

M E M O R A N D U M O F L A W

Subject: Effect of Penal Code Section 17(b) Reduction to Misdemeanor
On State and Federal Firearm Possession Prohibition

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ISSUE

Whether a charge for possession of a firearm by a convicted felon can be supported under California and federal law when the predicate felony conviction is reduced to a misdemeanor?

SHORT ANSWER

No, a charge for possession of a firearm by a convicted felon cannot be supported under California and federal law when the predicate felony conviction is reduced to a misdemeanor so long as the underlying felony conviction is the only prohibition he or she faces.

STATUTORY ANALYSIS

California Penal Code § 12021(a) states:

“Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country... and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.”

Likewise, 18 U.S.C. § 922(g) states:

“It shall be unlawful for any person— who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year

to...possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”

California Penal Code § 17(b) provides:

“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:”

- (1) After a judgment imposing a punishment other than imprisonment in the state prison.
- (2) When the court, upon committing the defendant to the Youth Authority, designates the offense to be a misdemeanor.
- (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.
- (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint.
- (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint.

The language of section 12021(a) and 18 U.S.C. § 922(g) has lead to some confusion about whether a reduction to a misdemeanor pursuant to Penal Code section 17(b) restores one’s right to own a firearm by eliminating the 12021(a) and/or 922(g) prohibitions.

Both California and federal law prohibit the possession of a firearm by any person who has been convicted of a felony. *See* California Penal Code § 12021(a) and 18 U.S.C. § 922(g). Convictions under federal law also prohibit the possession of ammunition.

California Penal Code § 17(b) sets out the relevant process for a felony conviction to be reduced to a misdemeanor under certain circumstances as enumerated above. First, the offense charged must be categorized as a "wobbler." The first paragraph of PC 17(b) tells us that a

wobbler is any offense that can be charged as either a felony or a misdemeanor. Second, the person charged under the wobbler offense must meet one of the five circumstances as listed in PC 17(b). Note that a felony conviction must have been given a probationary sentence in order to be able to have it reduced to a misdemeanor.

CASE LAW INTERPRETATION

As discussed in *People v. Gilbreth* the reduction of a prohibiting felony to a misdemeanor will restore a persons ability to own and possess firearms under California law *so long as* the felony prohibition is the *only* prohibition the client faces; some crimes prohibit the possession of a firearm as a felony or misdemeanor.

“[O]nce a court has reduced a wobbler to a misdemeanor pursuant to ... 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 [defendant] stands convicted of a misdemeanor, not a felony, for all purposes upon the court so declaring.” (*Gbremicael v. California Com. on Teacher Credentialing* (2004) 118 Cal.App.4th 1477, 1483 [13 Cal. Rptr. 3d 777] (*Gbremicael*)). Accordingly, defendant's possession of a firearm by a convicted felon must be reversed. (*See People v. Banks* (1959) 53 Cal.2d 370, 383–387, 388 [1 Cal. Rptr. 669, 348 P.2d 102] [“defendant would remain classified as one convicted of a felony within the meaning of section 12021 ... until and unless the [prior] offense was reduced to a misdemeanor by imposition of appropriate sentence ...”]; *Gbremicael, supra*, at p. 1485 [“as the Banks court observed, 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”].)

The People attempt to create an aura of uncertainty around the application of section 17, subdivision (b)(3) by comparing this case to those where defendants unsuccessfully argued their convictions were automatically classified as misdemeanors because they successfully completed probation. (*People v. Banks, supra*, 53 Cal.2d 370; *People v. Livingston* (1970) 4 Cal.App.3d 251 [84 Cal. Rptr. 237]; *People v. Esparza* (1967) 253 Cal.App.2d 362 [61 Cal. Rptr. 167].) We find those cases to be inapposite. Defendant's earlier conviction for evading an officer was reduced upon motion of the prosecution to a misdemeanor “for all purposes.”

We also are not persuaded by the People's criticism of *Gbremicael, supra*, 118 Cal.App.4th 1477, for its reliance on dicta in our Supreme Court's decision in *People v. Banks, supra*, 53 Cal.2d 370. We have no reason to

disagree with the *Gebremicael* court's construction of section 17, and we agree that: "as observed in *Banks*, when the Legislature wants to continue treating a felony reduced to a misdemeanor under ... section 17 as a felony, it expressly says so, and the court will treat the person as such only upon those occasions." (*Gebremicael, supra*, at p. 1486.) In fact, the Legislature added subdivision (b)(3) to section 17 after *Banks* was decided, and included no language to suggest that a defendant whose conviction was reduced under section 17, subdivision (b)(3) was to still be considered a felon for purposes of section 12021. At the time he was charged in this case, defendant had a prior misdemeanor conviction for evading an officer, and that conviction could not be considered a felony to serve as the basis for a charge that defendant had violated section 12021. Defendant's conviction for being a felon in possession of a firearm is reversed."

People v. Gilbreth, 156 Cal. App. 4th 53, 57-58 (Cal. Ct. App. 2007)

While the Federal felony conviction prohibition is defined differently, the restoration of firearm rights are treated the same when it comes to reduction of the felony to a misdemeanor pursuant to Penal Code section 17. The Code of Federal Regulations states:

"Any Federal, State or foreign offense for which the maximum penalty, whether or not imposed, is capital punishment or imprisonment in excess of 1 year.

The term shall not include:

- (a) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices or
- (b) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of 2 years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for the purposes of the Act or this part, unless such pardon, expunction, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms, or unless the person is prohibited by the law of the jurisdiction in which the proceedings were held from receiving or possessing any firearms."

27 CFR 478.11

If the crime is a “wobbler” the possibility of a felony conviction will be considered the maximum punishment. *United States v. Pruner*, 606 F.2d 871, 873 (9th Cir. 1979)

“The actual sentence imposed for the previous conviction has no bearing on the legitimacy of a prosecution under the federal firearms statute. See, *United States v. Glasgow*, 478 F.2d 850, 852 (8th Cir. 1973), Cert. den. 414 U.S. 845, 94 S. Ct. 107, 38 L. Ed. 2d 83 (1973); *United States v. Rosenstengel*, 323 F. Supp. 499 (E.D.Mo.1971).”

United States v. Rivera, 467 F. Supp. 37, 40 (D. Conn. 1979)

United States v. Bridgeforth interprets the Federal question of a reduction of a state felony to a misdemeanor in much the same way *Gilbreth* does:

“It is true that the actual sentence imposed is irrelevant to whether a crime is a felony under the career offender enhancement; the crime need only be punishable by a imprisonment for more than one year. *Davis*, 932 F.2d at 764. However, *Robinson* requires us to hold that a state court's subsequent treatment of a wobbler is controlling for purposes of the career offender enhancement. When the California court sentenced *Bridgeforth* to 365 days in county jail, section 17(b)(1) of the California Penal Code operated to convert that offense to a misdemeanor "for all purposes." We hold, therefore, that *Bridgeforth's* conviction for violating California Penal Code section 245(a) was not a felony conviction for a crime of violence under sections 4B1.1 and 4B1.2 of the Sentencing Guidelines, and that *Bridgeforth* was improperly sentenced as a career offender. Because we hold that the 1995 conviction was a misdemeanor under California Penal Code section 17(b)(1), we do not reach *Bridgeforth's* contention that the conviction also qualified as a misdemeanor under section 17(b)(3).”

United States v. Bridgeforth, 441 F.3d 864, 872 (9th Cir. 2006)

CONCLUSION

The reduction of a felony to a misdemeanor will change the classification of the conviction from a felony to a misdemeanor for “all purposes” including State and Federal firearm prohibitions so long as the underlying felony conviction is the only prohibition the person faces.