SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent

S193938

v.

AARON SUNG-UK PARK

Defendant and Appellant

Petition for Review of the Unpublished Decision of the Court of Appeal, Fourth District, Division One, Affirming the Judgment of the San Diego County Superior Court in Case SCD210936

Court of Appeal No. D056619

PETITION FOR REVIEW

Doris M. Frizzell, SBN 145260
P.O. Box 240
Westcliffe, CO 81252
Telephone: (719)783-2665

Attorney for Petitioner
By Appointment Of The Court Of Appeal
Under the Appellate Defenders, Inc.
Independent Case System

TABLE OF CONTENTS

/ / /

TABLE OF AUTHORITIES

/ / /

Statutes

Other Authority

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff and Respondent

vs.

AARON SUNG-UK PARK

Defendants and Appellants

TO: THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner ***Aaron Sung-Uk Park*** (hereinafter, "appellant") respectfully petitions for review of the unpublished decision of the Court of Appeal, Fourth Appellate District, Division One (per Nares, J.), filed May 4, 2011. A copy of the opinion ("Opinion") is attached to this petition as an Appendix. The Court of Appeal affirmed the judgment. Appellant's Petition for Rehearing was denied.

/ / /

/ / /

ISSUES PRESENTED FOR REVIEW; NECESSITY FOR REVIEW

1. **Is a wobbler violation of Penal Code section 245, subdivision (a)(1) which has been reduced to a misdemeanor under Penal Code section 17, subdivision (b) still eligible to be used as the basis for a five-year sentence enhancement under Penal Code section 667, subdivision (a)?**

In its opinion filed May 4, 2011, the Court of Appeal held that appellant's prior conviction may be used as the basis for an enhancement under Penal Code[1] section 667, subdivision (a), despite the fact the prior had been reduced to a misdemeanor under section 17, subdivision (b). (Opinion 4-12.) The court based that holding on a comparison between the language of section 17 and the language of section 1203.4 (Opinion 8-9); on the reasoning of *People v. Feyrer* (2010) 48 Cal.4th 426 (Opinion 9, 11); and on the provisions of California Constitution, article I, section 28, subdivision (f), enacted as part of Proposition 8 (Opinion 9-10).

Other courts have reached contrary conclusions about the effect of a reduction to a misdemeanor under section 17, albeit without consideration of article I, section 28, subdivision (f). *People v. Marshall* (1991)

---

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

227 Cal.App.3d 502, 505 held that a felony reduced to a misdemeanor under section 17 may not be used as a prior conviction under section 667, subdivision (a). *People v. Camarillo* (2000) 84 Cal.App.4th 1386, 1390-1394 held that a prior felony conviction under section 23153 which was reduced to a misdemeanor may not be used under Vehicle Code section 23550.5 to enhancement punishment for a current violation of Vehicle Code section 23152 or 23153.

Appellant respectfully requests this court grant review, in order to determine whether the language of section 1203.4 is controlling on the issue of the effect of a reduction under section 17; and to determine whether, under established rules of statutory construction, section 17 can be harmonized with, and not be limited by, the statutory and constitutional provisions enacted as Proposition 8.

This issue has broad-ranging implications because of the large number of wobbler offenses reduced to misdemeanors under section 17. Review is necessary to settle this important question of law. In light of the conflicting decisional authority mentioned above, a grant of review is consistent with this court's mission

to maintain uniformity in decisional law, and to oversee the development of the law.

2. Did the trial court abuse its discretion when it denied appellant's *Romero* motion?

The trial court is vested with broad discretion in matters of sentencing, and charged with the duty to exercise its sentencing discretion in a fashion tailored to suit each defendant's individual circumstances. As part of its continuing role of overseeing the development of the law, this court should grant review to decide whether discretion is abused where a "Strikes" sentence is imposed despite the presence in the particular case of numerous factors weighing in favor of greater leniency.

SUMMARY OF THE CASE

The Opinion generally contains an adequate procedural and factual summary for introductory purposes. However, as relates to Arguments I and II, the following background information is provided.

Appellant admitted he suffered a 2003 conviction of a violation of section 245, subdivision (a)(1) in Los Angeles case VA075018. (7 RT 1279.) On September 20, 2006, that offense had been reduced to a misdemeanor

pursuant to section 17, subdivision (b)[2], and then dismissed pursuant to section 1203.4. At the time appellant admitted the prior as part of the instant case, he stated it was a misdemeanor (7 RT 1277), and trial counsel referred to the prior as a misdemeanor in the context of the *Romero* motion (2 CT 272), but apparently no documentation was furnished to the trial court. At sentencing in the instant case, the trial court imposed a five-year enhancement pursuant to section 667, subdivision (a)(1). (2 CT 330.)

In the Court of Appeal, appellant argued that section 17, subdivision (b) sets forth circumstances under which a wobbler crime becomes "a misdemeanor for all purposes." Because appellant's prior conviction under section 245, subdivision (a)(1), a wobbler, was reduced to a misdemeanor under subdivision (b), that conviction

---

[2]The minute order states the reduction was pursuant to "17B5 of the Penal Code." However, subdivision (b)(5) by its terms applies to cases at or before the preliminary-hearing stage, before the defendant has been bound over. The procedural posture of this case at the time of the order was that three years had passed and appellant had completed his probation. Under those circumstances, the correct statutory authority for the reduction to a misdemeanor was subdivision (b)(3), which applies "[w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

could not qualify as an enhancing prior serious felony conviction for purposes of section 667, subdivision (a)[3]. (*People v. Marshall* (1991) 227 Cal.App.3d 502, 505.) The imposition of the five-year enhancement under that section constituted an unauthorized sentence, which was subject to correction by a reviewing court. (*People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295.) The Court of Appeal rejected appellant's argument.

ARGUMENT

I.

THE PROVISIONS OF SECTION 1203.4 ARE NOT CONTROLLING, BECAUSE THE REDUCTION TO A MISDEMEANOR WAS PRIOR TO AND INDEPENDENT OF THE DISMISSAL; AFTER ITS REDUCTION UNDER SECTION 17, THE PRIOR CONVICTION WAS A MISDEMEANOR, REGARDLESS OF WHETHER OR NOT IT WAS DISMISSED.

As explained in the the Opinion, the conclusion appellant's claim failed was based in part on the following language in section 1204.4: "...the prior conviction...shall have the same effect as if probation

---

[3]Section 667, subdivision (a)(1) states, in pertinent part: "... any person convicted of a serious felony who previously has been convicted of a serious felony...shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction... ." (Compare Pen. Code sec. 667, subd. (d)(1) (Three Strikes Law: states, in pertinent part: "The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction... .")

had not been granted or the accusation or information dismissed." (Opinion 8-9.) Appellant contends this language is not germane to a consideration of this issue because the reduction of his prior offense to a misdemeanor occurred prior to, and under different statutory authority, than the subsequent dismissal under section 1203.4.

Section 17, subdivision (b) governs the matter of the reduction of a felony to a misdemeanor. (*People v. Wood* (1998) 62 Cal.App.4th 1262, 1269.) As will be discussed in more detail below, once a court reduces a wobbler to a misdemeanor under section 17, the crime is thereafter a misdemeanor for all purposes, in civil as well as criminal proceedings, unless the Legislature states otherwise. (*Gebremicael v. California Com'n on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1481.)

Independently, section 1203.4 allows a court to dismiss a conviction, whether it is a felony or a misdemeanor. As explained in *Gebemicael*: "Relief under Penal Code section 1203.4 affects only punishment. By contrast, Penal Code section 17 reduces a wobbler felony to a misdemeanor 'for all purposes.' Relief under Penal Code section 17 changes the fundamental character of the

offense." (*Gebremicael v. California Com'n on Teacher Credentialing, supra,* 118 Cal.App.4th 1477 at p. 1489.)

Once appellant's offense had been reduced to a misdemeanor under section 17, it became a misdemeanor. This would have been true even if it had not been dismissed. The status of that prior conviction as a misdemeanor was not affected by section 1203.4; it is that status as a misdemeanor which precludes its use as the basis for the enhancement under section 667, subdivision (a).

II.

SECTION 17 AND THE PROVISIONS ENACTED AS PROPOSITION 8 CAN READILY BE HARMONIZED, SO THAT THE WHOLE RETAINS EFFECTIVENESS.

A. Principles of Statutory Construction.

The court begins by examining the language of the statute. However, the language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. The court does not construe statutes in isolation, but rather reads every statute with reference to the entire scheme of law of which it is part, so that the whole may be harmonized and retain effectiveness. (*People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 357.)

In construing any particular provision of a statute, the court does not insert words into it; courts may not add provisions to a statute. Nor is a court permitted to rewrite the statute to conform to an assumed intent that does not appear from its plain language. The court assumes the Legislature is aware of statutes and judicial decisions already in effect, and has enacted the new statute in light thereof. If an ambiguity exists in a penal statute, the construction more favorable to the defendant will generally be adopted. (*People v. Superior Court (Perez), supra,* 38 Cal.App.4th at p. 357.)

B. The Provisions Enacted as Proposition 8 Do Not Purport to Define What Constitutes a "Felony Conviction," but Rather, Specify the Enhancement If a Serious Felony Prior Conviction Exists.

Section 17 defines offenses and provides the only means of reducing a felony wobbler conviction to a misdemeanor. (*People v. Wood, supra,* 62 Cal.App.4th at p. 1269; *People v. Superior Court (Perez), supra,* 38 Cal.App.4th at pp. 355-356.) Article I, section 28, subdivision (f) of the California Constitution does not purport to define what is a felony.

Particular or specific provisions will generally take precedence over conflicting general provisions. (*People v. Superior Court (Perez), supra,* 38 Cal.App.4th

at p. 357.) In a somewhat different context, *People v. Vessell* (1995) 36 Cal.App.4th 285, 294, found section 17, subdivision (b) to be a more specific statute than the Three Strikes Law. (See *People v. Superior Court (Perez), supra,* 38 Cal.App.4th at p. 360, fn. 16.) In *Vessell*, the court analyzed whether the Three Strikes Law precluded a trial court from exercising its discretion under section 17 to reduce the current wobbler offense to a misdemeanor. In finding the trial court retained its discretion under section 17, the *Vessell* court explained (*People v. Vessell, supra,* 36 Cal.App.4th at p. 294):

> [T]he more specific provisions of section 17, subdivision (b)(1) do not conflict with the general provisions of section 667. That is, a trial court may exercise its discretion under the more specific provision of section 17, subdivision (b)(1) without considering section 667. We conclude that because the trial court reduced the crime to a misdemeanor under section 17, subdivision (b)(1), respondent was not convicted of a felony, and section 667 does not apply.

As explained in *People v. Superior Court (Perez)*, which addressed the same issue presented in *Vessell*, the Three Strikes Law "added a new sentencing punishment scheme for a certain class of recidivist offenders"; it did not affect definitions of crimes. (*People v. Superior Court (Perez), supra,* 38 Cal.App.4th at pp. 361-362.) The same is true of article I, section 28, subdivision

(f)(4), which states, in pertinent part: "A prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." This provision does not purport to ***define*** "felony conviction." The only relevant definition is that contained in subdivision (g), which states: "As used in this article, the term 'serious felony' is any crime defined in subdivision (c) of Section 1192.7 of the Penal Code, or any successor statute."

Thus, the provisions of article I, section 28, subdivisions (f) and (g) do not re-write or create a definition of a "felony conviction." The constitutional provisions are more general on that subject, and the more specific provisions of section 17 govern on the question of what ***is*** a felony conviction.

C. Section 667, Subdivision (a) Lacks Key Provisions Present in the Three Strikes Law; Without Those Provisions, Subdivision (a) Cannot Be Read as Limiting the Effect of Section 17.

The opinion of the Court of Appeal quotes *People v. Feyrer* (2010) 48 Cal.4th 426 for the proposition that sections 17 and 1203.4, read together, leave open the possibility a conviction which has been reduced and

dismissed may still be used for limited purposes as a prior felony conviction. (Opinion 9.) However, *Feyrer* does not support that premise because the issue in *Feyrer* was whether a great-bodily-injury allegation deprived the trial court of its discretion to reduce the wobbler offense of assault to a misdemeanor. (*Id.* at pp. 430-431.) *Feyrer* did not consider section 17 in conjunction with section 667, subdivision (a), and the issue in that case did not involve article I, section 28, subdivision (f).

The quoted statement from *Feyrer* appears to relate to the effect of language in the Three Strikes law which is not present in section 667, subdivision (a). As pertinent to this issue, the Three Strikes Law contains two key provisions. First, section 667, subdivision (c) begins with the phrase "Notwithstanding any other law." Second, subdivision (d) contains the following language (emphasis added):

> (d) Notwithstanding any other law and for the purposes of subdivisions (b) to (i), inclusive, a prior conviction of a felony shall be defined as: (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. ***The determination of whether a prior conviction is a prior felony conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence***

imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor.

"Thus, a conviction occurs on the date that guilt is adjudicated for purposes of determining whether a prior constitutes a strike. However, if the offense is made a misdemeanor at the initial sentencing, this determination is retroactive to the date guilt was decided, rendering the conviction a nonstrike." (*People v. Queen* (2006) 141 Cal.App.4th 838, 842.)

That the Legislature knows how to limit the impact of section 17 on sentencing enhancements is demonstrated by the language of the Three Strikes Law, i.e., section 667, ***subdivisions (b) through (i)***. However, no such language has ever been included in section 667, ***subdivision (a)***.

> [I]n construing any particular provision of a statute, we do not insert words into it as such would violate the cardinal rule that courts may not add provisions to a statute. Nor are we permitted to rewrite the statute to conform to an assumed intent that does not appear from its plain language. We assume the Legislature in enacting a new law is aware of statutes and judicial decisions already in effect and has enacted the new statute in light thereof.

(*People v. Superior Court (Perez), supra,* 38 Cal.App.4th at p. 357.)

In order to construe section 667, subdivision (a) to allow use of a conviction reduced under section 17 as the basis for an enhancement under section 667, subdivision (a), it would be necessary to read into the statute provisions which do not exist. Courts may not reason backwards from the presumed intent of Proposition 8 to write into the provisions language which was not part of the original enactment. (*See People v. Superior Court (Perez), supra,* 38 Cal.App.4th at p. 361 [improper to reason backwards from stated intent of the Legislature to a result which requires rewriting the statute].)

D. The Explicit Exclusion Contained in Section 667, Subdivision (a) Precludes Implication of Any Other Exclusion; an Implied Repeal of the "Misdemeanor for All Purposes" Language in Section 17 Is Disfavored.

Section 667, subdivision (a) contains a provision which, in conjunction with section 1385, precludes an enhancement under section 667, subdivision (a) from being stricken under section 1385. Section 667, subdivision (a) states its provisions must be applied "[i]n compliance with subdivision (b) of Section 1385"; section 1385, subdivision (b) states: "This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." The enumeration of this limitation on the

effect of another penal statute (section 1385) as it relates to section 667, subdivision (a), by necessary implication, excludes all other limitations not expressly stated. (*Schweisinger v. Jones* (1998) 68 Cal.App.4th 1320, 1326; *People v. Honig* (1996) 48 Cal.App.4th 289, 321, fn. 11.)

Furthermore, reading article I, section 28, subdivision (f) as allowing use of appellant's prior conviction to enhance his current sentence works an implied repeal of the language in section 17 that states that when an felony has been reduced it is a misdemeanor "for all purposes." Such repeals by implication are disfavored, and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws. (*People v. West* (1984) 154 Cal.App.3d 100, 108.)

The analysis in *West* is instructive. In that case, the Court of Appeal considered whether the "without limitation" language of article I, section 28, subdivision (f) meant that a prior felony juvenile adjudication could be used as the basis for an enhancement under section 667, subdivision (a). The Court explained (*People v. West, supra,* 154 Cal.App.3d at pp. 108-109, emphasis added):

> ***[W]e disagree that the intent of the electorate was to alter existing law and make juvenile adjudications "convictions" for purposes of enhancement.*** ... The analysis of the legislative analyst appended to Proposition 8 ["Analysis"] contains a discussion entitled: "Longer Prison Terms." [Citation.] The analysis first sets out existing law and states, "[c]onvictions resulting in probation or commitment to the Youth Authority generally are not considered for the purpose of increasing sentences, ..." (Analysis, at p. 54.) ... While it might be argued that "convictions resulting in ... commitment to the Youth Authority" was a reference to juvenile adjudications under Welfare and Institutions Code section 602, ***we must assume the legislative analyst was aware of existing law and was not so inartful as to include wardship adjudications under the incorrect heading of "convictions."*** [Citations.] ... The legislative analyst's analysis of Proposition 8 is particularly significant in that it specifically omits any mention of juvenile wardship adjudications and discusses only "convictions" in connection with "Longer Prison Terms." As we assume the legislative analyst was aware that juvenile adjudications are not convictions, we must also assume this omission was intentional. ... ***To interpret the word "juvenile" in article I, section 28, subdivision (f) as modifying either the words "conviction" or "criminal proceeding" would require a drastic change in the law which was neither explained to the electorate nor apparent on the face of the enactment.***

Similarly, as relates to the issue at bar, the legislative analyst is presumed to have been aware that convictions reduced under section 17 are misdemeanors "for all purposes," and would not have been so inartful as to include such misdemeanors in the classification of prior "serious felony" convictions for which enhancements may be imposed under section 667, subdivision (a). There

is no mention of section 17 in the legislative analysis; because the analyst is presumed to have been aware of section 17 and its operation, this omission must be assumed to be intentional. (Ballot Pamp., Proposed Amends. to Cal. Const., with analysis by the legislative analyst, Primary Elec. (June 8, 1982) pp. 54-55.) Interpreting "serious felony" to include a prior wobbler conviction which has been reduced to a misdemeanor would require a change in the law which was not apparent on the face of the enactment or explained in the legislative analysis.

E. The Legislature Has Demonstrated it Knows How to Limit the Effect of a Section 17 Reduction When it So Desires.

> [O]nce a court has reduced a wobbler to a misdemeanor pursuant to Penal Code section 17, the crime is thereafter regarded as a misdemeanor "for all purposes." This unambiguous language means what it says, and unless the Legislature states otherwise, a person such as a plaintiff stands convicted of a misdemeanor, not a felony, for all purposes upon the court so declaring.

(*Gebremicael v. California Com'n on Teacher Credentialing, supra,* 118 Cal.App.4th at p. 1483.)

The Legislature has, from time to time, unambiguously created exceptions to the foregoing. As discussed in detail above, the Three Strikes Law is one such example. As explained, in *Gebremicael*, another

example is found in Business and Professions Code section 6102, which requires the immediate suspension of an attorney from practicing law upon that attorney's conviction of a felony. Included in subdivision (b) of that section is a provision that a felony reduced to a misdemeanor under section 17, subdivision (b)(1) or (b)(3) is still treated as a felony for purposes of imposition of a suspension.

The Legislature and electorate are presumed to have been aware of the operation of section 17 when section 667, subdivision (a) was enacted. (See *People v. Superior Court (Perez), supra,* 38 Cal.App.4th at p. 362.) If the Legislature had intended to restrict the effect of section 17 reductions for purposes of section 667, subdivision (a), it knew how to do so. That no such limitation is specified must be read as an indication that none was intended.

F. The Provisions of Section 17 and Proposition 8 Can Be Harmonized, and Are Not Ambiguous; If They Are Ambiguous, They Should Be Construed in Favor of Appellant.

As was said by this court in *People v. Weidert* (1985) 39 Cal.3d 836, 843, internal citations and quotation marks omitted:

> It is a settled principle in California law that when statutory language is thus clear and

> unambiguous there is no need for construction, and courts should not indulge in it. This principle is but a recognition that courts must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature.

Of course, "[e]ven literal language of a statute may be disregarded to avoid absurdities or to uphold a clear contrary intent of the Legislature." (*People v. Superior Court (Perez)*, *supra*, 38 Cal.App.4th at p. 357.) However, construing sections 17 and 667, subdivision (a) in accordance with their literal language does not result in an absurdity. Section 17 defines what is a felony conviction, and section 667, subdivision (a) creates an enhancement to be applied if there exists a prior serious felony conviction.

Thus, a construction which gives full effect to both section 17 and section 667, subdivision (a) satisfies the principle of statutory construction that statutes should be interpreted in such a way that each remains effective. (*See People v. Superior Court (Perez)*, *supra*, 38 Cal.App.4th at p. 357.) There is no conflict or absurdity.

Even if, in light of article I, section 28, subdivision (f), there appears to be an ambiguity, there are important reasons to interpret sections 17 and 667,

subdivision (a) in such a way as to give full effect to both. First, it is noteworthy that the electorate apparently intended to implement a finely balanced scheme, providing for longer sentences, but also for some leniency for deserving individuals. The longer sentences were provided for by restricting the discretion of the trial court under section 1385.[4]

However, it may be inferred from the absence in Proposition 8 of any mention of section 17 that the electorate determined the lack of discretion under section 1385 should be balanced by leaving in place the existing leniency available to a defendant who, after having been convicted of a wobbler crime, has satisfied his probation and has convinced a court that his rehabilitation makes him deserving of reduction of his offense to a misdemeanor. A similarly balanced scheme was put in place under the Three Strikes law, which pulls

---

[4]Proposition 8 as enacted did not include an explicit limitation on the discretion of a sentencing court under section 1385. However, such a limitation was added by 1986 amendments to section 667, subdivision (a) and section 1385. The legislative intent was spelled out in the enactment: "It is the intent of the Legislature to abrogate the holding in People v. Fritz, 40 Cal.3d 227, and to restrict the authority of the trial court to strike prior convictions of serious felonies when imposing an enhancement under Section 667 of the Penal Code." (Stats.1986, ch. 85, § 3, p. 211; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 521.)

into the ambit of its operation certain wobbler offenses which have been reduced to misdemeanors, but leaves in place the discretion of the sentencing court to strike the enhancement allegation under section 1385.

Moreover, it has often been held that it is for the Legislature to clarify its intent rather than the court to do so when to interpret or construe a statutory conflict or ambiguity will be counter to the interests of a criminal defendant. As explained in *People v. Coelho* (2001) 89 Cal.App.4th 861, 885, internal citations and quotation marks omitted:

> Ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. ... Thus, when language which is susceptible of two constructions is used in a penal law, the policy of this state is to construe the statute as favorably to the defendant as its language and the circumstance of its application reasonably permit. The defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of a statute. This rule applies to statutes that govern sentencing.

The reasonable construction which most satisfies all tenets of statutory construction, and which favors appellant, is that the effect of a section 17 reduction of an offense from a felony to a misdemeanor was not circumscribed by the laws enacted as Proposition 8. A felony, once reduced under section 17, is a misdemeanor

which cannot serve as the basis for imposition of an enhancement under section 667, ***subdivision (a)***.

III.

THE TRIAL COURT ABUSED ITS DISCRETION BY REFUSING TO STRIKE APPELLANT'S PRIOR "STRIKE" CONVICTION.

The trial court may dismiss a "strike" in the interests of justice. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 529-530; Pen. Code § 1385.) In determining whether to dismiss, the trial court must consider the nature and circumstances of the defendant's present felony conviction(s), his prior serious or violent felony convictions, and his background, character and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) Although the trial court must be mindful of the Three Strikes sentencing scheme, it must also tailor each sentence to suit the individual defendant. (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.)

In deciding what sentence to impose, the trial court must consider the interests of society and the constitutional rights of the defendant, as well as whether the application of the Three Strikes Law to the defendant would result in an unjust sentence. (*People v. Superior Court (Romero), supra,* 13 Cal.4th at pp. 530-531.) "A defendant's sentence is ... a relevant

consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences." (*People v. Garcia* (1999) 20 Cal.4th 490, 500.)

Thus, even within the guidelines of *Williams*, trial courts retain significant discretion in sentencing. In *People v. Garcia, supra,* 20 Cal.4th 490, 501 (internal citations and quotation marks omitted) the California Supreme Court declared:

> [W]hile a defendant's recidivist status is undeniably relevant, it is not singularly dispositive. ... [T]he purpose of ensuring longer prison sentences in Three Strikes cases, while relevant to a court's exercise of its 1385 discretion, does not predominate the trial court's exercise of that discretion, which would be one step shy of declaring the three strikes law eliminates the court's section 1385 discretion entirely.

Clearly, then, the concept of ensuring a just sentence requires the trial court to take into account more than just the defendant's recidivist history. *People v. Bishop* (1997) 56 Cal.App.4th 1245 illustrates the true scope of the trial court's discretion. The current offense in *Bishop* was theft of videos from a retail store. (*Id.* at p. 1248.) Bishop's record of serious

crimes was extensive and violent, including two robbery convictions, one involving use of a firearm, and one conviction of battery of a custodial officer, in addition to other theft offenses and a federal drug conviction. (*Id.* at p. 1248, fns. 1 and 3.) The current offense in *Bishop* had been committed within three days of Bishop's release from prison, while he was on parole. (*Id.* at p. 1248.)

Despite all of these factors, the Court of Appeal upheld the exercise of the trial court's discretion to strike all but one of defendant Bishop's strike priors, and to impose a 12-year prison sentence. (*Id.* at pp. 1249, 1251.) The Court of Appeal explained: "Every defendant who appears for sentencing with two strikes against him is deserving of a prison sentence of at least twenty-five years to life. But some of those defendants may also be deserving of a lesser punishment. This is precisely what section 1385 and *Romero* are all about." (*Id.* at p. 1250.)

Appellant technically falls within the Three Strikes Law, but, as just explained, not all who technically qualify are actually deserving of an enhanced sentence. From a numerical standpoint, appellant's record demonstrates the requisite degree of prior criminality -

he has a prior strike conviction. However, when his record is viewed as a whole, it is apparent appellant does not pose the problem the Three Strikes Law was designed to solve. That is, his crimes are not excessively numerous, and he lived a significant period of years crime-free in the recent past.

Appellant's prior strike was committed on February 11, 2003, when appellant was eighteen years old. (2 CT 255, 260.) In that case, appellant pled guilty to a violation of Penal Code section 245, subdivision (a)(1), a charge which arose as a result of an assault with a stick. Appellant was placed on probation for three years and ordered to serve 180 days in county jail. (2 CT 260.) After he served out his probation, the offense was reduced to a misdemeanor pursuant to Penal Code section 17, subdivision (b)(3), and then dismissed pursuant to Penal Code section 1203.4.

All of this indicates that the court presiding over that case viewed it as less serious than the average "serious felony," despite the fact it technically qualifies as a strike offense. Furthermore, appellant successfully completed his supervised probation in that case. These factors weigh in favor of an exercise of discretion to strike the prior offense.

The conviction of attempted voluntary manslaughter in this case was based on a finding by the jury that appellant acted in the heat of passion. (2 CT 394.) In other words, the jury found appellant acted as a consequence of "provocation [which] would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." (See 2 CT 219 [CALCRIM No. 603, defining voluntary manslaughter/heat of passion, as given in this case].) Thus, although appellant's actions unfortunately resulted in serious injuries to Mr. Joseph, they were the result of provocation sufficient to inflame the average person, rather than being the product of a cold, calculated act of violence.

Appellant's prospects for leading a law-abiding life also weigh in favor of an exercise of discretion to strike his strike. Appellant had obtained his Associate degree from Cypress College, and planned to continue his education. He had been employed by the Mirage Hotel and Casino for two and a half years and had minimal debt before this case. He was a youth pastor at his church and had volunteered to take relief aid to victims of hurricane Katrina. (2 CT 262.) In all, his prospects to lead a law-abiding and productive life were very good.

Finally, an exercise of discretion to strike appellant's prior strike conviction would still have resulted in a lengthy sentence. The trial court retained a range of options, including imposition of the upper term on count 2 (nine years), or the upper term on the gun enhancement (ten years). Any of the resulting terms would have been lengthy, certainly not "lenient." (*People v. Garcia, supra,* 20 Cal.4th at p. 503.)

All of these factors weigh in favor of a finding that appellant falls at least partially outside the spirit of the Three Strikes scheme. In imposing a sentence of 24 years, the trial court failed to fulfill its duty to tailor the sentence to suit appellant's individual circumstances.

Appellant is not a hopeless criminal who cannot be redeemed and therefore must be segregated from society for the majority of his productive lifespan. He is, instead, an educated man who has the capacity to lead a law-abiding life. The trial court's refusal to strike appellant's prior conviction was abuse of discretion. This Court should remand the case to allow the trial court to reconsider the sentence.

/ / /

/ / /

CONCLUSION

Review should be granted.

Respectfully submitted,

Date:

DORIS M. FRIZZELL
Attorney for Petitioner
Aaron Park

CERTIFICATE OF LENGTH

I, Doris M. Frizzell, attorney for petitioner, certify pursuant to the California Rules of Court, that the word count for this document is 5,654 words, excluding the tables, this certificate, and any attachment permitted under the Rules of Court. This document was prepared in WordPerfect, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at Westcliffe, Colorado on _____, 2011.

DORIS M. FRIZZELL

APPENDIX

Opinion of the Court of Appeal

Filed 5/4/11 P. v. Park CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. AARON SUNG-UK PARK, Defendant and Appellant.	D056619 (Super. Ct. No. SCD210936)

APPEAL from a judgment and order of the Superior Court of San Diego County, Francis M. Devaney, Judge. Affirmed.

A jury convicted Aaron Sung-Uk Park of attempted voluntary manslaughter based on heat of passion (Pen. Code,[1] §§ 192, 664)) as a lesser included offense of attempted murder, and assault with a semiautomatic firearm (§ 245, subd. (b) (hereafter § 245(b)). As to both counts, the jury found true allegations that Park personally used a firearm (§ 12022.5, subd. (a)) and personally caused great bodily injury (§ 12022.7, subd. (a)). Park admitted the allegation in the fourth amended information (the information) that in

---

1 All further statutory references are to the Penal Code.

2003 he suffered a prior serious felony conviction for assault with a deadly weapon (§ 245, subd. (a)(1), hereafter § 245(a)(1)) within the meaning of sections 667, subdivision (a)(1) (hereafter section 667(a)), 668 and 1192.7, subdivision (c), which also qualified as a prior strike conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 668, 1170.12). At the hearing, both defense counsel and Park informed the court that the prior serious felony conviction had been reduced to a misdemeanor.

Park brought both a motion under *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) and section 1385 to strike the prior serious felony and strike conviction, and a motion for new trial based on ineffective assistance of counsel, prosecutorial misconduct, and other claims of error. The court denied both motions.

The court sentenced Park on the assault with a semiautomatic firearm conviction to the middle term of six years, doubled to 12 years under the Three Strikes law as a result of Park's prior strike conviction, plus consecutive terms of four years for his personal use of a firearm, three years for causing great bodily injury, and five years for having a prior serious felony conviction—for a total prison term of 24 years. As to the attempted voluntary manslaughter conviction, the court imposed, then stayed under section 654, one-third of the middle term of three years (i.e., one year), doubled to two years under the Three Strikes law. The court also stayed under section 654 a term of one year four months for the personal use of a firearm enhancement and a term of one year for the great bodily injury enhancement.

Park appeals, contending (1) his section 667(a) five-year sentence enhancement for his prior serious felony conviction should be stricken because that prior conviction

was reduced to a misdemeanor under section 17, subdivision (b) (hereafter section 17(b)), and then dismissed under section 1203.4; (2) the court abused its discretion by denying his *Romero* motion to dismiss his prior strike conviction; and (3) if this court determines the trial court's exercise of discretion in refusing to dismiss his prior strike conviction was "impacted by the absence of documentation" that his prior conviction had been reduced to a misdemeanor, then his trial counsel provided constitutionally ineffective assistance "in failing to provide documentation for the trial court's consideration."

We conclude that Park's admitted prior serious felony conviction is a prior serious felony conviction for purposes of section 667(a) notwithstanding its 2006 reduction to a misdemeanor under section 17(b)(3), and thus the court did not err by imposing the five-year serious felony enhancement under section 667(a), the court's order denying Park's *Romero* motion was not an abuse of discretion, and Park's ineffective assistance of counsel claim is unavailing. Accordingly, we affirm the order and judgment.

FACTUAL BACKGROUND

A. *The People's Case*

In September 2007 a group of passers-by, including victim Eric Joseph, attempted to stop a fight in which defendant Park was involved.

B. *The Defense Case*

The defense presented no witnesses and offered no evidence other than the following stipulation, which the court received in evidence:

> "On September 17th, 2007, San Diego Police Department Officer, Tim Peterson, interviewed [Joseph] at the hospital. Mr. Joseph had been admitted to the hospital and medicated. Mr. Joseph stated that

he stepped in front of his friend to protect him. He said he hit the Asian male in the face. [The] [s]uspect then pulled out a black handgun and shot at him three times. The next day[,] on September 18th, 2007, Detective Hoover spoke to [Joseph] in the hospital. Mr. Joseph said he stepped between [his friend] and the shooter. The shooter pulled out a gun. [Joseph] did not tell Detective Hoover that he hit the shooter."

DISCUSSION

I. *FIVE-YEAR PRIOR SERIOUS FELONY CONVICTION ENHANCEMENT*

Park contends that the five-year sentence enhancement the court imposed under section 667(a) for his prior serious felony conviction for assault with a deadly weapon (§ 245(a)(1))[2] should be stricken because that conviction, a wobbler,[3] was reduced to a misdemeanor in 2006 under section 17(b)(3)[4] and dismissed under section 1203.4,

---

2 Section 245(a)(1) provides: "Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars ($10,000), or by both the fine and imprisonment."

3 A wobbler is an offense that can be punished "as a felony or misdemeanor depending upon the severity of the facts surrounding its commission." (*People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 360, fn. 17.) Assault with a deadly weapon in violation of section 245(a)(1) is a wobbler because it can be punished as a felony or misdemeanor depending upon the severity of the facts surrounding its commission, as shown by the provisions of that statute (see fn. 2, *ante*).

4 Section 17, subdivision (b)(3) provides: "(b) When a crime is punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, it is a *misdemeanor for all purposes* under the following circumstances: [¶] . . . [¶](3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (Italics added.)

subdivision (a) (hereafter section 1203.4(a)),[5] and thus the five-year enhancement is an unauthorized sentence. We reject this contention.

A. *Background*

In 2003 Park was convicted in *People v. Park* (Super. Ct. Los Angeles County, No. VA075018-03) of one felony count of assault with a deadly weapon (§ 245(a)(1)). The court in that case suspended imposition of sentence and placed Park on formal probation for three years on condition that he serve 180 days in jail, be subject to gang conditions, receive violence counseling, among other terms and conditions.

On September 20, 2006, after Park completed his probation, his conviction was reduced to a misdemeanor under section 17(b) and then dismissed under section 1203.4.

In the present case, Park's prior section 245(a)(1) conviction was alleged in the information as a separately brought and tried serious felony conviction within the

---

5 Section 1203.4(a) provides in part: "In any case in which a defendant has fulfilled the conditions of probation for the entire period of probation, . . . or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, if he or she is not then serving a sentence for any offense, on probation for any offense, or charged with the commission of any offense, be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, except as provided in Section 13555 of the Vehicle Code. . . . However, *in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed.*" (Italics added.)

meaning of the five-year sentence enhancement provision set forth in section 667(a).[6] After the jury returned its verdicts, Park waived his right to a jury trial with respect to that enhancement allegation. When discussing Park's plea regarding that allegation, both Park and his counsel indicated that the prior felony conviction had been reduced to a misdemeanor. The court indicated, however, that the prior conviction was alleged as a felony conviction and asked Park whether he wanted to "admit to having suffered that felony conviction." Park replied, "Yes, Your Honor." The court asked him, "You understood that you had the right to have the jury determine whether you had been previously convicted of a felony?" Park responded, "Yes, Your Honor." Park also answered "yes" when the court asked, "You waived that right to me earlier. Do you understand that?"

The court also explained to Park the consequences of admitting he had suffered that prior felony conviction. Specifically, the court stated that the prior conviction was "a first serious felony prior and . . . a strike prior" and explained that it "dictates to me at sentencing what I can do. Having a strike prior on your record at sentencing causes me to deny you probation, deny you the right to bail. It also causes me to double any sentence that I may impose upon you on the charges that the jury just returned the verdicts on."

---

6 Section 667(a)(1) provides: "In compliance with subdivision (b) of Section 1385, *any person convicted of a serious felony who previously has been convicted of a serious felony* in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, *shall receive*, in addition to the sentence imposed by the court for the present offense, *a five-year enhancement for each such prior conviction* on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." (Italics added.)

The court asked Park, "Do you understand those are the consequences of having this strike prior and this serious felony prior on your record?" Park replied, "Yes, Your Honor." Knowing and understanding those facts, Park freely and voluntarily admitted the existence of that prior felony assault with a deadly weapon conviction.

The prosecutor then stated, "I just also want to make clear [Park's] admitting it as a serious felony prior as well under [*section*] *667(a)(1)*, 668 and 1192." (Italics added.) The court responded, "[W]e'll note that," and then asked defense counsel, "You concur in your client's admission?" Park's counsel answered, "Yes, your honor."

The court then made the following findings: "[Park] has knowingly and voluntarily given up his right to jury trial on the prior. He has admitted to the prior. I will . . . accept his admission and find that [Park] has previously been convicted of the *felony* identified, and it's also alleged and will be found to be a *first serious felony prior pursuant to* [*sections*] *667(a)(1)*, 668 and 1192.7[, subdivision](c)." (Italics added.)

Before sentencing, Park moved for a new trial and brought his *Romero* motion to strike the prior strike conviction. The court denied both motions, and sentenced Park to a prison term of 24 years, which included a five-year term under section 667(a) for his prior serious felony conviction.

B. *Analysis*

In support of his claim that the section 667(a) five-year enhancement is an unauthorized sentence that should be stricken, Park relies on the provision of section 17(b)(3) that indicates that, when a court reduces a felony wobbler offense to a

misdemeanor under the circumstances specified in that subdivision (see fn. 4, *ante*), it "is a misdemeanor *for all purposes*." (Italics added.)

Thus, Park suggests that because his prior serious felony conviction was reduced under section 17(b)(3) to a misdemeanor "for all purposes" that conviction now must be deemed a prior *misdemeanor* conviction for purposes of section 667(a), which, as Witkin explains, "applies when a defendant convicted of a serious felony in the present case has a prior conviction of a *serious felony* in California." (3 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Punishment, § 340, p. 439, italics added.) Thus, he contends, his five-year enhancement is an unauthorized sentence because his prior serious felony conviction is now only misdemeanor conviction and section 667(a) does not apply.

Park's contention is unavailing. As the record shows his prior serious felony conviction was dismissed under section 1203.4 after it was reduced to a misdemeanor under section 17(b)(3), we must consider the provisions of section 17(b)(3) together with those of section 1203.4 in determining the effect of the section 17(b)(3) reduction of that conviction to a misdemeanor on the applicability and operation of section 667(a) in this case. Of particular significance here is the provision in section 1203.4(a) (see fn. 5, *ante*) that, "in any subsequent prosecution of the defendant for any other offense, *the prior conviction . . . shall have the same effect as if probation had not been granted or the accusation or information dismissed.*" (Italics added.)

Thus, although Park's prior serious felony conviction was reduced to a misdemeanor under section 17(b)(3) and then dismissed, under the plain language of section 1203.4(a) that prior serious felony conviction has "the same effect" in the current

prosecution "as if probation had not been granted or the accusation or information dismissed." Construing sections 17(b)(3) and 1203.4(a) together, we conclude for purposes of section 667(a) in the instant criminal prosecution that Park's admitted prior serious felony conviction continues to be a prior serious felony conviction notwithstanding its 2006 reduction to a misdemeanor under section 17(b)(3).

Our conclusion is consistent with *People v. Feyrer* (2010) 48 Cal.4th 426, in which the California Supreme Court recently explained that, "[w]hen a trial court grants probation without imposing a sentence, sections 17 and 1203.4, read together, express the legislative purpose 'that an alternatively punishable offense remains a felony . . . until the statutory rehabilitation procedure has been had, at which time the defendant is restored' to his or her former legal status in society, *subject to use of the felony for limited purposes in any subsequent criminal proceeding*." (*Feyrer*, *supra*, at pp. 439-440, italics added, quoting *People v. Banks* (1959) 53 Cal.2d 370, 391.)

Our conclusion that Park's admitted prior serious felony conviction continues to be a prior serious felony conviction for purposes of section 667(a), notwithstanding its 2006 reduction to a misdemeanor under section 17(b)(3), also finds support in the provisions of article I, section 28, subdivision (f)(4) of the California Constitution, which were originally enacted in 1982 as section 28, subdivision (f) of that article as part of The Victims' Bill of Rights (Proposition 8) (*People v. Castro* (1985) 38 Cal.3d 301, 305) and were recodified without change as a result of the voters' approval of Proposition 9 in 2008. (See Cal. Const., former art. I, § 28; cf. Cal. Const., art. I, § 28, subd. (f)(4).) Article I, section 28, subdivision (f)(4) provides in part:

> "*Any prior felony conviction* of any person in any criminal proceeding, whether adult or juvenile, *shall subsequently be used without limitation for purposes of . . . enhancement of sentence in any criminal proceeding*." (Italics added.)

Under the foregoing plain language of California Constitution article I, section 28, subdivision (f)(4), "[a]ny" prior felony conviction "shall" be used in any subsequent prosecution "without limitation for purposes of . . . enhancement of sentence." Thus, Park's prior serious felony conviction must be used "without limitation for purposes of . . . enhancement of sentence" in the current criminal prosecution notwithstanding the 2006 reduction of that conviction to a misdemeanor under section 17(b)(3).

Furthermore, to the extent they cannot be reconciled, California Constitution, article I, section 28, subdivision (f)(4) prevails over Penal Code section 17(b)(3). It is well established that when two laws "governing the same subject matter cannot be reconciled the later in time will prevail over the earlier." (*Los Angeles Police Protective League v. City of Los Angeles* (1994) 27 Cal.App.4th 168, 178; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7.) "Subdivision (b)(3) of section 17 was added by amendment in 1963." (*People v. Wood* (1998) 62 Cal.App.4th 1262, 1270, citing Stats. 1963, ch. 919, § 1, pp. 2169-2170.) As already discussed, the provisions now found in article I, section 28, subdivision (f)(4) of the California Constitution were enacted in 1982 with the voters' approval of Proposition 8. (See *People v. Castro*, *supra*, 38 Cal.3d at p. 305.) Thus, as section 17(b)(3) predates those provisions, the latter prevails to the extent its provisions cannot be reconciled with those of the former.

We are also persuaded that our holding is supported by sound public policy. Placing a criminal defendant on probation for a serious felony wobbler provides that person an opportunity for rehabilitation, including the opportunity to have that felony reduced to a misdemeanor under section 17(b)(3) and then dismissed under section 1203.4(a), if his or her performance on probation demonstrates rehabilitation. (See *People v. Feyrer*, *supra*, 48 Cal.4th at pp. 439-440.) If a defendant knows that his or her serious felony wobbler will be treated as a serious felony in the future, even if it has been reduced to a misdemeanor under section 17(b)(3) and dismissed under section 1203.4(a), the defendant will know that any subsequent serious felony conviction he or she suffers may result in a five-year sentence enhancement under section 667(a). Such a rule provides the defendant with a strong incentive to not reoffend.

Finally, Park's reliance on *People v. Marshall* (1991) 227 Cal.App.3d 502 is unavailing. The *Marshall* court held that the trial court erred when it used the defendant's prior felony conviction for burglary to impose a five-year sentence enhancement under section 667(a) because the defendant's honorable discharge from the California Youth Authority rendered his prior felony conviction a misdemeanor for all purposes by operation of law under section 17, subdivision (c), which was added in 1976.[7] (*Marshall*, *supra*, at pp. 504-505.) *Marshall* is inapposite as it did not address the import

---

7 Section 17, subdivision (c) provides: "When a defendant is committed to the Youth Authority for a crime punishable, in the discretion of the court, by imprisonment in the state prison or by fine or imprisonment in the county jail, the offense shall, upon the discharge of the defendant from the Youth Authority, thereafter be deemed a misdemeanor for all purposes."

of Proposition 8 with respect to the issue presented here of whether a recidivist defendant's prior serious felony conviction that has been reduced to a misdemeanor under section 17(b)(3) and dismissed under section 1203.4 may be used in a prosecution for a subsequent serious felony offense to impose a five-year sentence enhancement under section 667(a).

II. *ROMERO MOTION TO STRIKE THE PRIOR STRIKE CONVICTION*

Park next contends the court abused its discretion by denying his *Romero* motion to dismiss his prior strike conviction. We reject this contention.

A. *Applicable Legal Principles*

Section 1385, subdivision (a) (hereafter section 1385(a)) provides in part that a trial court "may, either of [its] own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes."

In *Romero, supra,* 13 Cal.4th 497, the California Supreme Court held that section 1385(a) permits a court acting on its own motion to strike prior felony conviction allegations in cases brought under the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12). (*Romero*, *supra*, at pp. 529-530.) The *Romero* court emphasized that "[a] court's discretion to strike prior felony conviction allegations in furtherance of justice is limited. Its exercise must proceed in strict compliance with section 1385(a), and is subject to review for abuse." (*Romero*, at p. 530.) Although the Legislature has not defined the phrase "in furtherance of justice" contained in section 1385(a), *Romero* held that this language requires a court to consider both the constitutional rights of the defendant and

the interests of society represented by the People in determining whether to strike a prior felony conviction allegation. (*Romero*, at p. 530.)

In *People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*), our state Supreme Court further defined the standard for dismissing a strike "in furtherance of justice" by requiring that the defendant be deemed "outside" the "spirit" of the Three Strikes law before a strike is dismissed: "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to . . . section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies ."

In *People v. Carmony* (2004) 33 Cal.4th 367 (*Carmony*), our high state court held a trial court's decision not to dismiss a prior conviction allegation under section 1385 is reviewed under "the deferential abuse of discretion standard." (*Carmony*, at p. 371.) *Carmony* explained that when reviewing a decision under that standard, an appellate court is guided "by two fundamental precepts. First, ' "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary

determination to impose a particular sentence will not be set aside on review." ' [Citation.] Second, a ' "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' " ' [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.)

B. *Background*

In support of his *Romero* motion to strike his 2003 prior serious felony and strike conviction for assault with a deadly weapon (§ 245(a)(1), Park cited his background, character, and prospects, noting that he had been working in Las Vegas in a position of trust at the Mirage Casino at the time of his arrest in this matter, he was a youth pastor, he had completed two years of college, and he wanted to work in casinos upon his release.

1. *Ruling*

Following oral argument, the court denied the motion, finding that Park is a "violent felon [and] repeat offender" who "does not fall outside the spirit of the Three Strikes law." In exercising its discretion, the court reviewed the factors discussed in *Williams*, *supra*, 17 Cal.4th 148 (hereafter referred to as the *Williams* factors), and found that Park's 2003 prior offense was violent in that he used "some type of stick or pole" and the offense was not remote in time, his current offense was "extremely violent" because he "took three shots at an unarmed victim," the two offenses were similar in that they both involved the use of violence, Park has a criminal record both as a juvenile and as an

adult, and his offenses "are increasing in severity" because he "went from stolen cars and theft offenses to an armed assault" with a pole, which is a deadly weapon, and now to assault with a gun.

The court noted that, "on the other side of the coin," there was "no issue of drug addiction [and] no gang affiliation"; Park expressed willingness to rehabilitate himself. He was educated and intelligent, held a job, and had family support.

C. *Analysis*

Applying the deferential abuse of discretion standard, as we must (*Carmony*, *supra*, 33 Cal.4th at p. 371), we conclude Park has failed to meet his burden on appeal of showing the court's denial of his *Romero* motion was an abuse of discretion. The record shows the court understood both the scope of its discretion to strike the prior conviction and the various *Williams* factors it was required to consider, which it did consider in exercising its discretion. The court examined whether Park should be deemed outside the spirit of the Three Strikes law, as it was required to do (*Williams*, *supra*, 17 Cal.4th at p. 161), and determined that Park is a violent recidivist felon who does not fall outside the spirit of the Three Strikes law. In making this determination, the court made findings, supported by the record, that Park's prior and current offenses were similar in that they both involved the use of violence; Park has a criminal record both as a juvenile and as an adult, and his offenses are "increasing in severity." The court did not neglect to consider Park's positive attributes, such as his expressed willingness to rehabilitate himself, his employment, education, and family support, and the fact that he is not addicted to drugs and has no gang affiliation.

As discussed, *ante*, an appellant does not carry his burden on appeal by merely showing reasonable people might disagree on whether to strike a prior conviction allegation. (*Carmony*, *supra*, 33 Cal.4th at p. 378.) Here, at best, Park has merely shown reasonable people might disagree on whether to strike the prior conviction allegation. Accordingly, we affirm the court's order denying his *Romero* motion.

III. *INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM*

Last, Park contends that, if this court determines the trial court's exercise of discretion in refusing to dismiss his prior strike conviction was "impacted by the absence of documentation" that his prior conviction had been reduced to a misdemeanor, then his trial counsel provided constitutionally ineffective assistance "in failing to provide documentation for the trial court's consideration." This contention is unavailing.

A. *Applicable Legal Principles*

Generally, in order to show that defense counsel provided ineffective assistance at trial, the burden is on the defendant to show both " 'that [his] counsel's performance fell below an objective standard of reasonableness; *and* . . . that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails." (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

B. *Analysis*

Park asserts that, "[a]lthough it was mentioned in [his *Romero* motion] papers that [his] prior conviction had been reduced to a misdemeanor, that information was not

corroborated in the probation report, and was not mentioned by the trial court as a factor it considered in determining whether to strike [Park's] prior strike conviction." He contends "[t]hese circumstances *suggest* the trial court *may* not have fully considered the circumstance that the prior conviction was ultimately deemed a misdemeanor, and dismissed" (italics added), and thus, "[t]o the extent this Court finds the trial court's exercise of discretion to have been impacted by the absence of documentation concerning the ultimate disposition of the prior, then trial counsel was ineffective in failing to provide documentation for the trial court's consideration."

The record shows the court carefully and properly considered the circumstances underlying the prior conviction, not its legal status as a felony or misdemeanor. The record shows the court read Park's *Romero* motion papers, which expressly informed the court that "[t]he 2003 conviction that [he] admitted to was reduced to a misdemeanor by the sentencing court, which was aware of all the facts and circumstances of that case. Knowing about those circumstances, the court in that case deemed that the offense was a misdemeanor." The court was thus aware of the reduction of the prior felony conviction to a misdemeanor, which, in any event, was not relevant to its ruling on Park's *Romero* motion. While the circumstances underlying the prior conviction were relevant under *Williams*, *supra*, 17 Cal.4th at page 161, which requires the trial court to consider "the nature and circumstances of [the defendant's] . . . prior serious and/or violent felony convictions," the reduction of the prior conviction to misdemeanor status was not.

Park's ineffective assistance of counsel claim is based on mere speculation that defense counsel's failure to document that the prior serious felony conviction had been

reduced to a misdemeanor contributed to the court's well-supported decision to deny Park's *Romero* motion. We conclude Park has failed to meet his burden of demonstrating either that his counsel's performance fell below an objective standard of reasonableness or that, assuming counsel committed the alleged unprofessional error, there is a reasonable probability that, but for that assumed error, a determination more favorable to Park would have resulted.

DISPOSITION

The judgment and order are affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P. J.

HALLER, J.

PROOF OF SERVICE BY MAIL

_____I, the undersigned, am a citizen of the United States, residing in the State of Colorado; I am over eighteen years old and not a party to this action. My business address is P.O. Box 240, Westcliffe, CO 81252, in Custer County. My electronic service address is frizzell145260@gmail.com.

On ***June 10, 2011***, I served ***Appellant's Petition for Review*** in ***People v. Aaron Sung-Uk Park, Case No. D056619***, by placing a copy thereof with postage prepaid in the U.S. mail, addressed as follows:

Court of Appeal, Fourth District, Division One
750 "B" Street, Suite 300
San Diego, CA 92101

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Hon. Francis M. Devaney, San Diego Superior Court
220 West Broadway
San Diego, CA 92101-3409

Aaron Park AB8520, 3A05-217
P.O. Box 3461
Corcoran, CA 93212-3461

Knut S. Johnson [attorney for trial]
1010 Second Avenue, Suite 1850
San Diego, CA 92101

J.W. Carver [attorney for new trial motion and sentencing]
1010 2nd Avenue, #1000
San Diego, CA 92101-4904

Office of the District Attorney, Appellate Division
330 West Broadway, Suite 920
San Diego, CA 92101-3803

On the same date, I served a copy by e-mail, transmitted without error, as follows:

Appellate Defenders, Inc.
eservice-criminal@adi-sandiego.com

Office of the Attorney General
ADIEService@doj.ca.gov

I declare under penalty of perjury that the foregoing is true and correct. Executed at Westcliffe, Colorado on _____, 2011.

_____
Doris M. Frizzell