IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **MARCO ANTONIO ABUNDIZ,** Defendant and Appellant.	No. _____ (Court of Appeal No. H032622) (Santa Clara County Superior Court No. CC211137)

APPELLANT'S PETITION FOR REVIEW

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA HONORABLE ANDREA BRYAN, JUDGE PRESIDING

SIXTH DISTRICT APPELLATE PROGRAM

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TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT:

Issues Presented For Review

I. Should this court grant review in order to explore the parameters of its assertion in *People v. Shelton* (2006) 37 Cal.4th 759 that a defendant may "impliedly" reserve an issue for appeal notwithstanding his entry into a plea bargain which would otherwise bar appellate review?

II. Did the District Attorney violate the rule of *Santobello v. New York* (1971) 404 U.S. 257 by failing to honor his promise that appellant's prior conviction would not be prospectively usable as a serious felony prior pursuant to Penal Code sections 667, subdivision (a) and 1170.12?

REASONS FOR GRANTING REVIEW

This case raises two significant issues regarding the proper method for interpreting the terms of plea bargains. Since the issues in this case are likely to frequently reoccur, review should be granted.

In 1996, appellant entered a plea bargain in Santa Clara County whereby he admitted a violation of Penal Code section 245. The plea bargain included the provision that the conviction was "not a strike." (1 CT 182.)

Subsequently, appellant was charged in the present case in Santa Clara County. The 1996 conviction was charged as a serious felony prior. Appellant brought a motion to dismiss the prior conviction. The trial court denied the motion on the grounds that the terms of the 1996 plea bargain did not preclude the prospective use of the conviction as a serious felony.

After his motion to dismiss the prior conviction was denied, appellant brought a petition for writ of error coram nobis in the prior case. While the petition was pending, appellant entered a plea bargain in the present case for a top and bottom sentence of 12 years, 4 months. As a term of the plea bargain, appellant was promised that he would receive a lower sentence if his coram nobis petition was granted. (3 RT 18-20.)

The coram nobis petition was denied. (2 CT 478.) Appellant was sentenced to the promised term of 12 years, 4 months. (2 CT 475.) Appellant obtained a certificate of probable cause on the grounds *inter alia* that he desired to appeal the denial of his motion to strike the prior conviction. (2 CT 477-478.)

On appeal, appellant contended that the trial court erred in denying his

motion to dismiss the prior. The Court of Appeal held that the issue had been waived since appellant's plea bargain did not expressly reserve an appellate challenge to the order denying the motion. (Exhibit A, pp. 8-11.)

The lead issue before this court implicates the recent decision in *People v. Shelton*, supra, 37 Cal.4th 759. There, this court indicated that a defendant may enter a plea bargain which "impliedly" reserves an issue for appeal which would otherwise be waived due to the entry of a guilty plea. (*Id*. at p. 769.) This case directly raises the issue of whether appellant "impliedly" reserved an appellate challenge to the trial court's denial of his motion to dismiss the strike prior.

In appellant's view, there was such an implicit reservation since the parties specifically agreed that appellant would receive less than the agreed upon 12 year, 4 month sentence if his coram nobis petition was granted. Since the goal of both the motion and the petition was the same (i.e. to eliminate the strike prior), it is a fair understanding of the plea bargain that prospective litigation of the motion was reserved for appeal.

The Court of Appeal disagreed on the grounds that the motion and the petition were separate procedural vehicles. (Exhibit A, pp. 10-11.) However, this is a hyper-technical conclusion which ignores the primary intent of the plea bargain. Plainly, the parties intended that appellant would receive a lower

sentence if it was determined that his prior was not usable. If there is to be any meaning to *Shelton*'s proclamation that an issue may "impliedly" be reserved for appellate review, this is a proper case for application of the principle.

The second issue raised in this petition is also an important one. Due to the passage of time, the only documentary evidence regarding the 1996 conviction was a minute order which provided that the conviction was "not a strike." (1 CT 182.) Pursuant to the general principles which govern the construction of the terms of a plea bargain, this agreement should be deemed to have a prospective effect. Since this type of issue is likely to arise frequently in the many Three Strikes cases which are brought, this court would act wisely by granting review in order to provide authoritative guidance to the lower courts.

STATEMENT OF THE CASE

On May 17, 2007, appellant was charged in an indictment filed in the Superior Court for Santa Clara County. (1 CT 151-155.) In count 1, it was alleged that appellant had sold methamphetamine (Health and Safety Code section 11379). (1 CT 151.) In count two, it was alleged that appellant had possessed methamphetamine for sale (Health and Safety Code section 11378). (1CT 152.) It was alleged that both counts one and two were committed for

the benefit of a gang (Penal Code section 186.22, subdivision (b)(1)(A)). (1 CT 152.) Finally, prior conviction enhancements were alleged pursuant to Health and Safety Code sections 11370.2, subdivision (c), Penal Code section 667, subdivision (a) and Penal Code section 1170.12. (1 CT 153-154.)[1]/

On July 5, 2007, appellant filed a motion to strike the Penal Code section 667 and Penal Code section 1170.12 enhancements. (1CT 168-189.)[2]/ The motion was brought on the grounds that the plea bargain in the prior case had included the condition that the conviction could not be prospectively used as a strike prior. (1 CT 168-175.)

On July 12, 2007, the People filed an opposition to the motion to strike the prior conviction. (1 CT 199-214.) On July 18, 2007, appellant filed supplemental points and authorities. (1 CT 215-220.)

On July 20, 2007, a hearing was held on the motion. (1 CT 221.) The matter was continued. (1 CT 221.) On July 27, 2007, the People filed supplemental points and authorities. (1 CT 222-227.) On August 3, 2007, the matter was again heard and continued. (1 CT 229.) On August 13, 2007, the

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[1]Due to clerical error, the indictment also alleged a Penal Code section 1170.12 prior belonging to "Gustavo Lua." (1 CT 153.) The People acknowledged the clerical error and dismissed the allegation. (3 RT 21.)

[2]Appellant styled the motion as a "motion to specifically enforce plea bargain terms." (1 CT 168.) As a matter of convenience, appellant will refer to the pleading as a motion to strike the prior conviction.

motion was denied. (2 CT 251.)

On September 24, 2007, appellant filed a petition for writ of error coram nobis in which he sought to withdraw the plea in the case which served as the basis for the Penal Code section 667 and section 1170.12 allegations in this case. (2 CT 292-305.) On September 26, 2007, the People filed an opposition to the petition. (2 CT 306-421.)

On October 1, 2007, appellant entered a plea bargain for a top and bottom sentence of 12 years, 4 months. (2 CT 423.) Appellant pled nolo contendere to both counts and admitted all of the enhancement allegations. (2 CT 423.) As a term of the plea bargain, appellant was promised that he would receive a lower sentence if his coram nobis petition was granted. (3 RT 18-19.)

On October 3, 2007, the court issued an order soliciting additional briefing on the coram nobis petition. (2 CT 426-428.) On October 31, 2007, appellant filed supplemental points and authorities. (2 CT 430-435.) On November 8, 2007, the People filed supplemental points and authorities. (2 CT 436-441.) On December 21, 2007, the petition was denied. (2 CT 478.)

On January 11, 2008, appellant was sentenced to 12 years, 4 months in prison. (2 CT 475.) Appellant received the middle term of 6 years for his sales conviction and a consecutive sentence of 1 year, 4 months for the

possession for sale conviction. (2 CT 475.) A consecutive 5 year term was imposed for the Penal Code section 667, subdivision (a) enhancement. (2 CT 475.) The gang enhancements were stricken. (2 CT 476.) The Health and Safety Code section 11370.2 enhancement was also stricken. (2 CT 476.)

On February 15, 2008, appellant filed an application for a certificate of probable cause. (2 CT 477.) On February 20, 2008, the application was granted. (2 CT 478.)

On May 22, 2009, the Court of Appeal issued its opinion and dismissed the appeal. (Exhibit A.)

STATEMENT OF FACTS

William Vick was the primary witness against appellant. Mr. Vick became a police informant following an arrest. (1 CT 57-58.) Mr. Vick testified that both he and appellant were Norteno gang members. (1 CT 61, 76-77.) According to Mr. Vick, appellant was the regiment security man for the local Nuestra Familia. (1 CT 77-78.)

On December 12, 2006, Mr. Vick contacted appellant. (1 CT 80.) Appellant gave Mr. Vick over two ounces of methamphetamine on credit. (1 CT 82-83.) Mr. Vick delivered the drugs to the police. (1 CT 84.) Subsequently, Mr. Vick paid appellant $1900 for the drugs. (1 CT 85-86.)

On February 22, 2007, appellant became nervous that someone was

casing a safe house that he was using to store drugs. (1 CT 88, 91.) At appellant's direction, Mr. Vick had his girlfriend retrieve a safe from the house. (1 CT 91-92.) Mr. Vick delivered the safe to the police. (1 CT 92.) The safe contained one and a half pounds of methamphetamine. (1 CT 93.)

I.

THE COURT OF APPEAL ERRED IN CONCLUDING THAT THE TERMS OF APPELLANT'S PLEA BARGAIN DID NOT IMPLIEDLY RESERVE THE RIGHT TO APPEAL THE TRIAL COURT'S DENIAL OF THE MOTION TO STRIKE THE PRIOR.

Appellant was charged with prior conviction enhancements pursuant to Penal Code sections 667, subdivision (a) and 1170.12 based on his 1996 conviction for a violation of Penal Code section 245. (1 CT 153-154.) Appellant filed a motion to strike the prior conviction on the grounds that the 1996 plea bargain included the condition that the conviction could not be prospectively used as a strike prior. (1 CT 168-189.) The motion was denied.

Subsequently, appellant filed a petition for writ of error coram nobis in which he sought to withdraw the plea in the 1996 case. (2 CT 292-305.) While the petition was pending, appellant entered a plea bargain for a top and bottom sentence of 12 years, 4 months. (2 CT 423.) As a term of the plea bargain, appellant was promised that he would receive a lower sentence if his coram nobis petition was granted. (3 RT 18-20.)

The coram nobis petition was denied. (2 CT 478.) Appellant was sentenced to the promised term of 12 years, 4 months. (2 CT 475.) Appellant obtained a certificate of probable cause on the grounds *inter alia* that he desired to appeal the denial of his motion to strike the prior conviction. (2 CT 477-478.)

On this record, the Court of Appeal held that appellant was barred from challenging the trial court's order denying his motion to strike the prior since the issue had not been reserved by the terms of the plea bargain. (Exhibit A, pp. 8-11.) The court's conclusion cannot be sustained.

As a starting principle, it is settled that a defendant may admit a prior conviction and reserve an appellate challenge to the constitutional or legal validity of the prior. (*People v. Panizzon* (1996) 13 Cal.4th 68, 78, fn. 8; *People v. Calio* (1986) 42 Cal.3d 639, 643-644; *People v. Sumstine* (1984) 36 Cal.3d 909, 914-915 and fn. 3; see also *People v. Shelton*, supra, 37 Cal.4th 759, 769 [appellate challenge may be reserved as a condition of a plea bargain].) Here, the terms of appellant's plea bargain do not preclude the constitutional challenge which was advanced in the Court of Appeal.

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.]" (*People v. Shelton*, supra, 37 Cal.4th 759, 767.) The court is to give force to the mutual intention

of the parties. (*Ibid*.) If there is any ambiguity in the plea bargain, it must be resolved in the defendant's favor. (*People v. Toscano* (2004) 124 Cal.App.4th 340, 345.) This principle is applied with a focus on the question of whether the government's conduct led the defendant to reasonably believe that a certain benefit would be a consequence of the plea. (*People v. Arata* (2007) 151 Cal.App.4th 778, 787; *People v. Toscano*, supra, 124 Cal.App.4th 340, 345.) In order to protect the defendant's reasonable expectations, the court must enforce implied terms of a plea bargain which were within the defendant's contemplation. (*Arata,* supra, 151 Cal.App.4th 778, 787.)

Importantly, this court has recognized that the terms of a plea bargain may "impliedly" reserve the right to prosecute an issue on appeal even though the issue would ordinarily be waived by the guilty plea. (*People v. Shelton*, supra, 37 Cal.4th 759, 769.) This is a proper case for application of the principle.

Here, an express term of the plea bargain was that appellant would receive less than the agreed upon 12 year, 4 month sentence if his coram nobis petition was granted. (3 RT 18-20.) It is reasonable to conclude that appellant understood this term as also applying to his motion to strike the prior conviction. This is so since the goal of each procedural vehicle (i.e. the motion and petition) was to invalidate the present effect of the prior

conviction. Indeed, defense counsel so understood the terms of the plea bargain since he sought a certificate of probable cause with regard to the denial of the motion to strike the prior. (2 CT 478.)

People v. Toscano, supra, 124 Cal.App.4th 340 is closely on point. There, the defendant entered a written plea bargain whereby he was promised the right to make a "motion to strike prior." (*Id*. at p. 342.) The defendant moved to strike the prior pursuant to both Penal Code section 1385 and constitutional grounds. At the sentencing hearing, the court declined to entertain the constitutional grounds on the theory that such grounds were outside the terms of the plea bargain. The Court of Appeal reversed and held that the constitutional grounds were within the terms of the plea bargain. (*Id*. at pp. 344-345.)

The case at bar is similar to *Toscano*. Appellant's plea bargain reserved the right to challenge the validity of his prior conviction. While the terms of the plea bargain did not specifically reference the motion to strike the prior conviction, the terms implicitly did so. (*Toscano*, supra, 124 Cal.App.4th at pp. 344-345.)

In holding to the contrary, the Court of Appeal reasoned that the motion and the petition "were based on alternative premises and sought different relief." (Exhibit A, p. 10.) According to the court, the motion sought to bar

the use of the strike prior based on the parties' mutual understanding whereas the petition sought to invalidate the 1996 plea bargain based on appellant's misunderstanding of the terms of the deal. (Exhibit A, pp. 10-11.) This analysis fails for a simple reason.

While lawyers and judges understand legal niceties, criminal defendants do not. For this reason, a court must enforce the implicit terms of a plea bargain which were reasonably within the defendant's contemplation. (*People v. Arata,* supra, 151 Cal.App.4th 778, 787.) Here, appellant could reasonably understand the plea bargain as allowing for an appeal of the court's order denying his motion.

With respect to the reasonableness of appellant's belief, it is worth noting that defense counsel had the same understanding as appellant since he sought a certificate of probable cause with regard to the denial of the motion. (2 CT 477-478.) Presumably, counsel and appellant were on the same page with respect to their understanding of the terms of the plea bargain.

This court has recognized the salutary principle that a particular issue may be "impliedly" reserved for appeal notwithstanding a plea bargain. (*Shelton*, supra, 37 Cal.4th 759, 769.) Review should be granted so that the principle may be enforced in this case.

II.

PURSUANT TO THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS, APPELLANT'S PRIOR CONVICTION IS NOT USABLE AS A SERIOUS FELONY PRIOR.

Under present law, a Penal Code section 245, subdivision (a)(1) conviction constitutes a serious felony when the crime involved the use of a deadly weapon. (Penal Code section 1192.7, subd. (c)(31); *People v. Banuelos* (2005) 130 Cal.App.4th 601, 605.) This is true regardless of whether the defendant personally used a weapon or was convicted as an aider and abettor. (*Ibid*.)

In 1996, the law was different. At that time, a section 245, subdivision (a)(1) conviction could not constitute a serious felony unless the defendant personally used a deadly weapon. (*Banuelos*, supra, 130 Cal.App.4th 601, 604-605.)

In this case, the indictment included the allegation that appellant's prior Penal Code section 245 conviction was usable as both a strike prior and a five year prior pursuant to Penal Code sections 667, subdivision (a) and 1170.12. (1 CT 153-154.) The prior conviction was sustained in 1996 by way of a plea bargain in Santa Clara County case number 185595. (1 CT 182.)

Appellant brought a motion to strike the prior conviction on the grounds that the 1996 plea bargain provided that the conviction would not be

prospectively employed as a serious felony prior. (1 CT 168-175.) In support of the motion, appellant relied on several pieces of evidence.

The information in case number 185595 alleged that appellant and his co-defendant, Manuel Namovicz, had violated Penal Code section 245, subdivision (a)(1) by committing "an assault upon the person of JOSE GARCIA with a deadly weapon and instrument other than a firearm, to wit: a(n) CHAIR, and by means of force likely to produce great bodily injury." (1 CT 208.) The information also included a special allegation pursuant to Penal Code section 969f that appellant had personally used a weapon within the meaning of Penal Code sections 667 and 1192.7. (1 CT 208.)

On March 22, 1996, appellant entered a plea bargain in exchange for a grant of probation. (1 CT 182.) Due to the passage of time, a reporter's transcript of the hearing could not be prepared since the court reporter's notes were destroyed. (1 CT 189.) The minute order for the hearing reflected three facts: (1) appellant pled guilty to a violation of "PC 245 (a)(1);" (2) the special allegation pursuant to sections 667 and 1192.7 was dismissed; and (3) the parties had "stipulated this not a strike." (1 CT 182.)

Attorney Beverly Chan represented appellant at the 1996 hearing. (1 CT 182.) In her declaration signed under penalty of perjury, Ms. Chan indicated that she had negotiated the plea bargain with prosecutor James

Hammer. (1 CT 179.) A term of the plea bargain was that "there would be a stipulation on the record that the charged offense, Penal Code § 245, would *not* be a strike for all future purposes." (1 CT 179, emphasis in original.)

Appellant submitted his own declaration under penalty of perjury. (1 CT 185-186.) Consistent with Ms. Chan's recollection, appellant averred that the plea bargain included "a stipulation on the record that the charged offense, Penal Code § 245, would *not* be a strike for all future purposes." (1 CT 186, emphasis in original.)

In opposing the motion, the People submitted a declaration from Mr. Hammer. (1 CT 226-227.) The declaration was not signed under penalty of perjury. (1 CT 226-227.) Although Mr. Hammer had no "recollection of stating that the plea would or would not be a strike for all future purposes," he asserted that it was "the common practice in the District Attorney's Office at the time, and my own, to make no assurances regarding future changes in the law." (1 CT 226-227.)

Notwithstanding the stipulation memorialized in the March 22, 1996 minute order, the court found it "difficult . . . to believe" that Mr. Hammer had prospectively promised that the conviction could never be used as a strike. (1 RT 4.) In denying the motion, the court stated:

> "The court does find that there was no violation of the plea bargain. The law changed and the defendant was properly

> charged with the strike prior accordingly. The motion is denied." (2 RT 13.)

Pursuant to the due process clause of the Fifth and Fourteenth Amendments, a defendant is entitled to the enforcement of any promise which the government made in a plea bargain agreement. (*Santobello v. New York*, supra, 404 U.S. 257, 262.) This constitutional rule encompasses both express promises and implied terms of the plea bargain which were reasonably within the defendant's contemplation. (*People v. Arata*, supra, 151 Cal.App.4th 778, 787.)

In this case, the 1996 plea bargain between appellant and the government was memorialized as follows: "stipulated this not a strike." (1 CT 182.) According to the trial court, the quoted agreement merely reflected the parties' understanding that appellant's conviction for a violation of section 245, subdivision (a)(1) would not be a strike under then existing law. (1 RT 4, 2 RT 13.) As will be demonstrated below, the court's ruling is erroneous as a matter of law.

A plea bargain is a contract which must be interpreted pursuant to the general principles which govern the construction of contracts. (*People v. Shelton*, supra, 37 Cal.4th 759, 767.) The central principle is that effect is to be given to the mutual intention of the parties. (*Ibid.*)

"'The mutual intention to which the courts give effect is

> determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]'" (*Shelton*, supra, 37 Cal.4th at p. 767.)

In recognition of the fact that the government enjoys superior bargaining power over a criminal defendant, any ambiguity in a plea bargain is resolved in the defendant's favor. (*People v. Toscano*, supra, 124 Cal.App.4th 340, 345.) This principle is applied in conjunction with a constitutional focus on the question of whether the government's conduct led the defendant to reasonably believe that a certain benefit would be a consequence of the plea. (*People v. Arata*, supra, 151 Cal.App.4th 778, 787; *People v. Toscano,* supra, 124 Cal.App.4th 340, 345.)

Before examining the terms of the plea bargain, it is important to review the legal context in which the agreement was made. In 1996, a Penal Code section 245, subdivision (a)(1) conviction constituted a strike only if the offense involved the defendant's personal use of a weapon. (*People v. Banuelos*, supra, 130 Cal.App.4th 601, 604-605.) Given the state of the law, the 1996 information contained a Penal Code section 969f allegation that appellant had personally used a chair in the commission of the crime. (1 CT 208.) The sole purpose of this allegation was to create a record that the

conviction, if obtained, would be prospectively usable as a strike. (*People v. Leslie* (1996) 47 Cal.App.4th 198, 204 [the purpose of a section 969f allegation is to "prequalify a crime as a serious felony in the event of a defendant's future conviction . . . ."].)

As is reflected in the March 22, 1996 minute order, the section 969f allegation was dismissed as a condition of the plea bargain. (1 CT 182.) In addition, the parties stipulated that appellant's conviction was "not a strike." (1 CT 182.) The only reasonable interpretation of this record is that appellant was promised that the conviction could never be used as a strike.

It is a fundamental rule that a provision in a contract may not be construed so as to render it meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473.) On our record, the stipulation entered by the parties would be absolutely meaningless if it is not interpreted to preclude the conviction from ever being used as a strike.

As was discussed above, the section 969f allegation was included in the information for the sole purpose of creating a record whereby the conviction could be used as a strike. However, the allegation was dismissed pursuant to the plea bargain. As a result, the record of conviction would have shown to a certainty that the conviction was not a strike even if no stipulation was entered. Such being the case, the stipulation would be rendered meaningless

unless it is understood as providing prospective protection against any changes in the Three Strikes law.

Notwithstanding this commonsense construction of the agreement, the People contended in the trial court that prospective changes in the Three Strikes law are deemed to be a term of a plea bargain. (1 CT 200-204.) While there is authority for this proposition, (*People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070), the instant plea bargain contained an express term to the contrary. Thus, the general rule found in *Gipson* offers no solace for the People. (See *Davis v. Woodford* (9th Cir. 2006) 446 F.3d 957, 962-963 [distinguishing *Gipson* and holding that the record there included the government's promise that the defendant's guilty plea would allow for the prospective use of only one strike prior].)

People v. Arata, supra, 151 Cal.App.4th 778 establishes the merit of appellant's position. In *Arata*, the defendant pled guilty to a violation of Penal Code section 288 with the promise that he would be placed on probation. At the time of the plea, Penal Code section 1203.4 provided that the conviction would be dismissed upon the successful completion of probation. Several years later, the People opposed the defendant's dismissal motion on the grounds that a subsequent amendment to section 1203.4 precluded relief for convicted child molesters. The People further argued that section 1203.4

relief was not an express term of the plea bargain. The Court of Appeal held that the defendant was entitled to the application of section 1203.4 since "the plea bargain implicitly included the promise of section 1203.4 relief" and such "relief was within 'defendant's contemplation and knowledge' when he entered his plea. [Citation.]" (*Id*. at p. 787.)

The case at bar is quite similar to *Arata*. Here, as in *Arata*, the law changed after the plea bargain was entered. However, a fair understanding of the plea bargain is that appellant was promised prospective protection against the use of the conviction as a strike. Since appellant's understanding of the plea bargain was reasonable, he cannot be presently denied the benefit of the bargain. (*Arata*, supra, 151 Cal.App.4th 778, 787.)

Assuming that the proper interpretation of the agreement is not as clear-cut as appellant believes, the reality remains that appellant is still entitled to prevail. At best for the People, the terms of the stipulation are ambiguous with respect to whether the conviction could be prospectively used as a strike. Given this circumstance, the stipulation must be construed in appellant's favor. (*People v. Toscano,* supra, 124 Cal.App.4th 340, 345 [ambiguity in a plea bargain is to be construed in the defendant's favor].)

With regard to the last point, it is critical to note that the trial court's interpretation of the stipulation actually added words to those found in the

record. The minute order states: "stipulated this not a strike." (1 CT 182.) By holding that the agreement had no prospective effect, the court essentially amended the stipulation to read: "stipulated this not a strike [under current law]." Since the circumstances surrounding the entry of the plea bargain do not prove that the added words were within the parties' contemplation, the trial court erred by so construing the agreement.

In adopting its interpretation of the stipulation, the court appears to have given weight to the declaration submitted by Mr. Hammer who was the prosecutor in 1996. (1 RT 3-4.) In so doing, the court.

In support of his motion, appellant submitted declarations from both himself and Public Defender Beverly Chan who negotiated the 1996 plea bargain. (1 CT 178-180, 185-186.) The declarations were signed under penalty of perjury and indicated that both Ms. Chan and appellant believed that the plea bargain precluded any future use of the conviction under the Three Strikes law. (1 CT 178-180, 185-186.)

In his declaration, Ms. Hammer made no assertion that Ms. Chun and appellant were mistaken. Rather, Mr. Hammer indicated that he had no "independent recollection" of the matter. (1 CT 226.) Nonetheless, Mr. Hammer asserted that it "was the common practice in the District Attorney's Office at the time, and my own, to make no assurances regarding future

changes in the law." (1 CT 227.) The trial court failed to note two significant points concerning Mr. Hammer's declaration.

First, unlike the defense declarations, Mr. Hammer did not offer any direct evidence regarding the terms of the plea bargain. Thus, he did not contradict the express averments of Ms. Chan and appellant that the plea bargain precluded the future use of the conviction as a strike. Second, unlike the defense declarations, Mr. Hammer's declaration was *not* executed under penalty of perjury. (1 CT 226-227.)

Mr. Hammer is a highly experienced lawyer. By failing to execute his declaration under penalty of perjury, Mr. Hammer was plainly sending a message to the court that he was less than certain regarding the information set forth in his declaration. Under these circumstances, Mr. Hammer's declaration is not entitled to any weight. (*People v. Salazar* (1968) 266 Cal.App.2d 113, 115 [requirement of Code of Civil Procedure section 2015.5 that declaration must be signed under penalty of perjury "assures that the person stating the facts does so with an awareness of the grave responsibility he has assumed with respect to the truthfulness of his statement;" see also *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 612 [declaration is defective under section 2015.5 absent an express reference to California's perjury law].)

As a final point regarding Mr. Hammer's declaration, it must be emphasized that it does not derail appellant's cause even if it is accepted at face value. Mr. Hammer asserted that it was not his office's practice to provide "assurances regarding future changes in the law." (1 CT 227.) However, this fact would be relevant only if it was communicated to appellant.

As was discussed above, any ambiguity in the plea bargain must be construed in appellant's favor since appellant's "'reasonable beliefs'" are the ultimate measure of the terms of the agreement. (*People v. Toscano*, supra, 124 Cal.App.4th 340, 345.) Here, both Ms. Chan and appellant believed that the agreement conferred future protection for appellant. Since Mr. Hammer has not claimed that he gave the defense any contrary information, appellant's belief must carry the day.

Insofar as the trial court erred in denying the motion, the remaining question is the remedy to which appellant is entitled. Given the terms of appellant's present plea bargain, the case should be remanded to the trial court with directions to resentence appellant as if he has no prior serious felony conviction.

CONCLUSION

For the reasons expressed above, review should be granted.

Dated: June ____, 2009

Respectfully submitted,

_____
DALLAS SACHER
Attorney for Appellant,
Marco Antonio Abundiz

CERTIFICATE OF COUNSEL

I certify that this brief contains 5152 words.

Dated: June ____, 2009

_____
DALLAS SACHER
Attorney for Appellant
Marco Antonio Abundiz

PROOF OF SERVICE

I declare that I am over the age of 18, not a party to this action and my business address is 100 N. Winchester Blvd., Suite 310, Santa Clara, California 95050. On the date shown below, I served the within ***APPELLANT'S PETITION FOR REVIEW*** to the following parties hereinafter named by:

X Placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Clara, California, addressed as follows:

Catherine Rivlin, Esq.
Attorney General's Office
455 Golden Gate Avenue
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[Attorney for Respondent]

Court of Appeal
333 W. Santa Clara Street
Suite 1060, 10th Floor
San Jose, CA 95113

District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Clerk of the Superior Court
191 N First Street
San Jose, CA 95113

Marco Abundiz
885 N. San Pedro Street
San Jose, CA 95110

I declare under penalty of perjury the foregoing is true and correct. Executed this ____ day of June, 2009, at Santa Clara, California.

_____
Priscilla A. O'Harra