In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **STEVENSON BUYCKS,** **Defendant and Appellant.**	Case No. S231765

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

OPENING BRIEF ON THE MERITS

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ISSUE PRESENTED

This Court granted review on its own motion, limiting briefing to the following issue: "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?"

INTRODUCTION

Defendant-Appellant Stevenson Buycks was convicted of two felony offenses—theft and evading—that he committed while he was released pending sentencing on a felony drug charge. The sentencing judge in the theft and evading case imposed a two-year sentencing enhancement under Penal Code section 12022.1—the "on-bail" enhancement statute—consecutive to Buycks' other sentences in both cases.[1] After the convictions in both cases became final, the voters passed Proposition 47, changing specified felony crimes into misdemeanors and creating a specific procedural vehicle for offenders to receive resentencing on the reduced crimes. Buycks claims that because he received relief under Proposition 47

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[1] All further statutory references in this brief are to the Penal Code unless otherwise noted. CT and RT refer, respectively, to the trial court's one-volume Clerk's Transcript and one-volume Reporter's Transcript in Case No. NA097755. 1 ACT refers to the Augmented Clerk's Transcript that was filed on May 22, 2015, and 2 ACT refers to the Augmented Clerk's Transcript filed on August 14, 2015.

in both cases—converting his drug conviction in the earlier case, and his theft conviction (but not the evading conviction) in the second case, into misdemeanors—the two-year enhancement under section 12022.1 could not be maintained incident to his remaining felony evading conviction.

That contention is wrong. In determining whether a legislative change in the classification or punishment of a crime requires changes to related sentences, California law implements three general principles. First, more effect is given to changes that reflect a void conviction than to changes reflecting mercy and forbearance. Second, an offender who violates a prohibition related to his legal status is not excused from the consequent punishment merely because the underlying legal status is later changed. And third, those whose cases have become final do not receive the benefit of such changes absent specific legislative provision.

Proposition 47 and section 12022.1 deviate from these principles only in specific and limited ways, none of which apply here. Although the on-bail enhancement may not be imposed unless the offender has been properly convicted of both the crime for which he was on release and his newer felony, the law provides no mechanism for eliminating an enhancement based on later changes in the law. Proposition 47 does not create any avenue of direct relief, because Proposition 47 makes no mention of revisiting on-bail enhancements. And although Proposition 47 instructs that where a resentencing petition has been granted the reclassified

offense should be treated as a misdemeanor for all purposes, that instruction must be understood—consistent with the similarly worded provision that has long applied to so-called "wobbler" offenses—as having only forward-looking effect, rather than as entitling an offender to collateral reconsideration of an already imposed punishment.

The Court of Appeal's opinion requiring elimination of the enhancement in Buycks' case rested on two errors. It misconstrued the "full resentencing" principle as requiring that all developments postdating the original sentence be given nunc pro tunc effect, rather than as simply requiring that the remaining felony charge (here, evading) be substituted as the principal term when the original principal term was downgraded to a misdemeanor; and it required that adherence to the relevant statutes' express terms be subordinated to a desire to maximize accomplishment of what the court viewed as their purposes. The Court of Appeal's theory would expand the lower courts' already heavy burden in deciding Proposition 47 petitions, and would create confusion about the extent to which Proposition 47 requires revisiting sentencing components that were not expressly included in Proposition 47's text. Moreover, the Court of Appeal's view would give rise to more inequality than it would correct, because, in effect, it would specially benefit some offenders simply for committing more crimes, and would privilege other offenders based on the

order in which they committed their crimes. The Court of Appeal's decision should be reversed.

BACKGROUND

A. Statutory background

This case concerns two statutes: the resentencing provisions of Proposition 47, and the sentencing enhancement under section 12022.1 for offenses committed while released on bail or on one's own recognizance.

1. Proposition 47's resentencing provisions

Proposition 47, the "Safe Neighborhoods and Schools Act," was enacted on November 4, 2014. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089.) For offenders meeting statutory criteria, Proposition 47 converted certain drug and theft-related offenses that had previously been designated as either felonies or "wobblers" into misdemeanors. (*Id.* at p. 1091.)[2]

Proposition 47 also added to the Penal Code section 1170.18, which governs the retroactive applicability of this change to those sentenced before Proposition 47's enactment. As relevant here, Proposition 47 permits a defendant "currently serving" a felony sentence to petition for resentencing if the felony would have been a misdemeanor had Proposition

[2] A "wobbler" is a crime that can be punished as either a felony or a misdemeanor. (See generally *People v. Statum* (2002) 28 Cal.4th 682, 685.)

47 "been in effect at the time of the offense." (§ 1170.18, subd. (a); see § 1170.18, subds. (a)-(e).)[3] When such a person petitions for resentencing, "the petitioner's felony sentence shall be recalled and the petitioner resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).) Section 1170.18 further provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) ... shall be considered a misdemeanor for all purposes" except those relating to eligibility to possess or own firearms. (§ 1170.18, subd. (k).)

The voters' intent in enacting Proposition 47, as stated in section three of the Proposition, was to "[e]nsure that people convicted of murder, rape, and child molestation will not benefit from this [A]ct;" "[c]reate the Safe Neighborhoods and Schools Fund" with savings caused by the Act; "[r]equire misdemeanors instead of felonies for nonserious, nonviolent crimes like petty theft and drug possession, unless the defendant has prior convictions for specified violent or serious crimes;" "[a]uthorize consideration of resentencing for anyone who is currently serving a

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[3] A separate provision of section 1170.18 permits a defendant who has "completed his or her sentence" for a felony conviction, but whose offense would have been a misdemeanor had Proposition 47 been in effect at the time of the offense, to have the felony conviction redesignated as a misdemeanor. (§ 1170.18, subd. (f).)

sentence for any of the offenses" reclassified by the Proposition; "[r]equire a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety;" and "save significant state corrections dollars on an annual basis."

2. Section 12022.1's enhancement for offenders who commit a new felony while released on a pending felony case

Section 12022.1 "increases the period of imprisonment for a felony if the offender committed it while free on bail or his own recognizance (O.R.) pending resolution of earlier felony charges of which he is ultimately found guilty." (*In re Jovan B.* (1993) 6 Cal.4th 801, 807.)

The statute, which was originally enacted in 1982 and has been occasionally amended, provides that:

> Any person arrested for a secondary offense that was alleged to have been committed while that person was released from custody on a primary offense shall be subject to a penalty enhancement of an additional two years, which shall be served consecutive to any other term imposed by the court.

(§ 12022.1, subd. (b).) A "primary offense" is a felony offense "for which a person has been released from custody on bail or on his or her own recognizance prior to the judgment becoming final." (§ 12022.1, subd. (a)(1).) A "secondary offense" is a felony offense "alleged to have been committed while the person is released from custody for a primary offense." (§ 12022.1, subd. (a)(2).) As with many other enhancements, the

trial judge has discretion either to strike or dismiss the enhancement itself, or to "strike the additional punishment for that enhancement in the furtherance of justice." (§ 1385, subd. (c).)

Section 12022.1 has been interpreted as requiring that the on-bail enhancement not be given effect until the offender has been convicted of both the primary and secondary offenses. (See *People v. McClanahan* (1992) 3 Cal.4th 860, 869.) The statute provides specific mechanisms for imposing and (if necessary) staying execution of the enhancement, depending on the order in which the defendant's primary and secondary cases are resolved and become final on appeal.

- Where the Primary-Offense Case Is Resolved First. If the defendant is convicted in his primary-offense case first, then when the defendant is later sentenced in his secondary-offense case, the court in that case may either strike the enhancement under section 1385 or impose it, with the secondary-offense sentence running "consecutive to the primary sentence" (§ 12022.1, subd. (e)) and any enhancement running "consecutive to any other term imposed by the court" (§ 12022.1, subd. (b)).
- Where the Secondary-Offense Case Is Resolved First. If the defendant is sentenced in the secondary-offense case before the primary-offense case is resolved, then the secondary-offense court (if it does not strike the enhancement altogether under section 1385) must stay the

imposition of the enhancement "pending imposition of the sentence for the primary offense." (§ 12022.1, subd. (d).) "If the person is acquitted of the primary offense," then the stay becomes "permanent." (*Ibid.*) But if there is a conviction and sentencing for the primary offense, then "[t]he stay shall be lifted by the court hearing the primary offense at the time of sentencing for that offense and shall be recorded in the abstract of judgment." (*Ibid.*) The defendant is then returned to the secondary-offense court, which may decide whether to "strike the enhancement." (*People v. Meloney* (2003) 30 Cal.4th 1145, 1149-1150.)

- Effect of Appeal. If the primary offense conviction is reversed on appeal, then the on-bail enhancement in the secondary-offense case is suspended "pending retrial of that felony." (§ 12022.1, subd. (g).) If a retrial results in reconviction of the primary offense, then "the enhancement shall be reimposed." (*Ibid.*)

Section 12022.1 was enacted "'"to meet public concern over offenders who are arrested [and] then allowed back on the street a short time later only to commit more crimes."' [Citations.]" (*People v. McClanahan*, *supra*, 3 Cal.4th at p. 867.) The enhancement reflects multiple concerns. It "'deter[s] the commission of new felonies by persons released from custody on an earlier felony.'" (*Id.* at pp. 868-869, quoting *People v. Watkins* (1992) 2 Cal.App.4th 589, 593.) It punishes the defendant's "'"*breach* of the terms of his *special custodial status.*"'

[Citation.]" (*In re Jovan, supra,* 6 Cal.4th at p. 813.) And it reflects the Legislature's view that criminals who commit new crimes while released on bail for a previously charged felony are "particularly deserving of increased punishment for their on-bail recidivism." (*People v. Walker* (2002) 29 Cal.4th 577, 583-584; see also *People v. McClanahan, supra,* 3 Cal.4th at p. 868 [section 12022.1's purpose is "to penalize *recidivist* conduct with increased punishment"].)

B. Buycks' convictions and initial sentences

This appeal arises out of two of Buycks' convictions and accompanying sentences, each of which was originally imposed prior to the passage of Proposition 47.

In the first case (Case No. BA418285), Buycks pleaded guilty on November 19, 2013, to felony possession of narcotics, in violation of Health and Safety Code section 11350, subdivision (a). (1 ACT 1-4; October 20, 2015, Court of Appeal slip opinion as modified on denial of rehearing, November 5, 2015 (Slip opn.), p. 3.) This served as the "primary offense" for purposes of Buycks' later on-bail enhancement. After the plea, the trial court ordered Buycks to enroll in a one-year, live-in drug treatment program, and released him on his own recognizance. (1 ACT 1-4.) The trial court advised Buycks that if he failed to complete the program or was arrested on a new charge, the court would impose a state prison sentence. (1 ACT 2-3.) Buycks subsequently abandoned the drug treatment program,

and on December 26, 2013, the trial court sentenced Buycks to three years in state prison. (1 ACT 5-7; Slip opn., p. 3.)

The second case (Case No. NA097755) arose from Buycks' conduct while on release in the first case. On December 16, 2013, a Home Depot employee, who was familiar with Buycks from a recent shoplifting incident, saw him once again leave the store with stolen goods. (CT 10-24.) Two loss-prevention officers confronted Buycks. Buycks responded by striking one of the officers in the face, and in the ensuing struggle Buycks pulled out an unopened folding knife. (CT 21-24.) When the employees seized the knife, Buycks yelled that he had a gun, causing the employees to let him run away to his van. (CT 25-26.) A police officer who saw Buycks driving nearby activated his emergency lights and siren. (CT 30-32.) Instead of pulling over, Buycks led police on an eight-minute chase, during which he ran red lights, made an illegal U-turn, and drove above the speed limit in a school zone and around pedestrians. (CT 32-38.) Buycks was stopped only when his van was rammed by a police car. (CT 34-35, 38.)

Buycks was charged with two counts of second degree robbery in violation of section 211, one count of petty theft by a person with three prior convictions in violation of section 666, subdivision (a), and one count of evading a police officer in violation of Vehicle Code section 2800.2, subdivision (a). (CT 44-51.) The information alleged that, at the time he

committed these offenses, Buycks was released on bail or on his own recognizance in the first case. (CT 48.) As a result, these new offenses served as "secondary offenses" under the on-bail enhancement statute.

On August 8, 2014, the robbery charges were dismissed under a plea agreement, and Buycks pleaded no contest to the theft and evading felonies. (CT 83-85; Slip opn., p. 3.) Buycks admitted that he committed those offenses while released on bail in the earlier case, and that he had served two prior prison terms. (CT 84; Slip opn., p. 3.) The trial court imposed an aggregate sentence of seven years and eight months in state prison. (CT 84-85, 87; Slip opn., p. 3.) In arriving at that sentence, the court treated the theft charge as the principal term under California's Determinate Sentencing Act, and imposed an upper term of three years on that count.[4] The evading charge was treated as a subordinate term, receiving a sentence of eight months, or one-third of the evading offense's middle term. Buycks also received a two-year enhancement under section 12022.1 for committing his new felonies while on release in his earlier case, and

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[4] Under the Determinate Sentencing Act, where a person is convicted of multiple felonies and given consecutive sentences, "the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional terms imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1" (§ 1170.1, subd. (a).) The "principal term" is the "greatest term of imprisonment imposed by the court for any of the crimes." (*Ibid.*) Any "subordinate term ... shall consist of one-third of the middle term of imprisonment" for the corresponding offense. (*Ibid.*)

received two one-year enhancements under section 667.5, subdivision (b), for his prior prison terms. (CT 84-87; Slip opn., p. 3.)

C. Buycks' Proposition 47 resentencings

After Proposition 47 passed, Buycks petitioned for resentencing in both cases.

In the first case, the trial court granted Buycks' petition for resentencing on January 8, 2015. Buycks' felony narcotics conviction was reduced to a misdemeanor, and he was resentenced to 360 days in jail. (1 ACT 8-11; Slip opn., p. 3.) Buycks received 360 days of credit for time served, and was ordered released as to that conviction. (1 ACT 9.)

In the second case, Buycks' petition for resentencing was granted on January 28, 2015. (CT 92-95; Slip opn., p. 3.) The trial court reduced Buycks' theft conviction from a felony to a misdemeanor, and changed his sentence on this count from three years to six months. (CT 92-93, 95; RT 1-2, 3; 2 ACT 3, 5; Slip opn., p. 3-4.) Because the theft term was now a misdemeanor, it could no longer serve as the "principal term" under the Determinate Sentencing Act. (See § 1170.1, subd. (a).) As a result, the court treated the evading count as the principal term, increasing the sentence on that count to a full base term of three years. (CT 93, 95; RT 3; Slip opn., p. 4.) The court retained the previously applied enhancements: one year for each of Buycks' two prior prison terms, under section 667.5, subdivision (b); and the two-year on-bail enhancement under section

12022.1. (CT 93, 95; RT 2-3; Slip opn., p. 4.) Buycks objected that the on-bail enhancement could not be applied because his narcotics conviction in the first case had been reduced to a misdemeanor. The trial court rejected that argument, reasoning that because Buycks' felony evading charge was not subject to reclassification under Proposition 47, the voters had not intended Proposition 47 to affect Buycks' sentence (including the section 12022.1 enhancement) for that charge. (RT 2-3; see *ibid.* [reasoning that the charge in the first case "was a felony at the time … , so it was applicable," and "the intention of Prop 47 was not to release people who committed crimes that are not subject to Prop 47 out early or diminish their sentence"]; Slip opn., p. 4.)

D. The Court of Appeal's opinion

On appeal, Buycks again contended that, because his conviction in the first case had been reduced to a misdemeanor, it was improper for the trial court in the resentencing on the second case to retain the on-bail enhancement. (Slip opn., pp. 2-3, 5.) The Court of Appeal agreed. (Slip opn., pp. 4-10.) The court reasoned that, when Buycks' Proposition 47 petition was granted in his second case, he was "subject to a *full* resentencing" in that case (Slip opn., p. 5) and the trial court "was required to reevaluate the applicability of section 12022.1 *at that time*" (Slip opn., p. 6). By then, the court noted, Buycks' felony "in the first case had been reduced to a misdemeanor." (Slip opn., p. 6.) Accordingly, because

section 12022.1 "required that both the primary and secondary offenses be felonies in order for [Buycks] to incur the additional penalty," the trial "court could not reimpose the section 12022.1 enhancement." (Slip opn., p. 6.) The court therefore modified the judgment below by striking the on-bail enhancement, and otherwise affirmed. (Slip opn., p. 10.)

This Court ordered review on its own motion.

ARGUMENT

I. A PROPOSITION 47 RESENTENCING DOES NOT AUTHORIZE THE COURT TO SET ASIDE AN ON-BAIL ENHANCEMENT THAT WAS PROPERLY IMPOSED AT THE ORIGINAL SENTENCING

A. Under ordinary rules of California law, a properly imposed enhancement is not subject to revision based on subsequent reclassification of an underlying conviction

Neither Buycks nor the Court of Appeal's opinion contest that, under the plain text of section 12022.1, the on-bail enhancement was properly charged and imposed in the original proceedings on Buycks' secondary offense. Buycks was "arrested for" theft, robbery, and evading—all "felony offense[s] alleged to have been committed" during the pendency of Buycks' prior case, which included another "felony offense for which [he] ha[d] been released from custody on bail or on his ... own recognizance prior to the judgment becoming final." (§ 12022.1, subds. (a)(1), (a)(2), (b).) As a result, the on-bail enhancement statute made Buycks "subject to" a two-year enhancement, "consecutive to any other term imposed by the court." (§ 12022.1, subd. (b).) Furthermore, Buycks does not—and could

not—allege that the statute required the enhancement to be stayed when originally imposed because of any lack of finality in his primary-offense case.[5] Had Buycks challenged the enhancement when it was first imposed, the challenge would have been rightly recognized as frivolous.

Moreover, Buycks' conduct was precisely the type of conduct the Legislature intended to deter and punish when it passed section 12022.1. After his guilty plea in the first case, Buycks was released on his own recognizance in order to take advantage of a residential drug-treatment program. (1 ACT 1-4; Slip opn., p. 3.) The judge warned Buycks not to commit new crimes while on release. (1 ACT 2-3.) Instead of heeding that admonition, Buycks committed significant crimes. (See pp. 10-11, *supra.*) His convictions for those crimes proved a "'"*breach* of the terms of his *special custodial status*"' [citation]" and directly implicated the Legislature's '"concern over offenders who are *arrested* [and] then allowed back on the street a short time later to commit more crimes."' [Citations]." (*In re Jovan, supra,* 6 Cal.4th at p. 813.)

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[5] Because Buycks was "convicted of a felony for the primary offense" and "sentenced to state prison for the primary offense" before being "convicted of a felony for the secondary offense," his two sentencings were conducted under section 12022.1, subdivision (e), and he was not subject to the special stay-of-imposition provisions in subdivision (d).

Buycks claims, and the Court of Appeal determined, that the judge who resentenced him under Proposition 47 for one of his secondary offenses was nevertheless required to retroactively annul the original on-bail enhancement. But that position runs counter to several well established principles.

Where a conviction or sentence is voided by judicial or executive action, the effect on subsequent proceedings or sentencings in other matters depends on whether the voiding was based on a deficiency in the original conviction. Section 12022.1 itself demonstrates how the law may refuse to give effect, in subsequent proceedings, to a charge or conviction that was later deemed void *ab initio* based on factual innocence or procedural error. (See pp. 7-8, *supra* [discussing statutory mechanism for suspending enhancements based on primary charges that are overturned on direct appeal.) In contrast, this Court has held that a sentencing enhancement based on a prior conviction is not barred merely because the prior conviction was subsequently reduced or voided as a matter of "'forgiveness or remission of penalty,' [citation]" such as a pardon. (*People v. Biggs* (1937) 9 Cal.2d 508, 514.) This is because "a pardon of a convicted felon ... 'does not restore his character,' and 'does not obliterate the act itself.'" (*Ibid.*; see *ibid.* ["We are unable to see how the pardon, relieving the offender from the effects or disabilities of his first crime, can in addition

prevent the normal application of the statute punishing him for a subsequent offense."].)[6]

Where an enhancement or crime punishes a defendant's decision to engage in particular conduct while subject to a particular legal status, the defendant cannot attack the conviction or enhancement because of a later change in that status. Thus, a felon in possession of a firearm cannot halt prosecution for that crime by attacking the validity of the underlying felony, because the offense is based on that person's status at the time of the possession. (See *People v. Harty* (1985) 173 Cal.App.3d 493, 499-500 [construing former section 12021: "the possible invalidity of an underlying prior felony conviction provides no defense to possession of a concealable weapon by a felon"].) And a person convicted of an out-of-state sex offense who fails to register as a sex offender in California will not have his California failure-to-register conviction set aside merely because the out-of-state conviction was eventually set aside. (See *In re Watford* (2010) 186 Cal.App.4th 684, 694.)[7] Allowing the defendant to challenge his status post

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[6] Federal courts applying federal enhancements based on past convictions have similarly distinguished between later decrees which declare a person innocent of charges, and those which merely forgive the transgression. (See, e.g., *United States v. Norbury* (9th Cir. 2007) 492 F.3d 1012, 1015.)

[7] Here, too, federal law recognizes a similar distinction. (See, e.g., *United States v. Yepez* (9th Cir. 2012) 704 F.3d 1087, 1090 (en banc) (per curiam) [U.S. Sentencing Guidelines provision that assigns two criminal (continued...)

hoc would undercut the purpose of such status-based prohibitions: to punish a defendant's intentional decision to engage in conduct at a time when that conduct was prohibited because of a status he was aware of. (Cf. *Walker v. City of Birmingham* (1967) 388 U.S. 307, 320 [under collateral bar rule, party "could not by-pass orderly judicial review of the injunction before disobeying it"].)

Finally, when the Legislature enacts a statute reducing the sentence for a crime, the effect of that change on a previously imposed sentence depends on whether the conviction has become final on direct appeal. The Legislature may be presumed to have intended such changes to apply to cases in which "the judgment convicting the defendant of the act is not final." (*In re Estrada* (1965) 63 Cal.2d 740, 745.) That limitation is one this Court has repeatedly stressed. (See *People v. Brown* (2012) 54 Cal.4th 314, 324 ["Accordingly, *Estrada* is today properly understood, not as weakening or modifying the default rule of prospective operation codified in [Penal Code] section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative

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(...continued)
history points to defendants who commit a crime "'while under any criminal justice sentence' [citation]" requires court to "look to a defendant's status at the time he commits the federal offense"; post-offense adjustments in that status, even if putatively made nunc pro tunc, are irrelevant to the enhancement's applicability].)