<u>GENERAL OFFICE MEMORANDUM 18-124</u>

TO: ALL DISTRICT ATTORNEY PERSONNEL

FROM: JOHN K. SPILLANE
                 Chief Deputy District Attorney

SUBJECT: PROPOSITION 47: FELONY-BASED ENHANCEMENTS (PC
                 12022.1(B) & PC 667.5(B)) AND FELONY FAILURE TO APPEAR
                 CHARGES (PC 1320.5) IN THE WAKE OF *PEOPLE V. BUYCKS* –
                 GOM 15-036 SUPERSEDED.

DATE: SEPTEMBER 28, 2018

Proposition 47 (Prop 47) allows defendants who have completed their sentences (or who are currently serving a sentence) for an offense that is reducible to a misdemeanor under Prop 47 to apply (or petition) to have that offense reduced. The 2018 California Supreme Court case, *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), analyzed the effect of Prop 47 on felony-based enhancements charged under Penal Code[1] sections 12022.1 (on-bail/own recognizance enhancement) and 667.5(b) (one-year prior prison term enhancement), as well as the effect of Prop 47 on charges brought pursuant to section 1320.5 (release on bail; willful failure to appear charge). The effect of the *Buycks* holding on each of these sections is discussed herein. This General Office Memorandum (GOM) supersedes GOM 15-036, which addressed Prop 47's effect on the Section 667.5(b) prior prison term enhancement. This change is discussed in further detail below.

<u>On Bail/Own Recognizance Enhancement (Section 12022.1(b))</u>

Buycks analyzed the application of the section 12022.1(b) on-bail enhancement when the felony conviction underlying the enhancement is reduced to a misdemeanor under Prop 47. The California Supreme Court held that the section 12022.1(b) enhancement should be stricken when the underlying felony conviction has been reduced to a misdemeanor pursuant to Prop 47, so long as the judgment in the case to which the enhancement attached is not yet final.[2] The California Supreme Court reasoned that imposition of the section 12022.1(b) enhancement was necessarily predicated on the underlying offense being a felony. Once that offense is reduced to a misdemeanor under Prop 47, it can no longer be the basis for imposition of the section

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[1] All statutory references are to the Penal Code unless otherwise indicated.

[2] A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari with the United States Supreme Court have expired. (*People v. Kemp* (1974) 10 Cal.3d 611, 614 [111 Cal. Rptr. 562, 517 P.2d 826].)

12022.1(b) enhancement (as long as judgment in the subsequent case is not final). If, however, judgment in the subsequent case, to which the enhancement attached is final, the case is not eligible for resentencing, and the section 12022.1(b) enhancement remains intact.

An exception to this general rule arises when the subsequent case, to which the enhancement has attached, charged a Prop 47 eligible offense to which the defendant either pled or was found guilty. Under this limited circumstance, defendant is entitled to a full resentencing, irrespective of finality of judgment, and the section 12022.1(b) enhancement must be stricken.

Prior Prison Term Enhancement (Section 667.5(b))

Buycks also analyzed the application of the section 667.5(b) prior prison term enhancement when the felony conviction that serves as the basis for the enhancement is reduced to a misdemeanor under Prop 47. *Buycks* supports the position that section 667.5(b) enhancements should be stricken when the underlying felony conviction has been reduced to a misdemeanor pursuant to Prop 47, so long as the judgment in the subsequent felony case, to which the enhancement attached, is not yet final. The Court reasoned that section 667.5(b)'s reference to a prior "prison term" necessarily subsumes the existence of a prior felony conviction that justified the imposition of that prison term. Thus, it follows that a felony conviction is an element that necessarily underlies the prison term. "With this understanding, the resentencing of an underlying felony conviction to a misdemeanor conviction [pursuant to Prop 47] negates an element required to support a section 667.5, subd. (b) one-year enhancement." (*Buycks* at p. 889.) Therefore, when a felony conviction results in a prison commitment, but is reduced to a misdemeanor under Prop 47, that conviction can no longer qualify as a one-year prison prior in cases that are not yet final or in future cases under Penal Code section 667.5(b). However, if judgment in the subsequent case, to which the enhancement attached, is final, the case is not eligible for resentencing, and the section 667.5(b) enhancement remains intact. An exception to this general rule arises when the subsequent case, to which the enhancement has attached, charged a Prop 47 eligible offense to which the defendant pled or was found guilty. Under this limited circumstance, defendant is entitled to a full resentencing, irrespective of finality of judgment, and the section 667.5(b) enhancement must be stricken.

In April 2015, GOM 15-036 addressed this question and cited the California Supreme Court's earlier holdings in *People v. Coronado* (1995) 12 Cal.4th 145, and *People v. Baird* (1995) 12 Cal.4th 126, which supported the position that section 667.5(b) is based on a defendant's prior prison commitment, not just their prior felony conviction. However, the Office now believes, in light of *Buycks*, that this analysis is no longer applicable to offenses reduced under Prop 47.

Release on Bail/Willful Failure to Appear Charge (Section 1320.5)

Finally, *Buycks* analyzed the impact of reducing the felony offense underlying a section 1320.5 charge pursuant to Prop 47. Section 1320.5 states that "[e]very person who is charged with or

convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony." The California Supreme Court held that section 1320.5 remains unaffected by Prop 47 because Prop 47 only ameliorates the collateral effects of felony *convictions*, not the collateral effects of felony *charges*. Therefore, this charge remains intact regardless of final disposition of the underlying case, reduction or not.

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