In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

AARON SUNG-UK PARK,

Defendant and Appellant.

Case No. S193938

Fourth Appellate District, Division One, Case No. D056619
San Diego County Superior Court, Case No. SCD210936
The Honorable Francis M. Devaney, Judge

ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

Should defendant's five-year sentence enhancement under Penal Code section 667, subdivision (a), be stricken because his prior serious felony conviction was reduced to a misdemeanor under Penal Code section 17, subdivision (b)(3), after the defendant successfully completed probation, and was then dismissed under Penal Code section 1203.4?

INTRODUCTION

In 2003, appellant negotiated a plea deal in which he admitted one felony count of assault with a deadly weapon and received probation, and four other counts of assault and making terrorist threats were dismissed. Three years later, he had his serious felony conviction reduced to a misdemeanor pursuant to Penal Code section 17, subdivision (b)(3) (hereafter section 17(b)(3)), and his guilty plea vacated and the charges dismissed pursuant to Penal Code section 1203.4, subdivision (a) (hereafter section 1203.4) [1]

The next year, in 2007, appellant shot a man at close range in his hip, thigh and lower leg. A jury found him guilty of attempted voluntary manslaughter and assault with a firearm, and found true allegations that he personally used a firearm and personally caused great bodily injury. He admitted his prior serious felony conviction as a strike and as a serious felony conviction, although he objected that the conviction had been reduced to a misdemeanor. The trial court's sentence of 24 years in prison included a five-year term under section 667, subdivision (a) (hereafter 667(a)), for being a recidivist serious felon.

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

On appeal and before this Court, appellant contends that section 17(b), which provides that an offense reduced under that subdivision remains a misdemeanor "for all purposes," applies to and supersedes the recidivist enhancement of section 667(a). This contention lacks merit. The enhancement applies to "any person convicted of a serious felony who previously has been convicted of a serious felony." Appellant was previously convicted of a serious felony and then committed and was convicted of his current serious felony. The five-year enhancement applies to him under the unambiguous language of section 667(a). The fact that the prior offense was later reduced to a misdemeanor and then dismissed does not erase the fact that he was convicted of a serious felony. The five-year enhancement applies to all who, like appellant, were earlier convicted of a serious felony and chose to commit another serious felony, even if a trial court has exercised its discretion to reduce the earlier offense to a misdemeanor in consideration of and to further a felon's rehabilitation.

To exclude a serious felon from enhanced punishment in the event he commits another serious felony would undermine both his rehabilitation and also the will of the People to punish serious felony recidivists more harshly, to impose this longer punishment for any prior serious felony conviction regardless of the sentence imposed for that prior conviction, all as expressed in the California constitutional amendment that was enacted along with section 667(a) in the 1982 Proposition 8, the Victims' Bill of Rights. In light of the constitutional command, the scope and purpose of the rehabilitation scheme, and the express direction to punish serious felony recidivists more harshly, the use of any serious felony conviction to enhance the sentence of a subsequent serious felony is not limited by the Legislature's grant of statutory grace of treating serious felony convictions as misdemeanors for future purposes.

STATEMENT OF CASE

In 2003, appellant entered into a plea bargain in which he admitted one felony count of assault with a deadly weapon, in violation of section 245, subdivision (a)(1), and four other felony counts of assault and terrorist threats were dismissed. The court suspended imposition of sentence and placed appellant on formal probation for three years, on condition that he serve 180 days in jail, be subject to gang conditions, receive counseling for violence, and other terms and conditions. (2 CT 260.) After appellant completed probation in 2006, his conviction was reduced to a misdemeanor pursuant to section 17(b)(3), and then dismissed pursuant to section 1203.4. (2 CT 260.)

In 2009, a jury found appellant guilty of attempted voluntary manslaughter (§§ 664, 192, subd. (a)) and assault with a firearm (§ 245, subd. (a)), and found true allegations that appellant personally used a firearm (§ 12022.5, subd. (a)) and personally caused great bodily injury (§ 12022.7, subd. (a)). (7 RT 1266-1268.)

The 2003 assault with a deadly weapon conviction was alleged in this case as both a prior serious felony (§ 667(a)) and as a prior serious or violent strike conviction (§§ 667, subds. (b) - (i) (hereafter section 667(b)-(i)) and 1170.12.) (1 CT 185.) Appellant agreed to waive a jury trial on the truth of his 2003 conviction and the trial court took a formal change of plea on the prior conviction. (7 RT 1270, 1276-1280.) The prior conviction was alleged as a felony conviction of assault with a deadly weapon in violation of section 245, subdivision (a)(1), a serious felony prior conviction within the meaning of sections 667(a)(1), 668, and 1192.7, subdivision (c), and a strike prior conviction within the meaning of sections 667(b)-(i), 668, and 1170.12. (1 CT 185.) When discussing the plea, both appellant and his attorney stated that the prior conviction was a misdemeanor. (7 RT 1276-1277.) But the court stated that it was alleged as a felony conviction, and

asked appellant if he wanted to admit to having suffered that felony conviction. Appellant said yes. (7 RT 1277.)

The trial court also explained to appellant the consequences of admitting that prior serious felony conviction. (7 RT 1279.) The court stated that the prior conviction was a serious felony prior and a strike prior; that as a consequence of admitting this prior felony conviction, probation would be denied and the sentence would be doubled. (7 RT 1279.) Knowing and understanding those facts, appellant admitted the existence of the prior felony violation of assault with a deadly weapon. (7 RT 1279.) Appellant's attorney concurred in appellant's admission. (7 RT 1280.) The prosecutor noted that the conviction was a prior serious felony conviction within the meaning of sections 667(a)(1), 668 and 1192, as well as a strike conviction. (7 RT 1280.)

On January 7, 2010, appellant was sentenced to a total term of 24 years in prison. The court sentenced appellant on count 2 (assault with a firearm) to the middle term of 6 years, doubled to 12 years because of the prior strike conviction, and stayed the sentence on count 1 (attempted voluntary manslaughter) pursuant to section 654. The court also added consecutive terms of 4 years for personal use of a firearm, 3 years for causing great bodily injury, and 5 years for having a prior serious conviction. (9 RT 2211-2212; 2 CT 406-407.) The court included the consecutive five-year term for the prior serious felony conviction (section 667(a)) in appellant's sentence. (9 RT 2211-2212; 2 CT 406-407.)

Appellant appealed. The Fourth Appellate District, Division One, affirmed appellant's conviction in an unpublished opinion filed on May 4, 2011. This Court granted review on the issue as previously quoted.

STATEMENT OF FACTS

After the bars closed on September 17, 2007, appellant's friends got into a fight with a few other young men outside a taco shop in Pacific

Beach. (4 RT 615-616; 5 RT 827-829, 871; 6 RT 944-946, 948.) The fight escalated as appellant and many other bystanders joined in. (4 RT 524, 621, 638-639; 5 RT 829, 859, 872-873; 6 RT 918, 948-949.) One man, never identified, was badly beaten. Appellant was stomping on his head. (5 RT 842-845.)

Eric Joseph and his friends walked past the taco shop as the fight occurred. (4 RT 658-660; 5 RT 842; 6 RT 916.) Someone from this group punched appellant to get him to stop stomping on the man on the ground. (4 RT 663; 5 RT 842-843.) Joseph and another friend tried to separate the participants and end the fight, then walked away down the street. (5 RT 843-844; 6 RT 920.)

A few blocks from the taco shop, appellant ran up to Joseph and his group, wearing gloves and holding a 9 millimeter semi-automatic. (4 RT 566, 664-665, 6 RT 921.) Appellant yelled angrily, "Who pushed me down?" (6 RT 922, 924, 1039-1040.) While his friends were yelling, "He's got a gun!" and scattering, Joseph moved toward appellant to tackle or punch him. Appellant shot Joseph three times. (5 RT 844-847, 851; 6 RT 922, 924.) One bullet entered Joseph's right hip, fracturing his hip and pelvis; another went through his left thigh; and the third bullet went through Joseph's calf, shattering his fibula. Joseph's left femur was broken. Joseph was seriously injured. He could not walk for six weeks, and he will have permanent residual damage from the shots. (4 RT 438-453; 5 RT 847.)

ARGUMENT

I. APPELLANT'S PRIOR FELONY CONVICTION REMAINED A FELONY CONVICTION FOR PURPOSES OF THE FIVE-YEAR ENHANCEMENT FOR A PRIOR SERIOUS FELONY, EVEN THOUGH HIS PRIOR FELONY CONVICTION WAS LATER REDUCED TO A MISDEMEANOR AND DISMISSED

Appellant contends the appellate court erred in permitting his sentence to be enhanced pursuant to section 667(a) for his prior serious conviction, arguing that the prior conviction was reduced to a misdemeanor under section 17(b)(3), before it was dismissed under section 1203.4.[2] But

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[2] Section 667, subdivision (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.

Section 17, subdivision (b) provides in part:

> (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.)

(continued...)

appellant was convicted of a prior serious felony in 2003, so in accord with the express terms of section 667(a) and the Constitution, article I, section 28, subdivision (f)(4), he was a person "who previously has been convicted of a serious felony," and therefore the trial court correctly imposed a five-year enhancement on his sentence when he subsequently chose to commit another serious felony. His 2003 serious felony conviction was never vacated or nullified for purposes of subsequent criminal proceedings, and remained a felony conviction from 2003 until 2006, when a trial court reduced the conviction to a misdemeanor pursuant to section 17(b)(3) before vacating the plea and dismissing the charges under section 1203.4. Appellant relies on the phrase in subdivision (b) of section 17 that "it is a

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(...continued)

Section 1203.4, subdivision (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 with-draw 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.)

misdemeanor *for all purposes* under the following circumstances . . ." (§ 17(b) (italics added)) to argue that his 2003 serious felony conviction should not have been used in 2010 to enhance his 2010 serious felony conviction with an additional five-year term. His argument lacks merit because the requirement that any prior serious felony conviction subjects the repeat offender to greater punishment does not conflict with the statutory leniency of section 17(b). He had a serious felony conviction from 2003 to 2006, and that was the basis for the five-year enhancement when he chose to re-offend. The appellate court correctly held that a felony conviction once imposed is not vacated or reduced for purposes of recidivist enhancement under section 667(a), based on the entire corrective scheme and constitutional mandate for enhanced punishment of serious felony recidivists, in combination with the statutory provisions promoting rehabilitation of offenders through judicial and legislative leniency. (Slip opn. at pp. 8-12.)

The Court of Appeal's analysis is correct for three reasons. First, the plain language of the statute and of the California Constitution require that *any* prior felony conviction be used to enhance a subsequent serious felony conviction punishment. (Cal. Const., art. I, § 28, subd. (f)(4); § 667(a).) This clear language controls. Second, the rehabilitative purpose of section 17(b), like section 1203.4, would not be served by permitting a convicted felon to escape harsher punishment upon subsequent felony behavior. If interpreted as appellant seeks, section 17(b) would give no incentive to a felon to continue to act lawfully, whereas the continuing ability to use the prior felony in subsequent criminal proceedings provides a powerful incentive not to re-offend. And third, the Court of Appeal's ruling is consistent with this Court's interpretation of section 17(b), and appellant's contention is not. This Court has found that when probation is granted to a felon, the Legislature's mandatory statutory rehabilitation (§ 1203.4) and

the courts' discretionary rehabilitation power (§ 17(b)) must be read together to "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.*" (*People v. Feyrer* (2010) 48 Cal.4th 426, 439-440, italics added, quoting *People v. Banks* (1959) 53 Cal.2d 370, 391.) Appellant is asking this Court to repudiate that interpretation of section 17(b), with no support from any Court opinion or legislative directive. Both the law and logic both lead to an affirmation of the lower court's decision.

A. The Plain Language of Section 667(A) and the California Constitution Require the Enhancement For *Any Prior Felony Conviction*; a Conviction Occurs Upon Adjudication of Guilt

The plain language of the statute and constitution require that appellant's prior serious felony be used to enhance his current serious felony sentence. Section 667(a) was added to the Penal Code by direct action by the People of the State of California as part of the 1982 Proposition 8, a voter initiative in response to rising crime rates, called the Victims' Bill of Rights, that demanded greater public safety. The electorate demanded that serious felony recidivists be punished more harshly to ensure public safety. (*People v. Prather* (1990) 50 Cal.3d 428, 435 (*Prather*).)

Specifically, the electorate intended to increase punishment for serious felony recidivists and effectively deter crime by enacting together the constitutional command that prior felony convictions be used without limitation for purposes of enhancement of sentence in criminal proceeding, and the statutory mechanism that a five-year enhancement be added to the sentence of serious felons who had previously committed a serious felony

in all cases, *including those in which the offender had received probation for the prior serious felony offense*. (*Prather, supra*, 50 Cal.3d at pp. 435-436 (italic added); *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 247; see also *People v. Jackson* (1985) 37 Cal.3d 826, 833 (*Jackson*), overruled on other grounds in *People v. Guerrero* (1988) 44 Cal.3d 343, 355-356.) Ballot arguments in favor of the initiative emphatically expressed the citizenry's anger at both the courts and the Legislature for failing to deter and punish dangerous felons adequately. (*Prather, supra*, at p. 435, fn. 7.) Under prior law, felony convictions resulting in probation could not be used to enhance a recidivist's sentence. Proposition 8 reversed that rule, among others. The overarching goal of the People to protect public safety by increased punishment of those who repeatedly commit felonious acts was embedded in the State's Constitution:

> The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern. [¶] The rights of victims pervade the criminal justice system, encompassing . . . the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be . . . sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance. [¶] To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives. . . .

(Cal. Const., art. I, § 28, subd. (a).)

To effect an increase in public safety, the People demanded increased punishment of recidivist serious felony offenders, including those who had been granted probation for earlier felonies. In 1982 there was a habitual offender statute, but it was limited to those who had been imprisoned for

the earlier violent felony.[3] The People amended the California Constitution to demand public safety and to require that any prior felony conviction be used without limitation for enhancement of sentences in any criminal proceeding:

> (f) Use of Prior Convictions. Any 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. . . .

(Cal. Const., art. I, § 28, subd. (f), now subd. (f)(4).)

To implement this constitutional principle, Proposition 8 added section 667 to the Penal Code, creating an enhancement of five years for "any person convicted of a serious felony who *previously has been convicted of a serious felony*." (Italics added.) As initially enacted, section 667 provided:

> **667. Habitual criminals; enhancement of sentence; amendment of section**
>
> (a) 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.

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[3] Before Proposition 8, section 667.5, subdivision (a), enhanced prison terms for current violent felony offenders by three years for each prior separate prison term for a violent felony within the past ten years. Section 667.5, subdivision (b), provided for a one-year enhancement for prior prison terms within the previous five years, substantially the same as the current subsection. Section 667.6 provided for a five-year enhancement for prior sex-crime felonies with prison terms for certain sex offenders, and a ten-year enhancement for sex offenders with two prior sex-crime felonies with prison terms.

(b) This section shall not be applied when the punishment imposed under other provisions of law would result in a longer term of imprisonment. *There is no requirement of prior incarceration or commitment for this section to apply.*

(c) The Legislature may increase the length of the enhancement of sentence provided in this section by a statute passed by majority vote of each house thereof.

(d) As used in this section "serious felony" means a serious felony listed in subdivision (c) of Section 1192.7.

(e) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors.

This statute differs from the constitutional provision by narrowing the class of recidivists to receive an additional five-year term to the most serious offenders: it applies only to those who commit a current serious felony, and who also have a prior serious felony conviction. It does, however, broaden the pre-existing habitual offender statute, because that previous law provided an enhanced sentence only for those recidivists who had been imprisoned for their previous crimes. Felons who had been given the opportunity to reform, by a grant of probation for the earlier felony, and yet chose to re-offend, were treated as first-timers under the previous statute. (See prior §§ 667.5, 667.6.) Those who had received clemency from the courts the first time around, yet chose to violate that trust, were given no additional punishment under the old law. There was no incentive for the offender to use the grant of probation to rehabilitate himself, as the serious felony offender faced no additional punishment for committing an additional serious felony. Under the new habitual offender statute, section 667, there was no requirement of prior incarceration for this section to apply. (§ 667(b).)

Additionally, unlike the earlier statute, this new habitual-offender statute requires that the serious felony recidivist must receive the five-year enhancement for each separate prior serious felony conviction. The terms of the current offense and of each enhancement must run consecutively, to ensure that the offender serve the intended longer prison term. (§ 667(a).) And the People made it more difficult for the Legislature to water down the punishment, by providing that the Legislature could increase the punishment for recidivists by majority vote, but could not otherwise amend this statute except by a vote of two-thirds of the Legislature or by vote of the electorate. (§ 667(c), (e).)

In the Ballot Pamphlet sent to all voters in advance of the election, the Legislative Analyst explained the purpose of the statute:

> **Longer Prison Terms**. Under existing law, a prison sentence can be increased from what it would otherwise be by from one to ten years, depending on the crime, if the convicted person has served *prior prison terms*, and a life sentence can be given to certain repeat offenders. Convictions resulting in probation or commitment to the Youth Authority are generally not considered for the purpose of increasing sentences, . . .
>
> This measure includes two provisions that would increase prison sentences for persons convicted of specified felonies. First, upon a second or subsequent conviction for one of these felonies, the defendant could receive, on top of his or her sentence, an *additional* five-year prison term for each such prior conviction, regardless of the sentence imposed for the prior conviction. . . . Second, any prior felony conviction could be used without limitation in calculating longer prison terms.

(Analysis by the Legis. Analyst, Ballot Pamp., Proposed Stats. & Amends. to Cal. Const., Primary Elec. (June 8, 1982) pp. 54–55 (italics in original).)

The rules of statutory interpretation are well known and oft-repeated. Initiatives are interpreted in the same manner as statutes. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 979. The primary goal of statutory construction is to ascertain and effectuate legislative or electorate intent.

(*Ibid*; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037; *People v. Gardeley* (1996) 14 Cal.4th 605, 621.) When interpreting an initiative, '[T]he voters should get what they enacted, not more and not less.'" (*People v. Superior Court* (*Pearson*) (2010) 48 Cal.4th 564, 571 (*Pearson*), quoting *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114.) This Court should look first to the initiative's, or statute's, language, "giving the words their ordinary meaning and construing this language in the context of the statute and initiative as a whole." (*Pearson*, at p. 571.) The ordinary meaning of the statute's words are generally the most reliable indicator of the legislative intent. (*Arias v. Superior Court*, *supra*, 46 Cal.4th at p. 979.) If the language is clear, courts should apply the apparent meaning. If ambiguity exists, courts should consult extrinsic indicia of intent as contained in the ballot summaries and arguments of an initiative, and the legislative history of a statute. (*Ibid.*; *Ramos v. Superior Court* (2007) 146 Cal.App.4th 719, 727.) In the case of an initiative, the analysis and arguments contained in the official election materials submitted to the voters assist in interpreting the electorate's intent. (*Professional Engineers in California Government v. Kempton*, *supra*, 40 Cal.4th at p. 1050.) Once the legislative or electorate intent has been ascertained, statutes must be given a reasonable construction that conforms to that intent. (*Arias v. Superior Court, supra*, 46 Cal.4th at p. 979.) The intent prevails over the letter, and the letter will, if possible, be read so as to conform to the spirit of the act. (*Ibid.*) A literal construction of an enactment, however, will not control when such a construction would frustrate the manifest purpose of the enactment as a whole. (*Ibid.*; *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1126.)

Further, the Constitution is the voice of the People and must be given effect as the paramount law of the state. (*People v. Parks* (1881) 58 Cal. 624, 635.) Because statutes are subordinate to the Constitution, all statutes

must conform to the Constitution. (*Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564, 579.) When there is a conflict between a statute and the Constitution, the Constitution prevails. (*People v. Navarro* (1972) 7 Cal.3d 248, 260.)

Here, the clear language of section 667(a) and the constitutional mandate require that *any prior serious felony conviction* be used to enhance subsequent serious felony sentences, including those prior serious felony convictions for which the offender was not sentenced to prison. Appellant fits this category. In 2003 he was convicted of a serious felony, assault with a deadly weapon.[4] (2 CT 260.) This is not disputed. That crime was charged as a felony, and appellant pled guilty to a felony in a favorable plea deal in which four other serious felony charges were dismissed. The court exercised its leniency and granted probation to appellant, but that did not change the character of the offense.

When an alternately punishable offense is charged as a felony and not reduced by a magistrate at or before the preliminary examination, it is a felony for every purpose up to judgment. (*People v. Williams* (2010) 49 Cal.4th 405, 461, fn. 6; *Banks, supra*, 53 Cal.2d at pp. 381-382; *People v. Moomey* (2011) 194 Cal.App.4th 850, 857.) At sentencing, the court can sentence the defendant to state prison, in which case the judgment remains a felony, or to a misdemeanor sentence, in which case the judgment is a

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[4] Assault with a deadly weapon is punishable by imprisonment in the state prison for two, three or four years, or in a county jail for not more than one year, or by a fine or both a fine and imprisonment. (§ 245, subd. (a)(1).) Crimes that are punishable by death or by imprisonment in a state prison are felonies. Other crimes are misdemeanors, if punishable in county jail, or infractions. (§ 17(a).) A crime that is alternately punishable as a felony or a misdemeanor is sometimes known as a "wobbler." (See *People v. Williams, supra,* 49 Cal.4th 405, 461, fn. 6; *People v. Moomey, supra,* 194 Cal.App.4th 850, 857.)

misdemeanor. (*Banks*, *supra*, 53 Cal.2d at pp. 381-382; *Feyrer*, *supra*, 48 Cal.4th at pp. 438-439.)

The trial court has a third option of not imposing sentence, but suspending imposition of sentence and granting probation to the offender. In this case, the offense remains a felony. (*Feyrer*, *supra*, 48 Cal.4th at p. 438.) The trial court retains the discretion to reduce the offense to a misdemeanor at any later time. (§ 17(b)(3); *Feyrer*, *supra*, 48 Cal.4th at pp. 438-439; *Meyer v. Superior Court* (1966) 247 Cal.App.2d 133, 139-140 (*Meyer*).) This option gives the court the opportunity to oversee and encourage rehabilitation of the offender. Retaining jurisdiction over a defendant and his conviction through probation is an "'integral and important part of the penological plan of California,'" because the court has plenary power to either reward good behavior by favorably modifying the terms of probation or to punish bad behavior with a range of choices up to and including committing the defendant to prison. (*Feyrer*, *supra*, at p. 438, quoting *Banks*, *supra*, 53 Cal.2d at p. 383.)

While "conviction" can have different meanings in California in different contexts, in the context of habitual criminal statutes a conviction occurs when there is a factual ascertainment of guilt by verdict or plea. (*Feyrer, supra,* 48 Cal.4th at pp. 438-439; *People v. Balderas* (1985) 41 Cal.3d 144, 203; *Banks*, *supra*, 53 Cal.2d at pp. 390-391; *People v. Queen* (2006) 141 Cal.App.4th 838, 842; *People v. Kirk* (2006) 141 Cal.App.4th 715, 718-719; *People v. Williams* (1996) 49 Cal.App.4th 1632, 1637-1638.) An alternately punishable offense is a felony conviction when guilt is admitted or found. (*People v. Balderas*, *supra*, 41 Cal.3d at p. 203; *Banks*, *supra*, 53 Cal.2d at pp. 390-391.) This is appropriate because habitual offender statutes serve to punish criminal behavior. "When the deterrent effect of the law fails and the defendant subsequently commits another felony, he or she becomes a repeat offender and deserves harsher

punishment, regardless of whether judgment and sentence have been pronounced on the initial offense." (*People v. Williams*, *supra*, 49 Cal.App. 4th at p. 1638.) This serves to carry out the intentions behind both sections 667(a) and 17(b). One who commits a serious felony and is convicted of it – here, by pleading guilty – is offered the assistance of the court in rehabilitating himself. He can be relieved of all future disabilities of the felony conviction that inhibit rehabilitation through the procedures afforded by sections 17(b)(3) and 1203.4. But he cannot erase that serious felony conviction for purposes of subsequent increased punishment if he chooses to re-offend.

Here, appellant was convicted of a serious felony in 2003. The offense was reduced to a misdemeanor in 2006, but that reduction was not retroactive. (See *Feyrer, supra*, 48 Cal.4th at pp. 438–439; *Banks, supra*, 53 Cal.2d at p. 388; *Gebremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1482-1483 (*Gebremicael*).) "If ultimately a misdemeanor sentence is imposed, the offense is a misdemeanor from that point on, but not retroactively . . . ." (*Feyrer*, *supra*, 48 Cal.4th at p. 439.) Appellant was convicted of a serious felony from 2003 through 2006, and the reduction of the offense to a misdemeanor in 2006 did not change the character of the offense for the preceding three years.

Banks is the seminal case discussing the post-conviction transformation of a wobbler felony into a misdemeanor. In *Banks*, the defendant had pleaded guilty in 1953 to an alternately punishable offense. Imposition of sentence was suspended and he completed his term of probation without violation. He was, therefore, entitled to have the prior charge dismissed under section 1203.4, but he never applied for that relief. In 1958, he pleaded guilty to being a felon in possession of a firearm, then argued on appeal that because in his earlier case imposition of sentence was

suspended and he was placed on probation, and successfully completed probation, he was entitled to vacation and dismissal of that earlier charge under section 1203.4, even though he had not made a formal motion to the court for that relief. (See *Banks, supra*, 53 Cal.2d at pp. 375, 388.) This Court denied his claim and upheld his conviction as a felon in possession of a firearm in an extensive opinion describing the trial court's discretion in sentencing a defendant for an alternately punishable offense.[5] When the defendant was convicted of an alternately punishable offense, the trial court did not impose a misdemeanor sentence, which would have reduced the offense at that time. The defendant was, and remained, a felon, even though imposition of his sentence was suspended and he completed probation without a sentence ever being imposed, and he was never sent to prison. (*Id.* at p. 387.) As stated in *Banks*, "He does, however, for some specific purposes-for administration of the probation law and other laws expressly made applicable to persons so situated-stand convicted of a felony." (*Ibid.*)

This Court explained the balancing of benefits to the offender and protection of society that is considered by a court in exercising its sentencing discretion that comes with an alternately punishable offense:

> Thus, when he suspends pronouncement of sentence for an alternatively punishable offense, it is to be assumed that while he did not wish to deprive the defendant of his civil rights and thereby unnecessarily hamper defendant's efforts to rehabilitate himself (by stigmatizing him even temporarily as one against whom a judgment of conviction of felony and sentence to prison

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[5] At the time of *Banks*, section 17 did not permit the reduction of an alternately punishable offense to a misdemeanor after the initial sentencing hearing, but the Court recognized that a trial court had inherent power to reduce the offense during the probationary period by revoking probation and imposing a misdemeanor sentence. (*Banks, supra*, 53 Cal.2d at p. 383, fn. 7.)

> had been entered) the judge also did not wish to classify the defendant as a mere misdemeanant whose offense would not be available, for example, to increase defendant's punishment if defendant should thereafter prove himself a recidivist.

(*Banks*, *supra*, 53 Cal.2d at pp. 387-388.) Because the defendant did not ask the court for expungement of his conviction in appreciation of the clemency offered to him by suspension of imposition of sentence, he remained a felon and this Court affirmed the defendant's conviction for being a felon in possession of a firearm. (*Id.* at pp. 388, 391.)

Banks also argued that he had never been convicted of the earlier charge, because imposition of sentence was suspended, probation was granted, and the term of probation expired without sentence ever being imposed. (*Banks*, *supra*, 53 Cal.2d at pp. 388-389.) This Court ruled that even if the defendant had obtained the statutory dismissal of his earlier charge, the "prior conviction would be available to support a subsequent determination of habitual criminality because the habitual criminal statute . . . 'relates to a prior conviction of felony, and not to the manner in which the judgment on the conviction has been expiated.'" (*Id.* at p. 390, quoting *People v. Rosencrantz* (1928) 95 Cal.App. 92, 94.) The offender was convicted of the earlier charge when he pleaded guilty and this conviction did not evaporate. This rule applies to appellant. Section 667(a) applies to "any person convicted of a serious felony who previously has been convicted of a serious felony." (§ 667(a).) Appellant is a person convicted of a serious felony who previously was convicted of a serious felony. From 2003 through 2006 he was a person convicted of a serious felony. That status was mitigated in 2006 but not vacated. The fact that the 2003 judgment was later expiated by reduction to a misdemeanor does not change the fact of that serious felony conviction. (*Banks*, *supra*, 53 Cal.2d at p. 390.)

In *Moomey*, the defendant was charged with being an accessory to a felony, second degree burglary. (See § 460.) Second degree burglary is punishable as a felony or as a misdemeanor, and there was no evidence whether the burglar he helped had been sentenced to a felony or a misdemeanor. He argued that therefore there was insufficient evidence to show that he was an accessory to a felony. (*Moomey*, *supra*, 194 Cal.App.4th at pp. 856-857.) The court ruled that an alternately punishable offense is a felony at the time it is committed and remains a felony unless and until the principal is convicted and sentenced to a misdemeanor. But even if the principal were ultimately sentenced to a misdemeanor, that misdemeanor status would not be given retroactive effect. (*Id.* at p. 857, citing *Banks*, *supra*, 53 Cal.2d at pp. 381-382, and *Feyrer*, *supra*, 48 Cal.4th at p. 439.) The burglary was a felony when the principal committed it and when the defendant aided her in avoiding arrest. (*Moomey*, *supra*, at p. 858.) Similarly here, appellant was convicted of a serious felony conviction when he pleaded guilty in 2003, even though he received an expiated final judgment after completing three years of probation. Under the plain language of section 667(a), he properly received the five-year enhancement for that prior serious felony conviction.

B. Appellant's Interpretation of Section 17(B) Is Contrary to the Rehabilitative Purpose of That Section

Appellant contends that the language of section 17(b) – that an alternately punishable crime "is a misdemeanor for all purposes" when the court declares an offense to be a misdemeanor after a period of probation – trumps the language of section 667(a) that imposes a five-year enhancement on "any person convicted of a serious felony who previously has been convicted of a serious felony." (ABOM 11-29.) But this Court has explained the legislative intent of section 17, and that its statutory

rehabilitation reduction procedure is subject to the exception for subsequent criminal proceedings:

> [The] manifest, reasonable, legislative purpose (here, the purpose expressed by section 17 of the Penal Code) [is] that an alternatively punishable offense remains a felony until pronouncement of misdemeanor sentence or, if imposition of sentence is suspended, the purpose expressed by section 1203.4 read with section 17 that the offense remains a felony until the statutory rehabilitation procedure has been had, at which time the defendant is restored "to his former status in society insofar as the state by legislation is able to do so, with one exception, namely, that . . . the record in the criminal case may be used against him for limited purposes in any criminal proceeding thereafter brought against him."

(*Banks*, *supra*, 53 Cal.2d at p. 391, quoting *Stephens v. Toomey* (1959) 51 Cal.2d 864, 871; see also *Feyrer*, *supra*, 48 Cal.4th at pp. 439-440.)

Section 17 is a classification provision in the preliminary provisions of the Penal Code. At different procedural stages, both the prosecutor and the court have the power to classify as either a felony or a misdemeanor certain crimes that the Legislature has recognized could be punished in alternate ways. The People have the initial discretion to charge an alternately punishable offense as either a misdemeanor or a felony, depending on the gravity of the crime. (§ 17(b)(4); see *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 82.) A magistrate can determine a case to be a misdemeanor at or before the preliminary examination or before ordering the defendant to be held to answer the complaint. (§ 17(b)(5).) A court can reduce the offense to a misdemeanor at the initial sentencing after conviction. (§ 17(b)(1), (3).) At that time, the nature and circumstances of the offense may have been fleshed out at trial, along with the defendant's reasoning for his acts and / or remorse, if applicable, along with consideration of the defendant's criminal history. (See *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 981-982.) In 1963, the Legislature

also added the option of judicial reduction of the offense at any time after granting probation. (Stats.1963, ch. 919, pp. 2169-2170, § 1.) This could be during the probationary period, at its conclusion, or even any time after probation has expired. (*Meyer*, *supra*, 247 Cal.App.2d at pp. 139-140.)

Between the time of initial granting of probation and a later time, the only factor that can change is the defendant's post-offense behavior. The purpose of the amendment allowing later reduction of the class of the offense is to reward defendant's successful performance on probation, to further his rehabilitation, and to provide an incentive for continued good behavior. Discussing this amendment and the lack of outer time limit for expiation of the offense, an appellate court found:

> [T]he Legislature evidently intended to enable the court to reward a convicted defendant who demonstrates by his conduct that he is rehabilitated. Thus, the word "thereafter" should not be unduly restricted to the probationary period for there is even greater reason for rewarding a convicted defendant who continues to demonstrate his rehabilitation long after his probation has expired, when he is no longer under the constant supervision of a probation officer.

(*Meyer*, *supra*, 247 Cal.App.2d at p. 140.) The court analogized to the power of a court to expunge a felony or misdemeanor under § 1203.4. The expungement power, too, advances the rehabilitation of the offender and gives him a strong incentive to follow the law while on probation.

> The expungement of the record under section 1203.4 is also a reward for good conduct and has never been treated as obliterating the fact that the defendant has been convicted of a felony. . . . "But it cannot be assumed that the legislature intended that such action by the trial court under section 1203.4 should be considered as obliterating the fact that the defendant had been finally adjudged guilty of a crime. . . ." Therefore, a

> conviction which has been expunged still exists for limited purposes . . . .

(*Ibid.*, quoting *In re Phillips* (1941) 17 Cal.2d 55, 61.) In the 1963 amendment, therefore, the Legislature simply extended the time in which a trial court could grant statutory clemency to one convicted of an alternately punishable felony without expanding the reach of the clemency. This is not the critical portion of section 17 on which appellant relies.

Appellant's argument rests on the phrase in section 17 that an offense that is reduced is "a misdemeanor for all purposes." This phrase was added to section 17 in 1874. (Code Am. 1873-1874, ch. 196, p. 455, § 1.) After the amendment in 1874, section 17 provided, in its entirety:

> **Felony or misdemeanor defined.** A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the state prison.

(*Ibid.*)

If a court in its discretion decides to impose a misdemeanor sentence, based on the nature and circumstances of the crime and of the defendant at the conclusion of all court proceedings, then the defendant is not deprived of his civil rights and is able to rehabilitate himself. This Court has consistently interpreted this section in conjunction with section 1203.4, as both are legislative grants of clemency that advance the rehabilitation of an offender. (*Banks*, *supra*, 53 Cal.2d at p. 391; see also *Feyrer*, *supra*, 48 Cal.4th at pp. 439-440.) The current section 17 gives the offender an extended period in which to earn the clemency of the court by demonstrating rehabilitation by his good conduct through the probationary period and beyond. In these circumstances, he is considered a

misdemeanant for all purposes that assist and reward his rehabilitation, but he is not entitled to that leniency if he chooses to commit another serious felony.

C. Appellant's Interpretation Is Inconsistent With This Court's Precedents

In *Feyrer*, the defendant was convicted by plea of assault by means of force likely to produce great bodily injury, an alternately punishable offense. He also admitted he inflicted great bodily injury on the victim. (*Feyrer, supra*, 48 Cal.4th at p. 430.) The parties agreed that Feyrer would receive probation, and the conviction would be considered a strike if he committed another offense. (*Id.* at pp. 431-432.) The defendant performed well on probation, and after early termination of probation and his postplea behavior, asked the court to recharacterize his crime as a misdemeanor pursuant to section 17(b)(3) – a post-conviction reduction, as in this case. (*Id.* at pp. 432-433.) The trial court denied the defendant's request, expressing the view that it had no such authority because the defendant had inflicted great bodily injury upon the victim (*Id.* at p. 433.)

This Court ruled that the trial court did have that authority to grant a post-conviction reduction if it chose to. (*Feyrer, supra*, 48 Cal.4th at pp. 440-441.) The Court noted that the crime would remain a felony for Three Strikes purposes if the defendant were to commit a felony offense in the future, because the Three Strikes Law contains an exception for alternately punishable offenses that are reduced to misdemeanors at initial sentencing (*Feyrer, supra*, 48 Cal.4th at p. 442, fn. 8; §§ 17(b)(1), 667, subd. (d)(1), 1170.12, subd. (b)(1).) That exception is critical to the Three Strikes Law, as otherwise the plea of guilty to the alternately punishable offense remains a serious felony conviction even if the offense is later recharacterized as a misdemeanor. (*Feyrer, supra,* 48 Cal.4th at pp. 438-439; *People v. Balderas, supra*, 41 Cal.3d at p. 203; *Banks, supra*, 53 Cal.2d at pp. 390-

391; *People v. Queen, supra*, 141 Cal.App.4th at p. 842; *People v. Kirk, supra*, 141 Cal.App.4th at pp. 718-719; *People v. Williams, supra*, 49 Cal.App.4th at pp. 1637-1638.)

The section 17(b)(3) rehabilitory procedure for post-conviction reduction to a misdemeanor has been applied only to restore offenders to their civil rights and to rehabilitate themselves, and it has not been applied in subsequent criminal proceedings to treat felony offenders as equal to those with a blameless background. Reinstating civil benefits to a reformed misdemeanant makes sense; treating a former serious felony offender who chooses to re-offend the same as a first-time offender does not. Restoring civil norms, and particularly the ability to obtain steady employment, serves to rehabilitate the offender without endangering public safety. There is no reason to grant the benefit of reduction to a misdemeanor to one who subsequently commits another serious felony.

In *Gebremicael,* on which appellant relies, the post-conviction reduction assisted the offender in reforming his life by permitting him to take on the difficult job of teaching. (See ABOM 24-25.) In *Gebremicael*, the plaintiff pleaded no contest to discharging a firearm in a grossly negligent manner, a felony, and was placed on probation with the imposition of sentence suspended. Four years later the court reduced the felony conviction to a misdemeanor pursuant to section 17(b)(3), and later yet granted the plaintiff's motion to withdraw his plea and dismiss the conviction, pursuant to section 1203.4. (*Gebremicael, supra*, 118 Cal.App.4th at p. 1480.) Meanwhile, he applied for a teaching credential and informed the credentialing commission of his prior conviction and its reduction to a misdemeanor. (*Ibid.*) The commission denied the credential, because the Education Code required it to deny applications for credentials to any person who had been convicted of a serious felony, and the plaintiff's prior conviction was a serious felony for that purpose. (*Ibid.*) The

appellate court reversed. The court based its decision on the language in section 17 that an alternatively punishable offense "*is a misdemeanor for all purposes* under the following circumstances: [¶] . . . [¶] (3) When the court grants probation to a defendant without imposition of sentence and ... on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (*Gebremicael, supra*, 118 Cal.App.4th at pp. 1482-1483 [italics added].) The court also relied on dicta in *People v. Banks* that a person whose felony conviction is reduced to a misdemeanor will no longer be classified as one convicted of a felony within the meaning of section 12021 (possession of a firearm by a felon). (*Id.* at p. 1485, citing *Banks, supra*, 53 Cal.2d at p. 388.) The court also pointed to the two statutes that specifically refer to the misdemeanor reduction procedure: Business and Professions Code section 6102, subdivision (b), provides that a felony later reduced to a misdemeanor is still treated as a felony for purposes of an immediate suspension of an attorney convicted of a felony; and the Three Strikes Law provides that a prior felony conviction retains its status as a felony even if it is reduced after initial sentencing to a misdemeanor under section 17. (*Gebremicael, supra*, 118 Cal.App.4th at. pp. 1486-1487, citing §§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) In contrast, there was no reference to the misdemeanor reduction process in the Education Code. Permitting the plaintiff to enter a career of hard work furthered and facilitated his rehabilitation that was started with the reduction of his prior serious felony to a misdemeanor.

After this statutory rehabilitation procedure, California considers the offender to be only a misdemeanant, allowed to possess a firearm. (*People v. Gilbreth* (2007) 156 Cal.App.4th 53, 57 [after an alternately punishable offense has been reduced to a misdemeanor, the defendant is no longer a felon for purposes of section 12021, possession of a concealed firearm].)

Owning a firearm is a civil right available to those who have not been convicted of felonies. This civil right is restored to reformed and rehabilitated felons who recognize and accept the court's act of grace and clemency by seeking formal dismissal of the prior charge under section 1203.4. (*Banks*, *supra*, 53 Cal.2d at p. 388.)

Similarly, one whose felony has been reduced to a misdemeanor is thereafter entitled to vote. (*League of Women Voters of California v. McPherson* (2006) 145 Cal.App.4th 1469, 1485.) Reduction of a felony to a misdemeanor could prevent deportation of an alien. (See 8 U.S.C. § 1227(a)(2)(A)(iii) ["Any alien who is convicted of an aggravated felony at any time after admission is deportable."]; see also *People v. Kim* (2009) 45 Cal.4th 1078, 1088 & fn. 5.)

But nothing in these cases changes the basic rule of statutory interpretation here, to follow the words of the statute to effect the electorate's intent that any prior serious felony conviction shall be used to add a five-year enhancement to one who commits another serious felony. And these cases do not vary from the "manifest, reasonable, legislative purpose" of section 17 that an alternatively punishable offense remains a felony in any criminal proceeding thereafter brought against the offender. (*Banks*, *supra*, 53 Cal.2d at p. 391; *Stephens v. Toomey, supra*, 51 Cal.2d at p. 871; *Feyrer*, *supra*, 48 Cal.4th at pp. 439-440.) Appellant was convicted of a serious felony in 2003. The trial court granted to him the rehabilitory aid of post-conviction reduction of his serious felony to a misdemeanor. But that did not change, erase or vacate the serious felony conviction that occurred in 2003. When he chose to shoot a man three times at close range in 2007, the trial court correctly imposed the consecutive five-year term for serious felony recidivists.

Gebremicael is consistent with *Banks* and *Feyrer*, and respondent's position here, that the post-conviction reduction procedure restores civil

rights to assist rehabilitation, but that clemency should not provide an unwarranted benefit to those, like appellant, who continue to commit serious felonies. Appellant's contentions to the contrary lack merit. Appellant's first contention is that the reduction to a misdemeanor was before and separate from the dismissal under section 1203.4. (ABOM 7-11.) This is true but does not affect the case. Appellant distinguishes the facts of *Banks* and of *Freyer* to distance himself from the statement in those opinions that section 17 and section 1203.4 should be read together. But he provides no compelling reason why that principle should not apply here. Granted, *Banks* and of *Freyer* arise in different contexts from this case, and neither appellant nor respondent have found any cases that directly address the interplay of section 667(a) and section 17(b). Sections 667(a) and 17(b), however, and especially the post-conviction reduction procedure of section 17, both represent the Legislature's assistance to offenders who choose to rehabilitate themselves. Appellant has provided no alternate purpose or intent for the Legislature's authorization of discretionary post-conviction reduction of an alternately punishable offense, other than a bland statement that an offense reduced to a misdemeanor under section 17 is reduced in all circumstances for all purposes, in civil as well as criminal proceedings. (ABOM 7.) Appellant cites *Gebremicael* for that statement, but *Gebremicael* does not include a reference to or address future criminal proceedings. (ABOM 7-8; *Gebremicael*, *supra*, 118 Cal.App.4th at p. 1483.) When appellant's offense was reduced to a misdemeanor, it became a misdemeanor, whether or not it was also dismissed under section 1203.4. But appellant had a serious felony conviction from 2003 through 2006, and the trial court properly enhanced his sentence under section 667(a) because in 2010 he was a "person convicted of a serious felony who previously has been convicted of a serious felony" within the language and meaning of section 667(a).

D. Appellant's Reliance on the Language of the Three Strikes Law Is Misplaced

Appellant next argues that in 1982, the electorate and the Legislature did not intend the operation of section 17(b) to be limited by section 667(a), and that this intention is demonstrated by the provisions in the Three Strikes law of 1994 that exclude the operation of section 17(b). (ABOM 11-18.) It is the Three Strikes Law, and not the sentence-enhancing section 667(a) that makes this distinction. Sections 667, subdivision (d)(1), and 1170.12, subdivision (b)(1), describe a narrow exception to strike treatment for prior alternately punishable convictions for which the court grants misdemeanor status at the initial sentencing. (*People v. Queen*, *supra*, 141 Cal.App.4th at p. 842.) If the Three Strikes Law did not make that specific exception, then the general rule would apply that a conviction occurs upon the ascertainment of guilt, either by guilty plea or by verdict, in the context of habitual offender statutes. (*Feyrer, supra,* 48 Cal.4th at pp. 438-439; *People v. Balderas, supra*, 41 Cal.3d at p. 203; *Banks*, *supra*, 53 Cal.2d at pp. 390-391; *People v. Queen, supra*, 141 Cal.App.4th at p. 842; *People v. Kirk, supra*, 141 Cal.App.4th at pp. 718-719; *People v. Williams, supra*, 49 Cal.App.4th at pp. 1637-1638.) Under Three Strikes, if the court classifies the offense as a misdemeanor at the initial sentencing, then that determination is retroactive to the date guilt was decided, for the purpose of making that conviction not a strike. (*People v. Queen, supra*, at pp. 842-843.) It is sections 667, subdivision (d)(1), and 1170.12, subdivision (b)(1), that carve out a narrow exception to strike treatment for prior serious felony convictions that are initially sentenced as misdemeanors or declared by the court to be misdemeanors. (*Id.* at p. 843.) Section 667(a) does not contain this exception, so any alternately punishable serious offense to which a defendant pleads guilty or of which he is found guilty remains a serious felony conviction for purposes of section 667(a).

Appellant spells out other differences between the sentencing enhancement of section 667(a) and the alternate sentencing scheme of the Three Strikes Law. (ABOM 15-17.) Appellant describes the sentence enhancement and the separate alternate sentencing scheme as "a finely balanced sentencing scheme, providing for longer sentences, but also for *some leniency for deserving individuals*," and states that the electorate and the Legislature left in place the "the existing leniency available to a defendant who, after having been convicted of a wobbler crime, has convinced a court that *his rehabilitation makes him deserving of reduction of his offense to a misdemeanor*." (ABOM 16-17.) This argument highlights the absurdity of his claim. Appellant stopped being a deserving individual when he shot at Eric Joseph three times, trying to kill him. Appellant did remain law abiding throughout his probation from 2003 through 2006, and received clemency from the court to reward and assist in his reformation. But the very next year he resumed his seriously violent criminal ways. The wisdom of defining a conviction as the factual ascertainment of guilt for purposes of recidivist punishment is shown in this case. Appellant behaved well just long enough to obtain reduction of his offense and dismissal of the charge. But his status as a convicted serious felon remained intact for purposes of subsequent criminal proceedings. Appellant was convicted of a serious felony from 2003 through 2006, and it is that conviction that is referenced in section 667(a) as a basis for the five-year enhancement.

Appellant relies on "settled principles of statutory construction" to conclude that section 17 reductions are "not limited" by section 667(a) or by the constitutional mandate of Article 1, Section 28, subdivision (f)(4). (ABOM 18-20.) The primary goal of statutory construction is to ascertain and implement the electorate's or Legislature's intent. (See *Arias v. Superior Court, supra*, 46 Cal.4th at p. 979.) Appellant has failed to

demonstrate that his desired construction of sections 667(a) and 17 implements a recognized legislative intention. Appellant correctly identifies the legislative intent of section 17's post-conviction reduction procedure as solely to define and classify the offense as either a felony or a misdemeanor. (ABOM 18-20.) Section 17 defines a felony and a misdemeanor but it does not define conviction. Conviction means the factual ascertainment of guilt by verdict or plea in the context of habitual criminal statutes. (*Feyrer, supra,* 48 Cal.4th at pp. 438-439; *People v. Balderas, supra*, 41 Cal.3d at p. 203; *Banks*, *supra*, 53 Cal.2d at pp. 390-391; *People v. Queen, supra,* 141 Cal.App.4th at p. 842; *People v. Kirk, supra,* 141 Cal.App.4th at pp. 718-719; *People v. Williams, supra,* 49 Cal.App.4th at pp. 1637-1638.) That an offense is classified as a misdemeanor for all purposes after a post-conviction reduction does not alter the fact that the offender, appellant here, had a felony conviction at the time of sentencing. (*Ibid.*) "Conviction" is a key element in section 667(a); "conviction" is not defined in or a part of section 17. There is nothing in section 17 that conflicts with the clear language of section 667(a).

Moreover, it is apparent from the plain words of section 17(b)(3) that the purpose of post-conviction reduction is rehabilitory. The only factor that is variable after the time of conviction is the defendant's post-conviction behavior. The circumstances or nature of the criminal act cannot change after it has been completed. As stated in *Meyer*, the legislative intent behind permitting discretionary post-conviction reduction can only be to "enable the court to reward a convicted defendant who demonstrates by his conduct that he is rehabilitated." (*Meyer*, *supra*, 247 Cal.App.2d at p. 140.) This is likely the reason why this Court in *Feyrer* and *Banks* stated that section 17 must be read with section 1203.4, because the reduction procedure, like the vacation and dismissal procedure of

section 1203.4, serve the same purpose of assisting in the rehabilitation of offenders. (*Feyrer, supra*, 48 Cal.4th at pp. 439-440; *Banks, supra*, 53 Cal.2d at p. 391.)

Indeed, in *Banks* this Court explained that when a sentence is not imposed and probation is granted, the "manifest, reasonable, legislative purpose . . . [is] expressed by section 1203.4 read with section 17 that the offense remains a felony until the statutory rehabilitation procedure has been had, at which time the defendant is restored 'to his former status in society insofar as the state by legislation is able to do so, with one exception, namely, that ... the record in the criminal case may be used against him for limited purposes in any criminal proceeding thereafter brought against him.'" (*Banks*, *supra*, 53 Cal.2d at p. 391 [citation omitted].) *Banks* was decided before section 17 was amended to permit post-conviction reduction to a misdemeanor, but it did emphasize the salutary effects of retaining jurisdiction over a crime and the defendant by suspending imposition of sentence and granting probation. (*Id.* at pp. 383-386.) The cases relied on by appellant in support of his theory, *Vessell* and *Perez*, are not relevant here because both involve the reduction of an alternately punishable offense at the initial sentencing, in relation to the Three Strikes Law. (*People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347; *People v. Vessell* (1995) 36 Cal.App.4th 285.) Reduction to a misdemeanor at the initial sentencing is treated differently from reduction at a later time in the Three Strikes Law. (§§ 667, subd. (d)(1), 1170.12, subd. (b)(1).) Moreover, reduction of an offense at the initial sentencing does not consider the defendant's post-conviction behavior. (See *People v. Superior Court* (*Alvarez*), *supra*, 14 Cal.4th at pp. 981-982; *Meyer*, *supra*, 247 Cal.App.2d at p. 140.) Reduction to a misdemeanor at some time after conviction is not retroactive and does not erase the serious felony conviction that existed here from 2003 through 2006. (See *Feyrer,*

supra, 48 Cal.4th at pp. 438-439; *Banks, supra*, 53 Cal.2d at p. 388; *People v. Queen, supra*, 141 Cal.App.4th at p. 842; *People v. Kirk, supra*, 141 Cal.App.4th at pp. 718-719.).

Appellant also contends that the explicit exclusion contained in section 667(a) that prevents courts from striking prior convictions demonstrates that the Legislature, by adding that provision to the section 667(a) that was passed by the electorate, specifically meant to exclude any other unstated exceptions. (ABOM 21.) In a related argument, he contends that the Legislature knows how to limit the effect of a section 17 reduction when it chooses to do so. (ABOM 24-26.) These conclusions are not applicable here. The original section 667 enacted by the electorate as part of Proposition 8 did not contain a limitation on the power of the courts to strike prior convictions under section 1385. (See pp. 11-12, *ante*.) In 1985, this Court interpreted section 667(a) to be subject to the courts' existing discretionary power to strike prior convictions under section 1385, due to the absence of express language indicating that it was intended to eliminate a trial court's section 1385 power with respect to striking serious felony enhancements. (*People v. Fritz* (1985) 40 Cal.3d 227, 230-231.) The Legislature promptly responded by passing legislation to abrogate that judicial decision by amending section 1385 to expressly state that, "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." Appellant recognized that the intent of the Legislature in passing that amendment was specifically to abrogate the holding of *Fritz*. (ABOM 16-17, fn. 7, quoting Stats. 1986, ch. 85, §3, p. 211 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 521.) This prompt legislative response indicates that elected representatives of the People understood the intent of the electorate to eliminate the trial courts' discretion in striking prior serious felony convictions.

Here, the plain words of section 667(a) refer to a prior serious felony *conviction*, that occurs upon the factual adjudication of guilt. Section 17 does not define or limit convictions; it only classifies offenses. There was no need for the Legislature to add any other specific exclusion to the language of section 667(a).

Appellant also contends that the purported implied repeal of the words "for all purposes" in section 17 is disfavored. (ABOM 22-24.) But as already argued, there was no implied repeal of any part of section 17. Appellant had a serious felony conviction from 2003 through 2006. That is the basis for the enhancement to the current crime. The offense was reduced to a misdemeanor for all subsequent purposes, but did not retroactively diminish or vacate the serious felony conviction that appellant agreed to in 2003.

Appellant contends that section 17, Article I, section 28, subdivision (f) and section 667(a) can all be harmonized and are not ambiguous. Respondent agrees that these provisions can all be harmonized but not in the way appellant suggests. Rather, section 667(a) applies to prior serious felony convictions. Appellant had a prior serious felony conviction. That prior offense was reduced in 2006 to a misdemeanor for all purposes that assist in his rehabilitation, but his serious felony conviction from 2003 through 2006 was not vacated, dismissed, or otherwise evaporated. It would be an absurdity, and do violence to the purpose of section 17, to permit appellant to be treated as a first-time offender when he shot Eric Joseph three times and tried to kill him, after appellant had been granted leniency in 2003 by a grant of probation and subsequent reduction of that prior serious felony assault with a deadly weapon to a misdemeanor assault with a deadly weapon. There is no imaginable legislative purpose that is served by extending the benefit of the reduction of the offense into a subsequent criminal proceeding.

The rule requiring courts to adopt the more lenient interpretation of ambiguous penal statutes "is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, i.e., that resolution of the statute's ambiguities in a convincing manner is impracticable. Courts will not construe an ambiguity in favor of the accused if such a construction is contrary to the public interest, sound sense, and wise policy." (*In re Ramon A.* (1995) 40 Cal.App.4th 935, 941 [citations omitted].) The primary purpose of statutory construction is to effectuate the legislature's or electorate's intent. (*Arias v. Superior Court*, *supra*, 46 Cal.4th at p. 979.) The rule of construction favorable to the accused applies only when some doubt exists as to the legislative purpose in enacting the law. (*Ramon A.*, *supra*, 40 Cal.App.4th at p. 941.)

Moreover, appellant's argument that he should obtain the favorable construction of these statutes if they are ambiguous has already been answered in *Banks*, which specifically held that The rule that the more favorable to the offender out of two reasonable statutory constructions "will not be applied to change manifest, reasonable, legislative purpose (here, the purpose expressed by section 17 of the Penal Code) . . . that the offense remains a felony until the statutory rehabilitation procedure has been had, at which time the defendant is restored 'to his former status in society insofar as the state by legislation is able to do so, with one exception, namely, that . . . the record in the criminal case may be used against him for limited purposes in any criminal proceeding thereafter brought against him.'" (*Banks*, *supra*, 53 Cal.2d at p. 391 [citation omitted].)

Looking to the plain words of section 17(b) that permit a court to reduce an alternately punishable offense to a misdemeanor at some time after conviction and initial sentencing, the legislative intent can only be to "enable the court to reward a convicted defendant who demonstrates by his conduct that he is rehabilitated." (*Meyer*, *supra*, 247 Cal.App.2d at p. 140.)

Rewarding a convicted serious felony by permitting a lower, not enhanced sentence if he chooses to commit a subsequent serious felony does not serve any conceivable legislative intent.

Here, appellant was able to bargain down five serious felonies to a guilty plea to one serious felony conviction, with probation, with gang conditions. After three years, appellant had the wherewithal and the appreciation for the clemency shown to him by the court to request and obtain a further reduction of that serious felony conviction to a misdemeanor, before having his plea vacated and the charge dismissed. To all appearances, he had reformed himself into a productive citizen. He completed three years of probation without any probation violations. He moved to Las Vegas and had a steady job. He seemingly earned the privilege of restoration of his civil rights. But in a cold rage after a street brawl, he tracked down another young man who tried to break up the fight, and appellant shot the young man three times. Appellant has not explained how the Legislature's intent in crafting and amending section 17(b) would be served by giving him the benefit of relieving him from the five-year enhancement for serious felony recidivists.

CONCLUSION

Section 667(a) imposes a five-year mandatory sentence enhancement on "any person convicted of a serious felony who previously has been convicted of a serious felony . . . ." Appellant was convicted of a serious felony when he pled guilty to assault with a deadly weapon in 2003. After demonstrating reformed behavior for three years, appellant had the offense reduced to a misdemeanor for all purposes in the future under section 17(b), and had his plea vacated and the charge dismissed pursuant to section 1203.4. The reduction of the offense was not retroactive, however. Appellant was convicted of a serious felony in 2003 and he cannot take advantage of the clemency offered to him for good behavior and avoid the

five-year sentence enhancement properly imposed on him when he subsequently committed an additional serious felony. For the foregoing reasons, and to effectuate the intent of electorate and of the Legislature in enacting both sections 667(a) and 17(b), respondent respectfully requests that the judgment of the appellate court be affirmed.

Dated: January 19, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **ANSWER BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 10,832 words.

Dated: January 19, 2012

KAMALA D. HARRIS
Attorney General of California

MEAGAN J. BEALE
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DECLARATION OF SERVICE

Case Name: **People v. Aaron Sung-Uk Park** No.: **S193938**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On January 19, 2012, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Doris M. LeRoy Attorney at Law P.O. Box 240 Westcliffe, CO 81252 *Attorney for Appellant Aaron Sung-Uk Park* *2 copies*	Mike Roddy, Executive Officer San Diego County Superior Court Deliver to: The Honorable Francis M. Devaney, Judge 220 West Broadway San Diego, CA 92101-3409
Stephen M. Kelly, Clerk/Administrator California Court of Appeal Fourth Appellate District, Division One 750 B Street, Suite 300 San Diego, CA 92101	The Honorable Bonnie M. Dumanis District Attorney San Diego County District Attorney's Office 330 West Broadway, Suite 1320 San Diego, CA 92101
Appellate Defenders, Inc. 555 West Beech Street, Suite 300 San Diego, CA 92101	

On January 19, 2012, I caused fifteen (15) copies of the **ANSWER BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, San Francisco, CA 94102-7303 by Federal Express Standard Overnight service.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 19, 2012, at San Diego, California.

C. Pasquali
Declarant

C. Pasquali
Signature

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