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 OPENING BRIEF ON THE MERITS

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. AARON SUNG-UK PARK, Defendant and Appellant.	)	No. S193938 Court of Appeal No. D056619 San Diego County Superior Court No. SCD210936 APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

Should the enhancement imposed on appellant under Penal Code section 667, subdivision (a)[1] 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?

STATEMENT OF THE CASE

In connection with an incident which occurred on September 23, 2007, appellant was charged with attempted premeditated murder and assault with a firearm. It was further alleged appellant had suffered a prior conviction for a serious felony within the meaning of section 667, subdivision (a)(1) and the Three Strikes Law. (1 CT 183-186.)

[1]Unless otherwise stated, all further statutory references are to the Penal Code.

A jury acquitted appellant of attempted murder, but convicted him of attempted voluntary manslaughter based on heat of passion. Appellant was also convicted of assault, and gun use and great bodily injury allegations were found true. (2 CT 393-395.) Appellant admitted the prior conviction allegation. (7 RT 1276-1280.) On January 7, 2010, appellant was sentenced as a second-strike defendant to serve 24 years in state prison, including five years under section 667, subdivision (a)(1). (2 CT 330-331; 9 RT 2211-2212.)

Notice of appeal was filed January 7, 2010. (2 CT 332.) As pertinent here, in his appeal appellant argued the enhancement under section 667, subdivision (a)(1) could not be imposed, because that prior conviction had been reduced to a misdemeanor and subsequently dismissed. In an unpublished opinion filed May 4, 2011, the Court of Appeal rejected this contention and affirmed the judgment. Appellant's petition for rehearing was denied. This court granted review on August 10, 2011.

STATEMENT OF FACTS[2]

Appellant admitted he suffered a 2003 conviction of a violation of section 245, subdivision (a)(1) in Los

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[2]Stated herein are only those facts pertinent to the issue on review.

Angeles case VA075018. (7 RT 1279.) On September 20, 2006, after appellant had completed his probation, that offense had been reduced to a misdemeanor pursuant to section 17, subdivision (b)[3] and then dismissed pursuant to section 1203.4.

At the time appellant admitted the prior as part of the instant case, he stated it was a misdemeanor (7 RT 1277), and trial counsel referred to the prior as a misdemeanor in the context of appellant's *Romero*[4] motion (2 CT 272). At sentencing in the instant case, the trial court imposed a five-year enhancement pursuant to section 667, subdivision (a)(1). (2 CT 330.)

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[3]The minute order in VA075018 states the reduction was pursuant to "17B5 of the Penal Code." However, subdivision (b)(5) by its terms applies to cases at or before the preliminary-hearing stage, before the defendant has been bound over. The procedural posture of this case at the time of the order was that three years had passed since his guilty plea, and appellant had completed his probation. Under those circumstances, the correct statutory authority for the reduction to a misdemeanor was subdivision (b)(3), which applies "[w]hen the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor."

[4]*People v. Superior Court (Romero)* (1996) 13 Cal.4th 97.

ARGUMENT

Introduction

The Court of Appeal upheld imposition of the five-year enhancement under section 667, subdivision (a) on three bases.[5] First, the Court of Appeal held that the interplay of sections 17 and 1203.4 mandate a conclusion the prior conviction is available for imposition of the enhancement under section 667, subdivision (a). (Opinion 8-9.)

Second, the Court of Appeal held that California Constitution, article I, section 28, subdivision (f)(4), which provides that "any" prior felony conviction "shall" be used in any subsequent prosecution "without limitation for purposes of ... enhancement of sentence," prevails over section 17. (Opinion 9-10.) In reaching this conclusion, the Court of Appeal relied in part on language from *People v. Feyrer* (2010) 48 Cal.4th 426, a case involving sections 17 and 1203.4, and the Three Strikes Law. (Opinion 9.)

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[5]In the Court of Appeal, appellant initially cited *People v. Marshall* (1991) 227 Cal.App.3d 502, 505, in which the Court of Appeal, Fourth District, Division Three held the defendant's prior conviction could not be used as the basis for an enhancement under section 667, subdivision (a) because it had been reduced to a misdemeanor under section 17. That case did not consider the factors relied upon by the Court of Appeal in its opinion in this case.

Finally, the Court of Appeal rested its holding on considerations of public policy, finding that the possibility a wobbler conviction may be used as the basis for a sentence enhancement under section 667, subdivision (a) in the future provides an incentive for the defendant not to re-offend. (Opinion 11.)

Appellant contends that section 17 governs this issue because, in the present context, that section, alone, ***defines what is a felony***. Neither section 1203.4, nor article I, section 28, subdivision (f), purports to define what is a felony conviction. Instead, those provisions set forth the principles to be applied once it has been determined that a qualifying prior felony conviction does, in fact, exist.

Furthermore, language found in the Three Strikes Law (i.e., section 667, subdivisions (b) through (i)[6]) may not be read into section 667, subdivision (a) because subdivisions (b) through (i) of section 667 constitute an

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[6]In March, 1994, the Legislature enacted its version of the Three Strikes Law by amending section 667. In November, 1994, the voters enacted Proposition 184, codified as section 1170.12. In passing Proposition 184, the voters intended to adopt a sentencing scheme identical to the legislative version of the Three Strikes Law. (*People v. Hazelton* (1996) 14 Cal.4th 101, 104-105, 106-107.) For ease of reference, hereinafter, the Three Strikes Law will be discussed with reference to the provisions enacted by the Legislature as section 667, subdivisions (b) through (i).

alternative sentencing scheme, wholly separate and apart from the enhancement provision of subdivision (a) of section 667. The enhancement provided for in section 667, subdivision (a), and the alternative sentencing scheme provided in the Three Strikes Law, operate separately as finely calibrated components of a complex and nuanced sentencing scheme. And, as relates to this issue, the Three Strikes Law contains a provision which ***explicitly*** overrides the operation of section 17; there is no such provision in section 667, subdivision (a).

Finally, application of established principles of statutory construction leads to a conclusion the Legislature and electorate intended, in the case of a conviction of a wobbler offense, to preserve the opportunity for a convicted felon to redeem himself by adhering to conditions of probation, and to thereby avoid the application of section 667, subdivision (a) in subsequent prosecutions. As will be shown, no absurdity is created by such a construction because section 17 defines what is a prior felony conviction; if a qualifying prior felony conviction exists, article I, section 28, subdivision (f) and section 667, subdivision (a) specify the enhancement to be imposed. Thus, each enactment may be given full effect.

The imposition of an enhancement under section 667, subdivision (a) after appellant's prior conviction had been reduced to a misdemeanor under section 17 was an unauthorized sentence. That unauthorized sentence should be corrected by striking the enhancement.

I.

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

Section 17, subdivision (b) governs the matter of the reduction of a felony to a misdemeanor. (*People v. Wood* (1998) 62 Cal.App.4th 1262, 1269.) Subdivision (b)(3) provides as follows:

> 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.

As will be discussed in more detail below, once a court reduces a wobbler to a misdemeanor under section 17, the crime is thereafter a misdemeanor for all purposes, in civil as well as criminal proceedings, unless the Legislature states otherwise. (*Gebremicael v.*

California Com'n on Teacher Credentialing (2004) 118 Cal.App.4th 1477, 1483.)

Independently, section 1203.4 allows a court to dismiss a conviction, whether it is a felony or a misdemeanor, and further provides: "...the prior conviction ... shall have the same effect as if probation had not been granted or the accusation or information dismissed." As explained in *Gebremicael*: "Relief under Penal Code section 1203.4 affects only punishment. By contrast, Penal Code section 17 reduces a wobbler felony to a misdemeanor 'for all purposes.' ***Relief under Penal Code section 17 changes the fundamental character of the offense.***" (*Gebremicael v. California Com'n on Teacher Credentialing, supra,* 118 Cal.App.4th 1477 at p. 1489, emphasis added.)

The Opinion quotes the following passage from *People v. Feyrer, supra,* 48 Cal.4th at pp. 439-440 (Opinion 9, italics in the Opinion): "When a trial court grants probation without imposing sentence, sections 17 and 1203.4, read together, express the legislative purpose that an alternatively punishable offense remains a felony ... until the statutory rehabilitation procedure has been had, at which time the defendant is restored to his or her former legal status in society, *subject to use of the*

felony for limited purposes in any subsequent criminal proceeding." However, as will be explained, *Feyrer* does not support the premise that section 1203.4 limits or nullifies the effect of a section 17 reduction in the context present in this case.

Feyrer arose in the context of a plea bargain and primarily presented issues concerning the interpretation of the bargain. (*People v. Feyrer, supra,* 48 Cal.4th at pp. 435-438.) The quoted language was taken from an overview of the operation of statutes concerning probation, which provided context for the evaluation of the intent of the parties to the plea negotiations. (*Id.* at pp. 438-440.) *Feyrer* did not consider section 17 in conjunction with section 667, subdivision (a), and the issue in that case did not involve article I, section 28, subdivision (f). Because the *Feyrer* court was not considering the issue presented in this case, *Feyrer* is not authority governing the resolution of this issue. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [cases are not authority for propositions not considered].)

Furthermore, it is significant that the language in the *Feyrer* opinion was quoted from *People v. Banks* (1959) 53 Cal.2d 370. In *Banks*, the defendant was charged with being a felon in possession of a firearm, but asserted

his prior offense did not amount to a felony because imposition of sentence had been suspended, he had been placed on probation, and he had fulfilled the terms of his probation. (*Id.* at pp. 376-377.) However, in contrast with this case, there had been no proceedings under either section 17 or section 1203.4 to reduce or dismiss defendant Banks' prior conviction. (*Id.* at p. 377.)

The full passage from which the quote in *Feyrer* (and in the Opinion) was excerpted is as follows (*People v. Banks, supra,* 53 Cal.2d at p. 391):

> We recognize that "conviction" has sometimes been given the meaning of a final judgment of conviction (citations), but that meaning does not appear appropriate here. Defendant relies on the familiar rule that 'Where language which is reasonably susceptible of two constructions is used in a penal law, ordinarily that construction which is more favorable to the offender will be adopted.' (Citation.) But that rule will not be applied to change the manifest, reasonable, legislative purpose (here, the purpose expressed by section 17 of the Penal Code) 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.' (Citation.)

Thus, the *Banks* court did not consider the issue presented here, because the prior offense in *Banks* had

neither been reduced under section 17, nor dismissed under section 1203.4. Read in context, the above-quoted language does not purport to apply to, or decide, the effect of a such a reduction or dismissal. Again, cases are not authority for propositions not considered. (*People v. Banks, supra,* 53 Cal.2d at p. 389.)

When appellant's offense was reduced under section 17, it became a misdemeanor. This would have been true even if it had not been dismissed. The status of the offense as a misdemeanor was not affected by section 1203.4. It is that status as a misdemeanor which precludes its use as the basis for the enhancement under section 667, subdivision (a), unless there is an express exception to the "for all purposes" language of section 17 - and there is none in section 667, subdivision (a).

II.

SECTION 667, SUBDIVISION (a) LACKS THE EXPLICIT PROVISIONS FOUND IN THE THREE STRIKES LAW WHICH OVERRIDE THE OPERATION OF SECTION 17; THIS DEMONSTRATES THAT THE ELECTORATE AND LEGISLATURE DID NOT INTEND THE OPERATION OF SECTION 17 TO BE LIMITED AS APPLIES TO SECTION 667, SUBDIVISION (a).

The language from *Feyrer* quoted in the Opinion (and just discussed in Argument I) appears to relate in part to provisions found in the Three Strikes Law. *Banks*, from which the quotation originated, pre-dated the Three

Strikes Law. However, the Three Strikes Law was part of the context in *Feyrer*; a key factor considered by the *Feyrer* court in evaluating the intent of the parties to the plea agreement was the recognition that the prosecutor had designed the bargain to ensure the offense would qualify as a strike offense in any future prosecution. (*People v. Feyrer, supra,* 48 Cal.4th at pp. 437, 442, fn. 8.)

In the context of the issue presented in this case, an attempted analogy between the Three Strikes Law and section 667, subdivision (a) necessarily fails because section 667, subdivision (a) lacks key provisions present in the Three Strikes Law. Without those provisions, subdivision (a) cannot be read as limiting the effect of section 17 in the same manner as the effect of section 17 is limited in the Three Strikes Law.

In the Three Strikes Law, section 667, subdivision (c) begins with the phrase "Notwithstanding any other law." Subdivision (d) contains the following language (emphasis added):

> (d) ***Notwithstanding any other law*** and ***for the purposes of subdivisions (b) to (i), inclusive,*** a prior conviction of a felony shall be defined as: (1) Any offense defined in subdivision (c) of Section 667.5 as a violent felony or any offense defined in subdivision (c) of Section 1192.7 as a serious felony in this state. ***The determination of whether a prior conviction is a prior felony***

conviction for purposes of subdivisions (b) to (i), inclusive, shall be made upon the date of that prior conviction and is not affected by the sentence imposed unless the sentence automatically, upon the initial sentencing, converts the felony to a misdemeanor.

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

That the Legislature knows how to limit the impact of section 17 on sentencing provisions is demonstrated by the above-quoted and highlighted language contained in section 667, subdivision (d), which pertains ***only*** to ***subdivisions (b) through (i)***. No such limiting language has ever been included in section 667, ***subdivision (a)***.

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

(*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 827.)

In order to construe section 667, subdivision (a) as allowing use of a conviction reduced to a misdemeanor under section 17 as the basis for a five-year enhancement, it would be necessary to read into section 667, subdivision (a) provisions which do not exist in that subdivision. Several factors compel a conclusion it would be improper to read language present in subdivisions (b) through (i) as applying also to subdivision (a).

As this court has held, "[s]ection 667, subdivision (a) is a separate enhancement statute that is not part of the Three Strikes Law." (*People v. Fuhrman* (1997) 16 Cal.4th 930, 939.) *Fuhrman* held that the Three Strikes Law does not limit strikes to prior convictions of offenses which were brought and tried separately, despite the "brought and tried separately" limiting language present in section 667, subdivision (a). (*People v. Fuhrman, supra,* 16 Cal.4th at p. 939.) The reasoning of *Fuhrman* applies equally - though in reverse - as relates to this issue. Language found in subdivisions (b) through (i), but not in subdivision (a), should not be read into subdivision (a) because subdivision (a) is not part of the Three Strikes Law.

A comparison of section 667, subdivision (a) with the Three Strikes Law demonstrates that each has a distinct place in the overall sentencing scheme pertaining to recidivist offenders. Both share a common goal, which is to deter crime by significantly increasing punishment for individuals who re-offend. (*People v. Jones* (1993) 5 Cal.4th 1142, 1146-1147; § 667, subd. (b).) However, there are significant differences as to which circumstances trigger application of the provisions, and as to the discretion retained by the trial court:

- Under subdivision (a), prior convictions must be brought and tried separately. There is no such requirement in the Three Strikes Law. (*People v. Fuhrman, supra,* 16 Cal.4th at p. 939.)

- The current felony must be a serious felony to trigger application of the enhancement under subdivision (a). (§ 667, subd. (a).) Any current felony triggers application of the Three Strikes Law. (§ 667, subd. (c).)

- A prior juvenile adjudication may not be the basis for an enhancement under subdivision (a). (*People v. West* (1984) 154 Cal.App.3d 100, 110.) A juvenile prior may be used as a strike, under specified circumstances. (§ 667, subd. (d)(3).)

• Under the Three Strikes Law, the trial court retains discretion to strike a prior conviction allegation in the interest of justice pursuant to section 1385. (*People v. Superior Court (Romero)* 13 Cal.4th 497.) Subdivision (a), together with section 1385, specifically prohibits such exercise of discretion. (§§ 667, subd. (a)(1), 1385, subd. (b).)

Thus, section 667, subdivision (a) and the Three Strikes Law implement a finely balanced sentencing scheme, providing for longer sentences, but also for some leniency for deserving individuals. The longer sentences were explicitly provided for by omitting from the Three Strikes Law the limitation of subdivision (a) that prior convictions be brought and tried separately, and by providing that juvenile adjudications may be used as strikes.

On the other hand, under the Three Strikes Law, the trial court retains discretion to strike a prior conviction allegation if the defendant is deserving of a more lenient sentence. That discretion is explicitly limited in section 667, subdivision (a)[7]; however, the

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[7]Proposition 8 did not include an explicit limitation on the discretion of a sentencing court under section 1385. Such a limitation was added by 1986 amendments to section 667, subdivision (a) and section 1385. The legislative intent was spelled out in the enactment: "It is the intent of the

absence in subdivision (a) of any limitation pertaining to section 17 indicates that the Legislature and electorate determined the lack of discretion under section 1385 should be balanced by leaving in place the existing leniency available to a defendant who, after having been convicted of a wobbler crime, has convinced a court that his rehabilitation makes him deserving of reduction of his offense to a misdemeanor.

Thus, the provisions of subdivision (a), and of the Three Strikes Law, complement each other. Together they constitute a complex and nuanced sentencing scheme which balances increased punishment with opportunities for leniency for deserving individuals.

Courts may not reason backward from a presumed intent to write into statutory provisions language which was not part of the original enactment. (*See People v. Superior Court (Perez)* (1995) 38 Cal.App.4th 347, 361 [improper to reason backwards from stated intent of the Legislature to a result which requires rewriting the statute].) Language present in the Three Strikes Law

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Legislature to abrogate the holding in People v. Fritz, 40 Cal.3d 227, and to restrict the authority of the trial court to strike prior convictions of serious felonies when imposing an enhancement under Section 667 of the Penal Code." (Stats. 1986, ch. 85, § 3, p. 211; *People v. Superior Court (Romero), supra,* 13 Cal.4th at p. 521.)

which limits the effect of a section 17 reduction should not be written by implication into section 667, subdivision (a).

III.

APPLICATION OF SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION LEADS TO A CONCLUSION THE EFFECT OF SECTION 17 REDUCTIONS IS NOT LIMITED BY SECTION 667, SUBDIVISION (a) OR BY ARTICLE I, SECTION 28, SUBDIVISION (f); THE PROVISIONS CAN READILY BE HARMONIZED SO THAT ALL RETAIN EFFECTIVENESS.

A. Article I, Section 28, Subdivision (f) Does Not Purport to Define What Constitutes a "Felony Conviction"; Specific Provisions Govern over General Provisions.

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

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

Section 17 defines offenses. It also provides the means of reducing a felony wobbler conviction to a misdemeanor. (*People v. Wood, supra,* 62 Cal.App.4th at p. 1269; *People v. Superior Court (Perez), supra,* 38 Cal.App.4th at pp. 355-356.)

Article I, section 28, subdivision (f) of the California Constitution does not purport to define what is a felony. The only definition of offenses in article I, section 28 is contained in subdivision (g), which states: "As used in this article, the term 'serious felony' is any crime defined in subdivision (c) of Section 1192.7 of the Penal Code, or any successor statute."

Particular or specific provisions will generally take precedence over conflicting general provisions. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 420.) One example was discussed in *People v. Vessell* (1995) 36 Cal.App.4th 285. In that case, the court analyzed whether the Three Strikes Law precluded a trial court from exercising its discretion under section 17 to reduce the current wobbler offense to a misdemeanor. The court found section 17, subdivision (b) to be a more specific statute than the Three Strikes Law. In concluding the trial court retained its discretion under section 17, the court explained (*People v. Vessell, supra,* 36 Cal.App.4th at p. 294):

> [T]he more specific provisions of section 17, subdivision (b)(1) do not conflict with the general provisions of section 667. That is, a trial court may exercise its discretion under the more specific provision of section 17, subdivision (b)(1) without considering section 667. We conclude that because

> the trial court reduced the crime to a misdemeanor under section 17, subdivision (b)(1), respondent was not convicted of a felony, and section 667 does not apply.

Similarly, the more specific provisions of section 17 do not conflict with the general provisions of article I, section 28, subdivision (f). The trial court may exercise its discretion under section 17 without considering the constitutional provision.

As explained in *People v. Superior Court (Perez)*, which addressed the same issue presented in *Vessell*, the Three Strikes Law "added a new sentencing punishment scheme for a certain class of recidivist offenders"; it did not affect definitions of crimes. (*People v. Superior Court (Perez)*, *supra*, 38 Cal.App.4th at pp. 361-362.) The same is true of article I, section 28, subdivision (f)(4), which states, in pertinent part: "A prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding." This provision does not purport to ***define*** "felony conviction."

Thus, article I, section 28, subdivision (f) does not re-write or create a definition of a "felony conviction." The more specific provisions of section 17 govern on the question of what ***is*** a felony conviction.

B. The Explicit Exclusion Contained in Section 667, Subdivision (a) Precludes Implication of Any Other Exclusion.

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

The enumeration in section 667, subdivision (a) of this limitation on the effect of another penal statute (section 1385) by necessary implication excludes all other limitations not expressly stated. (*Schweisinger v. Jones* (1998) 68 Cal.App.4th 1320, 1326; *People v. Honig* (1996) 48 Cal.App.4th 289, 321, fn. 11.) The Legislature, by enacting the limitation pertaining to section 1385, demonstrated it knows how to create such limitations if it so desires. No limitation should be implied where one was not explicitly created.

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C. An Implied Repeal of the "Misdemeanor for All Purposes" Language in Section 17 Is Disfavored.

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

The analysis in *West* is instructive. In that case, the Court of Appeal considered whether the "without limitation" language of article I, section 28, subdivision (f) meant that a prior felony juvenile adjudication could be used as the basis for an enhancement under section 667, subdivision (a). The court explained why the legislative analysis of Proposition 8 supports a conclusion "convictions" was not intended to include juvenile adjudications (*People v. West, supra,* 154 Cal.App.3d at pp. 108-110, emphasis added):

> The analysis of the legislative analyst appended to Proposition 8 ["Analysis"] contains a discussion entitled: "Longer Prison Terms." [Citation.] The analysis first sets out existing law and states, "[c]onvictions resulting in probation or commitment to the Youth Authority generally are not considered for the purpose of increasing sentences, ..."

> (Analysis, at p. 54.) ... While it might be argued that "convictions resulting in ... commitment to the Youth Authority" was a reference to juvenile adjudications under Welfare and Institutions Code section 602, ***we must assume the legislative analyst was aware of existing law and was not so inartful as to include wardship adjudications under the incorrect heading of "convictions."*** [Citations.] ...
> ¶
> ***...To interpret the word "juvenile" in article I, section 28, subdivision (f) as modifying either the words "conviction" or "criminal proceeding" would require a drastic change in the law which was neither explained to the electorate nor apparent on the face of the enactment.***

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

Furthermore, there is no mention of section 17 in the legislative analysis. (Ballot Pamp., Proposed Amends. to Cal. Const., with analysis by the legislative analyst, Primary Elec. (June 8, 1982) pp. 54-55.) Because the analyst is presumed to have been aware of section 17 and its operation, this omission must be assumed to be intentional. Interpreting "serious felony" to include a prior wobbler conviction which has been reduced to a

misdemeanor would require a change in the law which was neither apparent on the face of the enactment, nor explained in the legislative analysis.

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

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

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

The Legislature and electorate have, from time to time, unambiguously created exceptions to the foregoing. As discussed in detail above, the Three Strikes Law is one such example. Had the Legislature or the electorate intended the limiting language in section 667, subdivisions (b) through (i) to apply to subdivision (a), it would have been simple enough to so provide. However, the provisions found in subdivisions (b) through (i) which limit the operation of section 17 were not extended to subdivision (a).

Another example was explained in *Gebremicael*: The Legislature limited the operation of section 17 as relates to 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 a suspension. (See *Gebremicael v. California Com'n on Teacher Credentialing, supra,* 118 Cal.App.4th at p. 1486.)

Article I, section 28, was enacted in 1982 as part of Proposition 8. (*People v. Jones, supra,* 5 Cal.4th at p. 1147.) Section 667, subdivision (a) was also enacted in 1982 (*People v. Williams* (2004) 34 Cal.4th 397, 404), and was amended in 1986 to insert the reference at the beginning of the first sentence relating to "compliance with subdivision (b) of Section 1385" (Stats.1986, c. 85, § 1.5, eff. May 6, 1986).

As for section 17, the words "for all purposes" were added in 1874. (Code Am. 1873-1874, c. 196, p. 455, § 1.) The language authorizing a court to declare an offense a misdemeanor at the time of sentencing, or later, after a grant of probation and upon application to the court, was added in 1963. (Stats. 1963, c. 919, p. 2169, § 1.) Thus, the provisions of section 17 at issue here substantially pre-dated the enactment of article I, section 28 and

section 667, subdivision (a). (*People v. Superior Court (Perez), supra,* 38 Cal.App.4th at pp. 355-356.)

In construing legislation, the court assumes the enacting body was aware of the statutes and judicial decisions already in effect and enacted the new provision in light thereof. (*People v. Weidert, supra,* 39 Cal.3d at p. 844.) This principle applies to legislation enacted by initiative. (*Ibid.*) The Legislature and electorate are presumed to have been aware of the operation of section 17 when section article I, section 28 and section 667, subdivision (a) were enacted.

And, as already discussed above, if the Legislature had intended to restrict the effect of section 17 reductions for purposes of section 667, subdivision (a), it knew how to do so, and could certainly have done so in 1986 when it added the restriction pertaining to section 1385, or in 1994 when it enacted the Three Strikes Law. That no limitation on the operation of section 17 has ever been added to section 667, subdivision (a) is a clear indication that none was intended.

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E. The Provisions of Section 17, Article I, Section 28, Subdivision (f), and Section 667, Subdivision (a) Can Be Harmonized, and Are Not Ambiguous; If They Are Ambiguous, They Should Be Construed in Favor of Appellant.

Of course, "[e]ven literal language of a statute may be disregarded to avoid absurdities or to uphold a clear contrary intent of the Legislature." (*Disabled & Blind Action Committee of Cal. v. Jenkins* (1974) 44 Cal.App.3d 74, 81.) However, construing article I, section 28, subdivision (f), and sections 17 and 667, subdivision (a) in accordance with their literal language does not result in an absurdity. "Article I, section 28, subdivision (f) is merely an enabling enactment. It is the statutory enactment, Penal Code section 667, subdivision (a), which actually requires the imposition of an additional five year term for 'each such prior conviction.' Penal Code section 667, subdivision (a) does not define 'prior conviction.'" (*People v. West, supra,* 154 Cal.App.3d at p. 110.) Rather, section 17 defines what is a felony conviction.

Thus, a construction which gives full effect to all three provisions satisfies the principle of statutory construction that statutes should be interpreted in such a way that each remains effective. There is no conflict or absurdity.

Even if, in light of article I, section 28, subdivision (f), there appears to be an ambiguity, there is an important reason to interpret sections 17 and 667, subdivision (a) in such a way as to give full effect to both. It has often been held that it is for the Legislature to clarify its intent rather than for the court to do so when to interpret or construe a statutory conflict or ambiguity will be counter to the interests of a criminal defendant. (*People v. Weidert, supra,* 39 Cal.3d at p. 848.) This principle applies to enactments by initiative. (*Ibid.*) As explained in *People v. Coelho* (2001) 89 Cal.App.4th 861, 885, internal citations and quotation marks omitted:

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

The reasonable construction which favors appellant is that once a felony has reduced under section 17 to a misdemeanor, it can no longer serve as the basis for imposition of an enhancement under section 667, subdivision (a).

CONCLUSION

Appellant's prior conviction was reduced to a misdemeanor under section 17. In accordance with the clear language of the statutory and constitutional provisions at issue, and in light of applicable principles of statutory construction, that prior conviction cannot provide the basis for an enhancement for a prior serious felony conviction under section 667, subdivision (a). The enhancement imposed in the trial court should be stricken.

Respectfully submitted,

Date:

Doris M. LeRoy
Attorney for Appellant
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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 6,080 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 _____, 2011.

_____
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 ***October 21, 2011***, I served ***Appellant's Opening 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:

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