IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. AARON SUNG-UK PARK, Defendant and Appellant.	)	No. S193938

After Decision by the Court of Appeal
Fourth District, Division One, No. D055619

San Diego County Superior Court No. SCD210936
Honorable Francis M. Devaney, Judge

APPELLANT'S REPLY BRIEF ON THE MERITS

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California Supreme Court

TABLE OF CONTENTS

/ / /

TABLE OF AUTHORITIES

/ / /

Statutes

Other Authority

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S193938
Plaintiff and Respondent,	)	Court of Appeal No. D056619
vs.	)	San Diego County Superior Court No. SCD210936
AARON SUNG-UK PARK,	)	
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ARGUMENT

Introduction

This court has asked the parties to address the following issue:

Should the enhancement imposed on appellant under Penal Code section 667, subdivision (a) be stricken because his prior conviction for a serious felony was reduced to a misdemeanor under section 17, subdivision (b), and dismissed under section 1203.4?

In his Opening Brief on the Merits, appellant argued that the Legislature and electorate know how to limit the effect of a reduction under Penal Code[1] section 17. Lawmakers did just that when they inserted into the Three Strikes Law the provision which establishes that the

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

character of an offense for purposes of that law is determined on the date of the conviction unless a misdemeanor sentence is imposed at the initial sentencing. (§ 667, subd. (d)(1).) No such provision has ever been added to section 667, subdivision (a).

Appellant also argued that article I, section 28, subdivision (f) of the California Constitution does not define what is a felony conviction; those provisions are in section 17. The provisions of section 17, section 667, subdivision (a), and article I, section 28, subdivision (f) can all be harmonized to give full effect to each.

I.

THE "PLAIN LANGUAGE" OF ARTICLE I, SECTION 28 IS NOT AS BLACK AND WHITE AS RESPONDENT SUGGESTS; NEITHER SECTION 667, SUBDIVISION (a) NOR SECTION 17 OPERATES AS A PROHIBITED "LIMITATION" ON THE USE OF PRIOR CONVICTIONS.

Respondent first argues that the plain language of article I, section 28, subdivision (f) of the California Constitution requires that "*any* prior felony conviction be used to enhance a subsequent serious felony conviction punishment." (RB 8 (italics in the original), 9-20.) In support of this proposition, respondent relies in part on *People v. Prather* (1990) 50 Cal.3d 428. In *Prather*, this court analyzed the "without limitation" language of article I, section 28, subdivision (f) as it affected

imposition of enhancements under section 667.5, subdivision (b) and the double-base-term limitation on enhancements. (*Id.* at pp. 433-434.) This court concluded the "without limitation" provision prohibited applying the double-base-term limitation to enhancements under section 667.5, subdivision (b). (*Id.* at p. 440.)

The holding of *Prather* included this express caveat (*People v. Prather, supra,* 50 Cal.3d at p. 437, emphasis added):

> ***In so holding, we do not suggest that article I, section 28, subdivision (f), is without ambiguity or that its application will be obvious in all cases.*** On the contrary, we recognize that the phrase "without limitation" can present unique interpretive difficulties. As Justice Grodin observed in his concurring opinion in *People v. Fritz, supra,* 40 Cal.3d at page 232: "In the context of sentence enhancements, the 'without limitation' language has no clear referent. ***Enhancement of sentences can occur only within a system of rules which prescribes what sorts of prior convictions are to be used for purposes of enhancement, and the criteria and procedure by which enhancements are to be computed in relation to the defendant and the crime he has committed. All of these criteria can be viewed both positively and negatively, i.e., as stating the conditions under which enhancement will or may occur, or as stating the circumstances under which they will not. A rule of law which provides that sentences will be enhanced on the basis of certain types of crimes, for example, carries with it the negative implication that enhancement will not occur on the basis of crimes outside the delineated category."*** ... ¶ ***In short, the "without limitation" language, taken to its literal extreme, might render meaningless all legislative criteria for sentence enhancements based on prior felony convictions***

because any affirmatively expressed criterion for enhancement necessarily "limits" by implication the use of others not specified.

Thus, the first lesson of *Prather* as it relates to the issue presented in this case is that applying the constitutional language is not as simple as distinguishing black from white. The second aspect of *Prather* which is particularly pertinent is the analytical model formulated to help decide whether a statutory provision amounts to an impermissible "limitation." The model is based on the premise that "in some cases, a particular statutory restriction on the use of an enhancement may be so integrally related to an enhancement provision that it may be said to constitute either an essential definitional element of the enhancement itself, or a necessary precondition to application of the enhancement in a particular context, ***in which case the definitional restriction should not be considered a 'limitation' for purposes of article I, section 28.***" (*People v. Prather, supra,* 50 Cal.3d at p. 438, emphasis added.)

The *Prather* model includes two considerations: 1) "the level of generality (e.g., does the restriction apply to a large number of different enhancements?)," and 2) "the purpose behind the limitation (i.e., to define

the applicable class of felons or restrict available penalties once a class of felons has been defined)." (*People v. Prather, supra,* 50 Cal.3d at p. 438.) *Prather* applied this model to conclude that the Legislature could properly restrict enhancements to only serious felonies, but could not prohibit enhancements by imposing a general cap on the overall length of a sentence. (*Ibid.*) The double-base-term limitation was not a conditional or definitional limitation, but was, instead, a general cap. Therefore, its application was precluded under article I, section 28, subdivision (f). (*Id.* at p. 439.)

However, a different result is reached when the model is applied to an enhancement under section 667, subdivision (a). Under the first criterion of the model (the level of generality of the restriction), it is apparent the restriction in section 667, subdivision (a) that the enhancement may only be imposed based on a prior serious felony is limited in its application to that enhancement, and has no general application beyond the operation of section 667, subdivision (a). As for the second criterion (the purpose behind the limitation), the description suggested by this court in the model is a perfect fit; that is, the provisions of section 667, subdivision (a) "define the applicable class of felons"

eligible for the enhancement as being those with a serious prior felony conviction.

Thus, the provision of section 667, subdivision (a) restricting the persons eligible for the enhancement to felons who have a prior serious felony conviction qualifies under the *Prather* model as a provision of a "conditional or definitional" nature, which should ***not*** be deemed a "limitation" within the meaning of article I, section 28, subdivision (f). Rather, the restriction is a legitimate exercise of the legislative authority to prescribe "what sorts of prior convictions are to be used for purposes of enhancement." (*People v. Prather, supra,* 50 Cal.3d at p. 437.)

As for section 17, consideration of the *Prather* analysis makes clear that section 17 does not operate as a limitation on enhancements at all. Section 17 has nothing to do with enhancements. Rather, section 17 merely provides a mechanism for the classification (and reclassification, where appropriate) of offenses. Thus, article I, section 28, subdivision (f) is no impediment to giving full force and effect to both section 17 and section 667, subdivision (a).

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II.

THE CASES ESTABLISHING THE MEANING OF "CONVICTION" IN OTHER CONTEXTS ARE INAPPOSITE; UNDER SECTION 17 THE INITIAL CHARACTER OF A WOBBLER OFFENSE AS A FELONY MAY BE CHANGED BY THE TRIAL COURT, AND ITS CHARACTER AT THE TIME IT IS PROPOSED TO BE USED IN A SUBSEQUENT CASE IS DETERMINATIVE.

A. The Nature of the Offense in 2007, and Banks.

Respondent points out that when appellant was granted probation in the 2003 case, that did not change the character of the offense. (RB 15.) Respondent discusses *People v. Banks* (1959) 53 Cal.2d 370 as authority for the proposition that an offender remains a felon even where imposition of sentence is suspended and probation is completed. (RB 17-18.) *Banks* does state exactly that. (*Id.* at p. 388.) However, what respondent apparently does not take into account is that the offense in *Banks* had ***not*** been reduced under section 17. (*Id.* at p. 377.) Thus, *Banks* does not resolve the current issue.

Here, the character of appellant's prior offense was changed, from a felony to a misdemeanor, in 2006 when it was reduced under section 17. As respondent several times acknowledges (e.g., RB 7, 8, 32, 34), the offense of which appellant had been convicted in 2003 was a misdemeanor by 2007, when he committed the offenses in the present case.

B. *The Meaning of "Conviction"; Respondent's Proposed Temporal Complication Is Not the Law, and the Character of the Prior Conviction as of the Time it Was Sought to Be Used in this Case Should Be Determinative.*

In an attempt to circumvent the reduction of appellant's prior conviction to a misdemeanor, respondent advances what appears to be an argument that if his prior conviction was ***ever*** a felony conviction, the court in the present case must reach back in time and treat it as though it ***remains*** a felony conviction ***forever***, regardless of the intervening reduction under section 17. In support of this result, respondent argues that "conviction" as used in section 667, subdivision (a) has the meaning discussed in *People v. Feyrer* (2010) 48 Cal.4th 426, *People v. Balderas* (1985) 41 Cal.3d 144, *People v. Queen* (2006) 141 Cal.App.4th 838, *People v. Kirk* (2006) 141 Cal.App.4th 715, and *People v. Williams* (1996) 49 Cal.App.4th 1632. (RB 16-17, 30-31.) That is, respondent argues that a "felony conviction" occurs at the moment of the plea or recording of the guilty verdict. Based on that uncontroversial point, respondent urges a conclusion that the existence of the felony conviction at the moment it is rendered is not altered by any subsequent reduction under section 17.

The cases cited by respondent do not establish anything beyond the uncontested point that initially, when appellant first entered his plea in the prior case, he stood convicted of a felony. Several of the cited cases address narrow questions of whether a "conviction" actually occurred, or exactly when the "conviction" occurred in relation to commission of a new offense, matters not in dispute in this case. For example, in *People v. Queen, supra,* 141 Cal.App.4th at p. 842, and *People v. Williams, supra,* 49 Cal.App.4th at pp. 1637-1638, the issue was the classification of the defendants' prior offenses as strikes, where new offenses were committed before sentencing on the previous offenses. Similarly, *People v. Kirk, supra,* 141 Cal.App.4th at pp. 718-719 considered whether a guilty plea upon which sentence had not yet been imposed could constitute a prior conviction which would preclude eligibility for drug diversion.

In *Balderas,* this court considered whether a prior offense proposed to be used in the penalty phase of a later capital trial was a "prior" felony conviction, where the initial plea to the felony offense was taken before a magistrate, and the defendant was not sentenced to prison until later, after he had violated his

probation. (*People v. Balderas, supra,* 41 Cal.3d at p. 203.) In *People v. Feyrer,* as here, there was no issue as to whether or when a conviction had occurred; the issue was the interplay of the plea agreement and the trial court's statutory power under section 17 to later reduce the offense to a misdemeanor. (*People v. Feyrer, supra,* 48 Cal.4th at pp. 437-439.)

Thus, none of the cases cited by respondent stands for the proposition that a reduction pursuant to section 17 is not fully effective from the date of the reduction forward.[2] Indeed, in *Feyrer,* this court stated: "When a defendant is convicted (whether by a guilty plea or a no contest plea, or at a trial) of a wobbler offense, and is granted probation without the imposition of a sentence, his or her offense is deemed a felony ***unless*** subsequently reduced to a misdemeanor by the sentencing court pursuant to section 17, subdivision (b)." (*People v. Feyrer, supra,* 48 Cal.4th at pp. 438-439, internal quotation marks omitted, emphasis added.) In *Balderas,* this court stated: "Under section 17, the offense is a misdemeanor after ... the court designates the offense a misdemeanor

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[2]And, respondent appears to concede as much, several times acknowledging that appellant had a serious felony conviction only "from 2003 through 2006." (RB 7, 8, 32, 34.)

... on application for such a declaration ... ." (*People v. Balderas, supra,* 41 Cal.3d at p. 203, fn. 30.)

Respondent's point in fixing the date of "conviction" seems to be that once the moment of conviction is established, the classification of the offense at that moment is immutable over time, regardless of later events. This theory finds no support in the cases. First, as a general matter, the use of the word "conviction" in penal statutes does not necessarily carry with it any special technical significance. (*In re Jovan B.* (1993) 6 Cal.4th 801, 814.) For example, the opinion in *In re Jovan B.* discussed the use of the word "conviction" in section 12022.1, the bail/OR enhancement statute. This court concluded the requirement of a "conviction" in that statute was aimed primarily at ensuring that both the "bailed" and "while-on-bail" charges were valid. (*In re Jovan B., supra,* 6 Cal.4th at p. 814 and fn. 8.) The cases cited by respondent do not establish that the use of the word "conviction" in section 667, subdivision (a) carries any special technical significance beyond requiring that the defendant's guilt of a prior offense was duly established in a court of law.

Furthermore, respondent's argument has wide-ranging implications. Under respondent's reasoning, where a wobbler offense has been charged, a conviction of a felony offense exists at the moment a valid plea is entered or a jury verdict recorded, and that felony offense can never be effectively reduced to a misdemeanor under section 17. The "felony conviction" will always exist, independently in time, even if a misdemeanor sentence is pronounced, or the offense is otherwise reduced at a later date. Such a construction would render meaningless the "for all purposes" language of section 17, and, as will be explained, call into question the results in several lines of cases.

Although there appears to be no California case directly on point, a number of cases decided in other contexts stand for the proposition that it is the character of the prior offense ***at the time it is sought to be used in the prosecution of the subsequent offense*** which is generally determinative of the propriety of its use, ***absent*** a specific provision to the contrary.[3] For example, many decades ago, this court held that a testifying defendant may be impeached with a prior

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[3]Such as the exception found in the Three Strikes Law; see, e.g., pages 16-17, *post*.

conviction, even where the prior was on appeal at the time of the subsequent trial, and was thereafter reversed. The status of the prior conviction at the time it was proposed to be used in the subsequent case was determinative of the propriety of its use. (*People v. Braun* (1939) 14 Cal.2d 1, 6.)

In *People v. Moomey* (2011) 194 Cal.App.4th 850, the Court of Appeal held the defendant could be convicted of being an accessory to a felony even though the offense committed by the principal was a wobbler, burglary in the second degree, and the principal had not yet been sentenced. As the Court of Appeal put it, the burglary was a felony offense "at all relevant times." (*Id.* at p. 858.) The "relevant time" was the defendant's commission of his offense of being an accessory to a felony; his principal's offense was a felony at the time it was committed, unless and until it became a misdemeanor at the time of sentencing, or later, under section 17. (*Id.* at pp. 856-858.)

In cases involving a charge of felon in possession of a firearm, the character of the prior offense at the time charges are filed in the new case has been held to be determinative of whether the prior offense is a felony. (*People v. Gilbreth* (2007) 156 Cal.App.4th 53,

57-58; see *People v. Lewis* (2008) 164 Cal.App.4th 533, 536-537 [Oregon prior which had been reduced to a misdemeanor not a prior felony offense, following *Gilbreth*].)[4]

Gilbreth relied on the decision in *Gebremicael v. California Com'n on Teacher Credentialing* (2004) 118 Cal.App.4th 1477. As discussed in the Opening Brief on the Merits at pages 8 and 24-25, *Gebremicael* held that "[r]elief 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.)

> [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 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.)

Respondent has suggested that *Gebremicael*, a civil case, is not persuasive authority on the question at bar. But, respondent has not shown that "for all purposes"

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[4]*People v. Banks, supra,* 53 Cal.2d at pp. 375-376 is, of course, distinguishable because the defendant had neglected to seek reduction of the prior offense to a misdemeanor.

merely means "for all ***civil*** purposes." (RB 25-28.) The cases cited by respondent establish only that the meaning of "for all purposes" has been litigated in certain civil contexts. Those cases do not establish that the outcome should be ***different*** in this context.

In the context of a charge of felon in possession of a firearm, the Court of Appeal in *Gilbreth* explained (*People v. Gilbreth, supra,* 156 Cal.App.4th at p. 58, internal citations and quotation marks omitted, emphasis added):

> We also are not persuaded by the People's criticism of *Gebremicael*... . We have no reason to disagree with the *Gebremicael* court's construction of section 17, and we agree that ... when the Legislature wants to continue treating a felony reduced to a misdemeanor under ... section 17 as a felony, it expressly says so[5], and the court will treat the person as such ***only upon those occasions***.

In the context of the use of a prior conviction to increase the sentence in a subsequent case, *People v. Kirk* held that drug diversion may be denied based on a prior conviction upon which sentence had not yet been

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[5]The example discussed in *Gebremicael* concerned the provision of 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 section 6102 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 such a suspension. (*Gebremicael v. California Com'n on Teacher Credentialing, supra,* 118 Cal.App.4th at p. 1486.)

imposed, despite the fact that the plea in the earlier case theoretically could still be withdrawn. (*People v. Kirk, supra,* 141 Cal.App.4th at p. 723.) The Court of Appeal adopted the reasoning of *People v. Rhoads* (1990) 221 Cal.App.3d 56, which had addressed a similar issue. The *Rhoads* court explained (*Id.* at p. 60, internal citations and quotation marks omitted):

> The possibility that a plea might be withdrawn or might be rejected does not, in our opinion, affect the validity or effect of the plea unless and until withdrawal or rejection occurs.[6] A guilty plea which might be withdrawn or rejected is directly analogous to a felony conviction which might be reversed on appeal. The legal effect of that conviction remains intact pending appeal and may be charged as a prior felony in a subsequent indictment or used to impeach a witness at trial. There is no reason to afford a guilty plea, which might be invalidated as the result of subsequent events, any less efficacy than that afforded to a conviction pending appeal.

The provision of the Three Strikes Law found in section 667, subdivision (d)(1) is consistent. That provision states, in pertinent part:

> [A] prior conviction of a felony shall be defined as ... a violent felony or ... a serious felony ... . The determination of whether a prior conviction is a prior felony conviction ... shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence

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[6]The *Rhoads* court acknowledged that a new question would arise if the prior relied upon for sentencing were, indeed, invalidated at a later date. (*People v. Rhoads, supra,* 221 Cal.App.3d at p. 60, fn. 3.)

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

Respondent proposes a tortured reading of this provision, positing that the "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 that offense is later recharacterized as a misdemeanor." (RB 24.) On the contrary, as one court explained, the purpose of the provision is to establish that for the purposes of the Three Strikes Law, the determination as to whether an offense is a felony or a misdemeanor "is made upon the date of the conviction, so subsequent events, such as a reduction to a misdemeanor (§ 17, subd. (b)(3)), will not affect its classification as a felony conviction." (*People v. Sipe* (1995) 36 Cal.App.4th 468, 478.)

In sum, it has consistently been held in several contexts that the character of a prior conviction as it relates to its use in a subsequent case is to be determined at the time of its proposed use in that subsequent case, absent a specific exception such as the one found in the Three Strikes Law (§ 667, subd. (d)(1)). Respondent's reasoning injects unnecessary temporal complexity into an otherwise relatively simple concept in the law. But, the law is much more straightforward than

respondent suggests; the crime becomes a misdemeanor "for all purposes" when the statutory reduction procedure is followed (§ 17, subd. (b)), absent some explicit exception.

Once a judge has ruled that a reduction under section 17 is warranted, it makes no sense to reach back in time and rely on a characterization of the offense which is no longer valid, absent an explicit exception to the operation of section 17. The Legislature and electorate know how to limit the operation of section 17, as demonstrated by the exception contained in the Three Strikes Law. (§ 667, subd. (d)(1).) No such exception exists in section 667, ***subdivision (a)***. Respondent has advanced no convincing reason for this court to read a significant and global temporal complication into section 17 by resort to the definition of when a "conviction" occurs.

III.

THE TRIAL COURT'S GRANT OF LENIENCY IN THE PRIOR CASE IN 2006 WAS FULLY EFFECTIVE AND MAY NOT BE ATTACKED IN THIS ACTION; THE "FOR ALL PURPOSES" LANGUAGE OF SECTION 17 MAY NOT BE NULLIFIED BY IMPLICATION EVEN IF THE RESULTING POTENTIAL FOR A LONGER SENTENCE FOR A SUBSEQUENT OFFENSE WOULD HAVE SOME REHABILITATIVE OR DETERRENT EFFECT.

Respondent approaches the subject of rehabilitation and deterrence from two angles. First, respondent argues that, as a matter of public policy, the possibility that

a prior conviction, even if reduced to a misdemeanor, may be used as the basis for sentence enhancement in a later case amounts to an important "stick" to motivate the defendant not to reoffend, and thereby promotes his rehabilitation. (RB 8, 20-24.) Second, respondent argues that appellant (or someone like him) demonstrates by committing a new offense that he was, in reality, undeserving of the leniency previously granted under section 17, so under those circumstances enhancement of his new sentence on account of his prior offense should be permitted. (RB 23-24, 27, 30.)

Respondent's latter point will be addressed here first. In support of that point, respondent argues appellant's claim is "absurd" because even though he had been deemed by a court in 2006 to be deserving of leniency in the form of a reduction under section 17, he later reoffended, demonstrating he was not really deserving of such leniency after all. (RB 30.) There is superficial appeal in this argument; at times, on both an individual and a societal level, we give a second chance to an individual who subsequently squanders that second chance, and we may then wish we could undo our earlier leniency.

However, respondent's argument amounts to an attack on the exercise of discretion in 2006 to reduce appellant's prior offense to a misdemeanor "for all purposes" under section 17. It is too late for that argument. It was within the court's discretion to reduce the offense in 2006, and that exercise of discretion was long ago final.

Furthermore, a trial court is not without means to take into account at sentencing a defendant's prior criminal record. A trial court may choose to impose the upper term sentence based on the prior criminality (Cal. Rules of Court, rules 4.420(b), 4.421(b)(2)), or may deny probation (Cal. Rules of Court, rule 4.414(b)(1)).

Nor is the hindsight urged by respondent a valid or sufficient reason to read into section 17 or section 667, subdivision (a) an exception which does not exist in either statute. Section 17 provides that an offense reduced under that section is a misdemeanor "for all purposes"; it does ***not*** say, "for all purposes unless the defendant reoffends." And section 667, subdivision (a) contains no provision whatsoever that transmutes an offense previously reduced to a misdemeanor back into a felony for purposes of sentencing in the new case.

As for respondent's "stick" argument, despite its superficial appeal, such an argument could be made with respect to almost any provision for a grant of leniency. That is, any exercise of leniency has the potential to lessen the punitive effect on the defendant, and thereby remove an incentive to be law-abiding.

However, encroachment upon the well-established authority of the trial court to grant leniency under section 17 will not be inferred lightly, even in the face of a legislative or electoral intent to ensure longer sentences. For example, this court has held that the partial limitation on the effect of a grant of leniency found in the Three Strikes Law as it pertains to wobbler offenses and section 17 (§ 667, subd. (d)(1)) does not act as a wholesale abrogation of judicial discretion under section 17. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968.) Therefore, a trial court may reduce a current wobbler offense to a misdemeanor even if Strike priors are also alleged. (*Id.* at pp. 975-980.)

In so holding, this court reasoned (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 975, internal citations and quotation marks omitted):

> The overarching intent to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses does not

> alter this conclusion. Although presumptively aware of preexisting law, including sections 17(b)(1) and 17(b)(3), neither the Legislature nor the electorate specifically limited the court's power under these provisions in regard to determining the nature of the current conviction in the three strikes law. And, nothing in the language or history of the three strikes legislation suggests the drafters contemplated abrogation of this well-established authority.

Similarly, nothing in the language of section 667, subdivision (a) suggests the drafters contemplated limiting or nullifying the "for all purposes" language of section 17. The provision in section 17 that an offense, once reduced, is a misdemeanor "for all purposes" should not be read out of that statute simply because it provides for leniency or deprives the State of a potential "stick."

IV.

THIS COURT NEED NOT "REPUDIATE" *FEYRER* OR *BANKS* BECAUSE NEITHER OF THOSE CASES STANDS FOR THE PROPOSITION THAT SECTION 17 MUST BE READ TOGETHER WITH SECTION 1203.4 IN THIS CONTEXT; EVEN IF THOSE STATUTES ARE READ TOGETHER, THE RESULT IN THIS CASE IS MERELY THAT APPELLANT'S MISDEMEANOR CONVICTION IS AVAILABLE TO BE PLEADED AND PROVED AS IF IT HAD NOT BEEN DISMISSED.

Respondent states in the overview of its Argument I that appellant is asking this court to "repudiate" language in *Feyrer* and *Banks* concerning the interplay of sections 17 and 1203.4. (RB 8-9.) This point is broached again when respondent theorizes that this court "likely"

stated in *Feyrer* and *Banks* that the two statutes should be read together because both statutes have something to do with rehabilitation. (RB 31-32; see RB 21, 22-23, 28.) However, respondent also acknowledges that when appellant's offense was reduced under section 17 it became a misdemeanor whether or not it was dismissed under section 1203.4. (RB 28.)

Neither *Feyrer* nor *Banks* stands for the proposition that section 17 must or should be read together with section 1203.4 under all circumstances, or that reading them together would support a conclusion that appellant's prior conviction remains a felony for purposes of the current case. The portion of *Feyrer* relied upon by respondent consisted of a general discussion of "the underlying purpose and effect of a grant of probation" as pertains to wobbler offenses. (*People v. Feyrer, supra,* 48 Cal.4th at pp. 438-439.) The issue in *Feyrer* had nothing to do with section 667, subdivision (a), or with the interplay of that section and section 17.

Similarly, the passage from *Banks* relied upon by respondent was a broad statement which was dictum in the context of that case because the defendant had not sought relief under either section 17 or section 1203.4. (*People v. Banks, supra,* 53 Cal.2d at p. 391.) That passage does

not stand for the proposition that section 17 and section 1203.4 must or should be read together in this context or that the result will be that appellant may be shown to have a prior ***felony*** conviction.

There is nothing in either section 17 or section 1203.4, or in the cases cited by respondent, which suggests that any part of section 1203.4 should be read as modifying the provisions of section 17. Giving each section full effect, appellant's prior offense was reduced to a misdemeanor under section 17, and then that ***misdemeanor*** conviction was dismissed under section 1203.4. Thus, it is appellant's prior ***misdemeanor*** conviction which, according to section 1203.4, subdivision (a)(1), may be pleaded and proved as if it had not been dismissed. That misdemeanor conviction does not trigger the enhancement under section 667, subdivision (a).

CONCLUSION

Article I, section 28, subdivision (f) does not govern the question of whether appellant's prior conviction must be treated as though it were still a felony conviction, because the provision of section 667, subdivision (a) which restricts the enhancement to a ***prior serious felony*** conviction is not a "limitation"

within the meaning of the constitutional provision. Although appellant's prior conviction was a felony until it was reduced, it was a misdemeanor "for all purposes" after its reduction in 2006, absent a specific exception such as the one found in the Three Strikes Law (§ 667, subd. (d)(1)). It is the status of his prior offense when appellant reoffended which is determinative; nothing in section 667, subdivision (a) suggests any intent to override the operation of section 17.

And, the absence of an express exception to the operation of section 17, such as the one found in the Three Strikes Law, settles the question of the intent of the Legislature and electorate. A provision which would nullify or limit the effect of section 17 should not be read into section 667, subdivision (a) simply based on a presumed broad intention to impose the longest possible sentence in every possible case.

For all the foregoing reasons, and those explained in the Opening Brief on the Merits, the reduction of appellant's prior conviction under section 17 should be given full effect, and the enhancement imposed in his current case on account of that prior conviction should be ordered stricken.

/ / /

Respectfully submitted,

Date:

Doris M. LeRoy
Attorney for Appellant
Aaron Park

CERTIFICATE OF LENGTH

I, Doris M. LeRoy, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 5,388 words, excluding the tables, this certificate, and any attachment permitted under the rules. 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 _____, 2012.

Doris M. LeRoy

PROOF OF SERVICE

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 leroy145260@gmail.com.

On ***February 9, 2012***, I served ***Appellant's Reply Brief on the Merits*** in ***People v. Aaron Sung-Uk Park, Case No. S193938***, by placing a copy thereof with postage prepaid in the U.S. mail, addressed as follows:

Court of Appeal, Fourth District, Division One
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I declare under penalty of perjury that the foregoing is true and correct.

Executed at Westcliffe, Colorado on _____, 2012.

_____
Doris M. LeRoy