CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

January 12, 2015

Frank A. McGuire
Clerk, Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Amicus* Letter by California Attorneys for Criminal Justice
in Support of Grant of Review in People v. Brown,
No. S222298, Court of Appeal No. E059809

Dear Mr. McGuire:

The California Attorneys for Criminal Justice (CACJ) support the granting of review by this Court in the above-named and numbered appeal.

CACJ is a nonprofit California corporation. According to Article IV of its bylaws, CACJ was formed to achieve certain objectives including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California and other applicable law." CACJ is administered by a Board of Governors consisting of criminal defense lawyers practicing within the State of California. The organization has approximately 2,000 members, primarily criminal defense lawyers practicing before Federal and State courts. These lawyers are employed throughout the State both in the public and private sectors.

The undersigned member of and attorney for CACJ certifies to this Court that no party involved in this litigation has tendered any form of compensation, monetary or otherwise, for legal services related to the writing or production of this letter, and additionally certifies that no party to this litigation has contributed any monies, services, or other form of donation to assist in its production.

In People v. Superior Court (Romero) (1996) 13 Cal.4th 497, this Court held that in proceedings under the Three Strikes Law, the sentencing court has discretion under Penal Code section 1385 to dismiss prior convictions in the interests of justice. That discretion exists "absent a clear legislative direction to the contrary." (Id at p. 518, citing People v. Thomas (1992) 4 Cal.4th 206, 210.)

In People v. Williams (1998) 17 Cal.4th 148, 161, the Court held that the sentencing court's discretion should be exercised when the defendant does not come within "the spirit of the Three Strikes law" and that a primary consideration is "the nature and circumstances of his present felonies ...." (Id. at p. 161; see Romero, at pp. 530-531.) The fact that the current offense itself is not a "strike" – i.e., a violent or serious felony – did not remove the defendant from the "spirit" of the law. (Id. at p. 529; see Ewing v. California (2003) 538 U.S. 11, 29-30.)

Since the Court's decision in Williams, the citizens of California have approved Proposition 36, the Three Strikes Reform Act of 2012, which generally provides that a third-strike sentence may not be imposed if the current offense is not a violent or serious felony. Thus, as of the effective date of the Reform Act, there is a *new "spirit" of the Three Strikes Law*, which disfavors third-strike offenses for non-violent, non-serious felonies.

Subdivision (c)(2)(C) of Penal Code sections 667 and 1170.12 provide exceptions to that general rule, including exceptions for persons who have prior convictions for offenses specified in subdivision (c)(2)(C)(iv) ("disqualifying priors") that have been "pled and proved." In the case of a person with two or more prior violent or serious convictions, including one or more of such disqualifying priors, who commits a non-violent, non-serious offense after the effective date of the Reform Act and against whom the prosecution charges such disqualifying priors, the sentencing court will have discretion under section 1385, as held in Romero, supra, to dismiss the disqualifying priors. The Reform Act added to subdivision (f)(2) of section 667 and to (d)(2) of section 1170.12 an affirmative recognition of the court's discretion: "Nothing in this section shall be read to alter a court's authority under Section 1385."

Proposition 36 also provides for re-sentencing of inmates serving third-strike sentences for non-violent, non-serious felonies, with the same exception for persons with the same "disqualifying priors." (§ 1170.126, subd. (e)(3).) The question presented by the present Petition for Review is whether the court which decides a petition for re-sentencing under the Reform Act has the same discretion that a sentencing court has in an original sentencing proceeding under the Act to dismiss disqualifying priors.

Many of the clients of CACJ attorneys have never had the advantage of a "Romero" hearing on whether the interests of justice would be served by the dismissal of a prior "strike" conviction which is a "disqualifying prior" *under either the "old" or the "new spirit" of the Three Strikes Law.* We believe that a fair interpretation of the Reform Act's re-sentencing provisions, in accordance with the above-stated principle of People v. Thomas, 4 Cal.4th at p. 210) is that the court deciding a re-sentencing petition has the same discretion to dismiss prior disqualifying convictions in the interests of justice.

Some of our clients were sentenced to third-strike sentences before the Court decided Romero, and the sentencing judges were unaware of their discretion to dismiss prior convictions of defendants who did not fall within the spirit of the Three Strikes Law. After Romero some of those defendants had an opportunity for hearings at which the judges exercised such discretion, but only if the court "misunderstood the scope of its discretion" and did not clearly indicate that it would not exercise it. (Romero, at p. 530, fn. 13.)

Many of our clients were sentenced after Romero and did have the advantage of the court's exercise of its discretion under section 1385 but that discretion was exercised under the "old spirit of the Three Strikes Law," which did not disfavor third-strike sentences for non-violent, non-serious felonies, contrary to the "new spirit" of the Three Strikes Reform Act.

Many of our clients who were sentenced to third-strike sentences had more than two prior "strikes," and sentencing judges might have been inclined to exercise their discretion to dismiss one or more of them for such reasons as their unaggravated nature, remoteness, or the youth of the defendants when they were committed but, still, declined to dismiss them because two or more other aggravated or less remote convictions brought the defendants within the old spirit of the law and dismissing of one or more other convictions would not spare those defendants a third-strike sentence or serve any other purpose. The convictions that the judges were inclined to dismiss but saw no practical purpose in dismissing may have been of what are now "disqualifying priors."

For example, referring to a case currently pending on appeal, a defendant committed a rape in 1975, when he was 16 years old, and he was committed to the Youth Authority. In 1984 and 1990, he was convicted of robberies. In 2002 he was convicted of violation of Vehicle Code section 2800.2, subdivision (a) (driving in disregard for safety of persons or property while fleeing from pursuing police officer), and was charged with the two prior robbery "strikes" convictions, which were found to be true, and was sentenced under the Three Strikes Law to 25 years to life. He was never charged with and, thus, there was no occasion for the sentencing judge to consider whether to dismiss the juvenile rape adjudication. But when he petitioned under section 1170.126 for re-sentencing, the prosecution alleged that he was disqualified because of that adjudication, and the court found him ineligible for re-sentencing.

If that defendant had committed the non-violent, non-serious Vehicle Code felony after the Three Strikes Reform Act, and the prosecution wanted a third-strike sentence, it would have to "plead and prove" the disqualifying juvenile adjudication. The court would clearly have discretion under Romero to dismiss that allegation under section 1385, thereby precluding a third-strike sentence for the current non-violent, non-serious felony.

CACJ believes that, in order to avoid such inequities as in the above example, and in keeping with the principle that a statute should not be read "as eliminating courts power under section 1385 'absent a clear legislative direction to the contrary'" (Romero, supra, 13 Cal.4th at p. 518, quoting Thomas, supra, 4 Cal.4th at p. 210), the Court should grant review in People v. Brown, No. S222298, and hold that the court, in deciding a petition for re-sentencing and whether or not the defendant is eligible therefor, has the discretion – not clearly eliminated by the electorate – to dismiss otherwise disqualifying convictions in the interests of justice.

Respectfully yours,

RICHARD SUCH
Attorney for California Attorneys for Criminal Justice

cc: Attorney General
John L. Dodd

PROOF OF SERVICE BY MAIL

I, BONNIE PALMER, say:

I am over the age of eighteen years, a citizen of the United States, and a resident of Contra Costa County, California. My business address is 730 Harrison St., #201, San Francisco, CA, 94107. On January 12, 2015, I served the within Amicus Letter on the following person by placing a true copy thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at San Francisco, California, addressed as follows

Peter Quon, Jr.
Office of the State Attorney General
110 W "A" St Ste 1100
San Diego, CA 92101

John L. Dodd
17621 Irvine Boulevard, Suite 200
Tustin, CA 92780

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of January, 2015, at San Francisco, CA.

BONNIE PALMER