, counsel for defendant Buycks states, "Other than the result, appellant does not agree with, nor endeavor to defend, the Court of Appeal's narrow opinion. Appellant agrees with respondent that the Court of Appeal's limited opinion would be both difficult to administer for lower courts and will result in inequitable results." (At p. 9.) (For clarity, your amici generally refer to Mr. Buycks as the defendant.)

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[1] Any unspecified references to Code are to the Penal Code.

However, amici respectfully submit the Court of Appeal arrived at both the right result and the right analysis based upon the sequence of events and the procedural history of the case before it. The otherwise final judgment in this case was vacated by new legislation, and jurisdiction was restored for a resentencing which involved no issues of retroactivity or collateral attack.

Regardless of the ruling on the primary issue, cases in which the first felony conviction is vacated present compelling reasons for the resentencing court to dismiss the on-bail enhancement in the interests of justice. "If the court concludes it is appropriate to exercise discretion to strike the enhancement, it may do so." (*People v. Meloney* (2003) 30 Cal.4th 1145, 1149.) The People do not contend otherwise, and concede that the enhancement may be stricken either at the time of the original sentencing hearing on the secondary offense or at an additional resentencing hearing after the primary offense has been fully resolved. (See, Opn. Brf. on the Merits, at p. 8.)

I.

The primary purposes of Proposition 47 are financial. Its purposes are to save money on incarceration of persons like Buycks and to use the saved funds for mental health, housing, and substance abuse services to reduce recidivism.

The Safe Neighborhoods and Schools Act must now be viewed in conjunction with Assembly Bill 1056 (AB 1056). Prop 47 requires that 65% of the state savings from reduced incarceration be deposited in the Safe Neighborhoods and Schools Fund (SNSF) to be repurposed in a competitive grant program to provide mental health and substance abuse treatment and diversion programs.

AB 1056 (Statutes of 2015, Chapter 438) expands the Prop 47 target population and provides funding for restorative justice, housing-related assistance,

jobs skills training, and services for juveniles. AB 1056 focuses not just on those convicted of offenses, but also those arrested or charged with crimes, who also have a history of mental health or substance use disorders.

After years of legislation to be "tough" on crime, with Prop 47 the electorate once again chose to reduce mass incarceration and get "smart" about crime. Prop 47 is best viewed as a continuation of other state criminal justice reforms such as the Three-Strikes Reform Act of 2012 and the Realignment Legislation of 2011. Recidivism and incarceration are reduced using a holistic process of community engagement which is also designed to address racial and ethnic disparities in criminal justice outcomes.

The savings that accrue to the state from reduced incarceration are calculated by the Department of Finance. (Gov. Code. § 7599.1, subd. (a).) The Controller than transfers most of the reduced incarceration savings from the General Fund to the Safe Neighborhoods and Schools Fund (*id.*, at subd. (b)) to be distributed as grants by the Board of State and Community Corrections (BSCC). The total made available for grant funds in fiscal year 2016-2017 is $35,360,000. AB 1056 refers to these funds as the "Second Chance Fund."

The Legislative Analyst's Office estimates that "the actual level of prison savings due to Proposition 47 could be $83 million higher compared to the administration's estimate. Overall, we estimate that the SNSF deposit in 2016-2017 could be around $100 million higher than the administration's figure." (LAO, "The 2016-17 Budget: Fiscal Impacts of Proposition 47", February 2016, at p. 3)

Reducing the aggregate term of incarceration for inmates such as Buycks furthers the purposes of Prop 47.

In the instant case (*People v. Buycks*), the Court of Appeal followed this court's ruling in *People v. Park* (2013) 56 Cal.4th 782 (*Park*), and held that reduction of a felony conviction to a misdemeanor under Proposition 47 precluded

use of the conviction for an on-bail enhancement. (*Buycks, supra*, at slp. opn., at p. 6.) In *Buycks*, the defendant committed a felony narcotics offense (Health & Saf. Code, § 11350) and, while out on bail on that first offense, committed two additional felony offenses: petty theft with a prior (§ 666, subd. (a)) and evading a police officer (Veh. Code, § 2800.2, subd. (a)). In sentencing the defendant in the second case, the court imposed a two-year sentencing enhancement pursuant to section 12022.1, subdivision (b), which only applies when a defendant commits a second felony while out on bail on an earlier felony.

After voters passed Proposition 47, the trial court in the first case granted defendant's petition to reduce his felony offense to a misdemeanor. Thereafter, the court in the second case reduced his petty theft with a prior count to a misdemeanor. The second felony count, evading-police, remained a felony and, because the defendant's original sentence was structured around the petty theft with a prior as the principal term, the court conducted a resentencing to deem the sole remaining felony count to be the base term. The court re-imposed the section 12022.1 enhancement. (R.T. 1/28/2015, at p. 3, ll. 15-17.) On appeal, the Court of Appeal held that, as in *Park*, after the defendant obtained a reduction of his offense in the first case to a misdemeanor, section 1170.18, subdivision (k), required the court to treat that offense as a "misdemeanor for all purposes" at his resentencing in the second case. Thus, without a felony as a primary offense, the court could not re-impose the on-bail enhancement. (*Buycks, supra,* slip opn. at pp. 9-10.)

We must assume that Prop 47 voters were aware of existing law when they embraced and supported its major shift and diversion of money from incarceration and imprisonment to community programs designed to foster safe neighborhoods and schools. (*John L. v. Superior Court* (2004) 33 Cal.4th 158, 171.) Although voters probably did not predict in advance precisely how the proposition might shorten the sentences of those serving time for on-bail

enhancements, the electorate trusted and admonished the courts to broadly and liberally construe their act to effectuate its purposes. These mandates apply to both our trial courts and courts of review. Neither are permitted to narrowly construe the act so as to undermine its intended financial impacts.

II.

The Safe Neighborhoods and Schools Act must be broadly and liberally construed to accomplish its primary purposes.

Prop 47 directs the "act shall be broadly construed to accomplish its purposes." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 15; see also *id.* at § 18 [the act shall be "liberally construed to effectuate its purposes"].)

When a statute defining a crime or describing a punishment is susceptible to two reasonable interpretations, the courts "ordinarily adopt that interpretation more favorable to the defendant." (*People v. Avery* (2002) 27 Cal.4th 49, 57; see also *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 312–313.) Indeed, federal due process may compel that resolution of any ambiguity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker [and not the courts] has clearly said they should." (H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in Benchmarks 196, 209 (1967).) Thus, where there is ambiguity in criminal statutes, doubts are resolved in favor of the defendant. Here, any ambiguities may be easily resolved in Buycks' favor without straining to interpret Prop 47 in a manner which ignores a contrary intent twice expressed by the electorate.

The on-bail enhancement has been narrowly construed. In *People v. Hernandez* (2009) 177 Cal.App.4th 1182, for example, the court held that because Hernandez never signed a formal written release agreement pursuant to Penal Code, section 1318, when he was temporarily released from custody to visit his ill

wife, his release was not an official own recognizance release, and his subsequent commission of a new felony could not be the basis for an on-bail enhancement under Penal Code, section 12022.1, subdivision (b). The court rejected the prosecution's argument for applying a functional equivalent test to the determination of whether such a release was an own recognizance release, concluding that the case law did not support such an analysis.

Similarly, in *People v. Ormiston* (2003) 105 Cal.App.4th 676, the Court distinguished a diversion program under section 1000 from a release on one's own recognizance under section 12022.1.

By parity of reasoning, this court should write an opinion holding that an offense which has become a misdemeanor conviction is not the functional equivalent of a felony conviction for purposes of the on-bail enhancement.

III.

Prop 47 authorizes a resentencing rather than a limited modification or adjustment to an otherwise final sentence.

"*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.*" (Couzens & Bigelow, Proposition 47, *supra*, p. 57, 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.*" (*Id.*, at p. 59, italics added.)

That is the type of resentencing the Court of Appeal describes in its opinion.

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IV.

At the resentencing of Buycks, good cause within the meaning of section 1018 existed for withdrawal of the admission of the enhancement. The recall of the original sentence vacated the judgment as to that allegation.

In August of 2014, prior to the recall of the original felony sentence in the first case, Buycks admitted the on-bail enhancement (§ 12022.1) in the second case. Amici respectfully suggests that something should be done about that admission, a topic largely ignored in the opinion of the Court of Appeal. Fortunately, section 1018 authorizes such an admission to be withdrawn when, as here, there is good cause to do so.

Section 1018 provides, in relevant part, that "On application of the defendant at any time before judgment . . . the court may . . ., for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice." Courts have construed section 1081 to be applicable to motions to withdraw the admission of a sentencing enhancement. (See *In re J.L.*, (2008) 168 Cal.App.4th 43, 51 [weapon enhancement].)

Amici contend that the reduction of the felony for which Buycks was on bail, to a misdemeanor in the first case constitutes an obvious form of "good cause" within the meaning of section 1018. As the Court of Appeal has observed in dictum, "We agree with defendant's rationale, in principle, that it would be unjust to impose an enhanced sentence based upon a prior conviction which was subsequently invalidated." (*People v. Rhoads* (1990) 221 Cal.App.3d 56, 60, fn. 3.)

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In the instant case, there was little confusion regarding the procedural history of the two cases because both were prosecuted in the Los Angeles County Superior Court. However, when the first case giving rise to the on-bail enhancement is prosecuted in a different county, the relevant procedural history in the first case may not be obvious to the second court. In such cases, a defense motion to withdraw the admission of the enhancement in the second case may be helpful.

V.

At a resentencing, the court has the discretion to strike an on-bail enhancement in the interests of justice when the primary offense has become a misdemeanor.

Assuming, without conceding, that an on-bail enhancement might still be imposed under the circumstances of this case, it must be stressed in this court's opinion that execution of the enhancement would in no way be mandatory.

As a general matter, a court has discretion under section 1385, subdivision (c), to dismiss or strike an enhancement, or to "strike the additional punishment for that enhancement in the furtherance of justice." "[A]bsent a clear legislative direction to the contrary, a trial court retains its authority under section 1385 to strike an enhancement." (*People v. Thomas* (1992) 4 Cal.4th 206, 210.)

A Prop 47 resentencing court which misunderstands the scope of its discretion reversibly abuses that discretion because of its failure to know the scope of its sentencing options. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529, fn. 13.) A review of the Reporter's Transcript shows that it is unclear that the sentencing court was aware that it could or should strike the enhancement in the interests of justice because the primary felony conviction had been vacated. Even if this court rejects the reasoning of the Court of Appeal, a remand for an exercise of discretion would appear necessary and appropriate.

It is not unreasonable to conclude that it would be an abuse of discretion not to dismiss the on-bail enhancement when the primary offense has become a misdemeanor. Because Buycks no longer has an antecedent felony, he falls outside the spirit of the 12022.1 enhancement. (Cf., *People v. Williams* (1998) 17 Cal.4th 148, 161 [in exercising section 1385 discretion the court should consider whether the defendant may be deemed outside the spirit of the Three-Strikes scheme].) An exercise of judicial authority which is truly discretionary in 99% of its applications can be mandatory in the unusual 1% of circumstances.

VI.

Defendant Buycks was not eligible for resentencing on the penalty enhancement for committing a new felony while released on bail on a drug offense because the superior court had reclassified the conviction for the drug offense as a misdemeanor under the provisions of Proposition 47.

Under subdivision (k) of section 1170.18, "Any felony conviction that is recalled and resentenced under subdivision (b) . . . 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 prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6." (Italics added.)

The Attorney General makes much of the fact that Prop 47 did not explicitly set forth its impact on recalled judgments which had included an on-bail enhancement. But the same point could be made that the voters mandated misdemeanor consideration for all purposes other than the firearm exception. Rewriting the statute to include an additional exception for on-bail enhancements would violate the fundamental rule of statutory construction *expressio unious est exclusio alterius*, that is, the expression of a single, specific exception implies the

exclusion of those exceptions not expressed. (See *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852.)

VII.

Subdivision (g) of section 12022.1 should now be read to include circumstances in which the primary felony no longer exists due to an appeal, a writ of habeas corpus, or legislative elimination of a felony.

Your amici respectfully submit that after the enactment of Prop 47, subdivision (g) of section 12022.1, should be read more expansively to harmonize it with the ameliorative provisions of the act.

For example, a literal reading of the subdivision would lead to absurd results and provide relief where the primary offense conviction is reversed on appeal, but no relief if it were reversed in a habeas proceeding.

All acts relating to felony sentencing should be read together as constituting one law. The subdivision provides authority to permanently suspend the enhancement and appears to confer jurisdiction in the second court to reopen an otherwise final judgment which included the two-year enhancement.

Amici suggest that the text of the subdivision limiting relief only to circumstances in which the reason the primary felony conviction is vacated on appeal should now be construed to provide a remedy in which the primary felony is vacated by any legal process. This would avoid unfair and unintended results.

Conclusion

The disposition of the Court of Appeal should be affirmed in an opinion which promotes judicial efficiency and the effective administration of criminal justice by providing some judicially declared guidance to courts