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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE OF THE STATE OF CALIFORNIA, )  
 ) No. B123456  
Plaintiff and Respondent, )  
 ) (Sup.Ct.No. CR12345)  
 )  
v. )  
 )  
JOHN DOE , )  
 )  
Defendant and Appellant. )  
\_\_\_\_\_ )

APPEAL FROM THE JUDGMENT OF  
THE SUPERIOR COURT OF VENTURA COUNTY  
THE HONORABLE KEVIN MCGEE, JUDGE PRESIDING

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APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

	<u>Page(s)</u>
APPELLANT'S OPENING BRIEF .....	1
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	4
ARGUMENT .....	5
I    THE COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT APPELLANT'S <i>ROMERO</i> MOTION AND STRIKE THE "STRIKE" PRIOR .....	5
II   THE CAUSE MUST BE REMANDED FOR A NEW SENTENCING HEARING BECAUSE THE COURT ERRED BY REFUSING TO CONSIDER APPELLANT'S CIRCUMSTANCES IN THE THREE YEARS BETWEEN HIS CONVICTION AND SENTENCING IN DECIDING WHETHER TO STRIKE EITHER APPELLANT'S "STRIKE" OR PENAL CODE SECTION 667.5 SUBDIVISION (B) PRIOR .....	13
CONCLUSION .....	16

## TABLE OF AUTHORITIES

Page(s)

### STATE CASES

<i>In re Cortez</i> (1971) 6 Cal.3d 78 .....	6, 14
<i>In re Saldana</i> (1997) 57 Cal.App.4th 620 .....	5, 10, 13, 14
<i>People v. Banks</i> (1997) 59 Cal.App.4th 20 .....	5, 8
<i>People v. Bishop</i> (1997) 56 Cal.App.4th 1245 .....	10, 11, 14
<i>People v. Bradley</i> (1998) 64 Cal.App.4th 386 .....	14
<i>People v. Cluff</i> (2001) 87 Cal.App.4th 991 .....	6, 14
<i>People v. Gaston</i> (1999) 74 Cal.App.4th 310 .....	11
<i>People v. Jones</i> (1995) 10 Cal.4th 1102 .....	3
<i>People v. Sipe</i> (1995) 36 Cal.App.4th 468 .....	12
<i>People v. Strong</i> (2001) 87 Cal.App.4th 328 .....	9
<i>People v. Superior Court (Alvarez)</i> (1997) 14 Cal.4th 968 .....	5, 10, 13
<i>People v. Superior Court (Romero)</i> (1996) 13 Cal.4th 49 .....	2

<i>People v. Superior Court (Romero)</i> (1996) 13 Cal.4th 497 .....	5
<i>People v. Thornton</i> (1999) 73 Cal.App.4th 42 .....	11
<i>People v. Watson</i> (1956) 46 Cal.2d 818 .....	15
<i>People v. Williams</i> (1998) 17 Cal.4th 148 .....	5, 6, 10, 11, 14

## STATE STATUTES

### Penal Code sections:

667 .....	1, 5
667.5 .....	2, 7, 13, 14
1192.7 .....	5, 7
1202.4 .....	3
1202.45 .....	3
1237.5 .....	3
1385 .....	2, 14

### California Rules of Court:

rule 4.423 (a)(6), (b)(2), (b)(3) .....	7
rule 31 (d) .....	3

### Health & Safety Code section:

11377 .....	1
-------------	---

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

Appellant, John Doe, appeals the judgment following his conviction of one count of possession of methamphetamine (Heath & Saf. Code, § 11377 subd. (a)) and true findings of a prior serious felony conviction within the meaning of Penal Code sections 667 subdivisions (b) through (i) and 1170.12 subdivisions (a) through (d) and a felony conviction for which he served a prison term within the meaning of Penal Code section

667.5 subdivision (b). (CT 69-70, 73)

Appellant was charged by information with the above offense and allegations. (CT 1-3) On April 27, 1999, appellant waived, both orally and in a written Felony Disposition Statement, his right to a jury trial, with its accompanying rights to confrontation and cross-examination and against self-incrimination, pleaded no contest to the charge and admitted the enhancement allegations.(CT 14-26, RT 12-14) At the time of the plea, the prosecutor made no agreement as to sentence, but the court indicated that it would impose a sentence no greater than 44 months in state prison. (CT 23-24, RT 14)

Thereafter, appellant failed to appear for his scheduled sentencing hearing on June 17, 1999. (CT 27) The sentencing hearing was subsequently held on June 3, 2002. (CT 68-70) Prior to sentence, appellant moved to strike the “strike” allegation because its application would result in a cruel and unusual sentence and because the striking would be in the interests of justice pursuant to Penal Code section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 49. (CT 59-67, RT 17-23) The motion was denied. (RT 22-23)

Thereafter, appellant requested that he be sentenced to only the low term doubled, 32 months. (RT 23-24) The court declined the request and sentenced appellant to the low term doubled, enhanced one year pursuant to Penal Code section 667.5 subdivision (b). (RT 25) The court additionally ordered appellant to pay a restitution fine of \$500 pursuant to Penal Code section 1202.4 and imposed but stayed an identical fine pursuant to Penal Code section 1202.45. (CT 69-70; RT 26) It further ordered appellant to

pay lab and drug program fees with their attendant penalty assessments. (RT 26; CT 70)  
The court also awarded appellant 155 days of actual pre-sentence custody credit and 76 days of conduct credits. (RT 26; CT 69)<sup>1</sup>

On June 14, 2002, appellant filed a timely notice of appeal from the sentence. (CT 73-74) The appeal lies. (Pen. Code, § 1237.5; Cal. Rules of Court, rule 31 (d); *People v. Jones* (1995) 10 Cal.4th 1102, 1108.)

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<sup>1</sup>Appellant also had pending a misdemeanor charge for being under the influence of a controlled substance on April 30, 1999. Appellant waived his constitutional rights and admitted the offense. At his request, he was immediately sentenced to a concurrent term of 180 days. (RT 26-27)

## STATEMENT OF FACTS

On June 27, 1998 at about 1 p.m., Officer David Sparks went to a home in response to a disturbance call. (CT 79) Appellant, who was on parole and had an outstanding parole warrant, was standing on the front porch of the home. (CT 80) Sparks parked in front of the house and was getting out of his car when he saw appellant throw a small black cloth bag to the right of the porch. (CT 80-81) Sparks arrested appellant on the parole warrant and recovered the black bag. (CT 81) The bag contained .13 grams of methamphetamine, a small amount of marijuana and cash. (CT 81) Appellant was under the influence of methamphetamine. (CT 82)



## ARGUMENT

### I.

#### THE COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT APPELLANT'S *ROMERO* MOTION AND STRIKE THE "STRIKE" PRIOR

Appellant requested that the trial court exercise its discretion to strike the "strike" allegation, which was based on his prior robbery conviction. (CT 59-67, RT 17-18) The trial court denied the motion. (RT 21-23) In so doing, the court abused its discretion. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497; *People v. Williams* (1998) 17 Cal.4th 148; *People v. Banks* (1997) 59 Cal.App.4th 20, 24.)

The trial court has the power to strike a prior serious or violent felony conviction charged as a "strike" pursuant to Penal Code sections 667 subdivisions (b)-(i) and 1192.7. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at 504, 530-531.) If after considering a defendant's background, the nature of his present offense, and the objectives of rational sentencing, it would be in the interests of justice to strike the prior, then the prior should be stricken. (*Ibid.*; see also *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978-980.) In the exercise of discretion under section 1385 the court is required to consider and weigh *all* the relevant factors. (*In re Saldana* (1997) 57 Cal.App.4th 620, 626; see also *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at 981-982.)

In *People v. Williams*, *supra*, 17 Cal.4th 148, the Court stated that in ruling

whether to strike a prior "strike" conviction, the judge should consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes law] scheme's spirit, in whole or in part, and hence should be treated as though he has . . . not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams, supra*, 17 Cal.4th at 161.)

The review of a superior court's ruling on a *Romero* motion is based on an abuse of discretion standard, which is deferential, but not empty. (*Id.*, at 162; *People v. Cluff* (2001) 87 Cal.App.4th 991, 998.) "Generally, sound discretion 'is compatible only with decisions "controlled by sound principles of law, . . . free from partiality, not swayed by sympathy or warped by prejudice . . . ." [Citation.]' [Citation] ' "All exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue."' [Citations.]" (*People v. Cluff, supra*, 87 Cal.App.4th at 998; see also *In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

Here, the court abused its discretion in denying appellant's *Romero* motion because appellant fell outside the spirit of the three strikes law. His "strike" prior was from 1992 and was a purse-snatch-turned-robbery; appellant grabbed a woman's purse from behind and, when the woman struggled to keep the purse, pulled so hard that the woman's arms were bruised. (POR 7) Though it qualified as a robbery, and thus, a serious felony (Pen. Code, § 1192.7, subd. (c) (19)), it was not, as the trial court noted, a

typical robbery with its attendant violence. (RT 22) In fact, appellant apparently did not initially intend to commit a robbery at all. Rather, the circumstances demonstrated that appellant intended a non-violent, opportunistic, theft offense. Additionally, appellant admitted his involvement in the offense within about a month of its occurrence. (POR 7) Furthermore, in 1992, appellant, who was under the influence of methamphetamine at the time of his arrest for the current offense, was 20 years old and had an apparent drug problem that may have been the motive for the theft. Thus, there were several factors in mitigation applicable to the “strike” offense itself. (See Cal. Rules of Court, rule 4.423 (a)(6), (b)(2), (b)(3).)

Moreover, appellant’s current crimes, which were the victimless offenses of possession of methamphetamine and being under the influence of that drug, were neither serious nor violent. (See Pen. Code, §§ 667.5; 1192.7.) Additionally, by the time of sentencing, appellant, who had improperly fled in 1999, had become a stable, employed, 30-year-old, husband and father, who had apparently rehabilitated himself and no longer qualified as a habitual drug user. (See CT 63-64, Defense Written Motion to Strike; POR 1)

All of these factors militated toward a granting of the request to strike the remaining “strike.” As Division Seven of this court noted when remanding to a trial court for consideration of a *Romero* motion, “[t]he trial court should first decide whether the circumstances of the instant offense . . . , the absence of violence or the threat of violence, appellant’s age, the nature of appellant’s previous offenses, appellant’s willingness to

undergo psychotherapy and drug counseling, . . . , and *all other relevant considerations* justify dismissal of one or more strikes.” (*People v. Banks* (1997) 59 Cal.App.4th 20, 24 [emphasis added].)

In ruling on the motion, the trial court here recognized that the robbery prior was “not a strike offense that is a classic 211, perhaps in the sense of a gun in the face of the victim,” but concluded that it “nevertheless was a case where the victim did sustain bruising . . . .” It also noted that appellant in 1990, had committed a battery that resulted in the victim having a broken right cheek and fractured wrist, and that appellant had committed a disorderly conduct offense while a fugitive in this case. It considered as well that appellant had been on parole, and in violation, at the time he committed the drug offense in the current case. Based on all of this, the court found that it would not be in the interest of justice to strike the “strike.” (RT 22-23)

The court was wrong. When all factors are considered here, this is the kind of case in which the trial court should have exercised its discretion to avoid the harsh punishments of a broadly-sweeping statute against a defendant whose conduct, while falling within the language of the statute, did not fall within its spirit, and who, at the present time, was a different person than he had been at the time of the current offense with different prospects for the future.

The trial court made its decision without giving proper weight to appellant’s most recent behavior. In addition to considering the circumstances of the prior robbery, the court primarily focused on appellant’s pre-“strike” conduct without considering most

of appellant's behavior since committing the purse-snatch/robbery some 10 years before sentencing and seven years before committing the current offense, and did not mention the fact that the current offense was a simple possession of methamphetamine by a user who was under the influence at the time of the offense.

Since the 1992 "strike" offense, appellant had committed three misdemeanors for being under the influence and disorderly conduct, two of which were committed on the same day. (POR 8) And, in the three years following his conviction in the current case, appellant had a contempt offense and disorderly conduct committed in Hawaii and for which he was only sentenced to a few days in jail and probation. (POR 8) Thus, in the ten years since his minimally violent behavior in stealing a woman's purse, appellant had only committed minor offenses, the earliest of which were seemingly related to his use of drugs and alcohol. Thus, he was not the "revolving door" criminal that the "strikes" law was intended to encompass. (Compare *People v. Strong* (2001) 87 Cal.App.4th 328, 338-340 and the examples cited therein.)

All of these circumstances should have been taken into account in deciding whether justice demanded that the trial judge should ameliorate the mandatory aspects of the three strikes law. (See *People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at 981-982; *In re Saldana*, *supra*, 57 Cal.App.4th at 626; see also *People v. Bishop* (1997) 56 Cal.App.4th 1245, 1250.) Yet, the court's reasons for denying the motion related almost exclusively to appellant's behavior from 1992 and before. The only later behavior that the court mentioned was appellant's disorderly conduct offense in Hawaii for which he

had been sentenced to time-served (two days) and probation. (RT 22, POR 8)

Moreover, the court's later comments in imposing sentence suggest that the judge did not even think it appropriate to consider appellant's post-conviction positive behavior. Thus, the court then stated, "[appellant] should [not] really benefit from the fact that he failed to appear at his sentencing back in 1999 in June. To his credit, he has apparently done better in Hawaii, although certainly not as good as he could have done, but he should not be in a better position, it seems to me, having failed to appear than he would have had he appeared at that time." (RT 25)

The court was wrong. Its determination of the requirements of justice should have been based on all the relevant factors relating to both the crime and appellant. The factors include appellant's prospects for the future and whether the application of the strikes law in the current case would further its objectives. (*People v. Williams, supra*, 17 Cal.4th at 161.) "Considering only a defendant's criminal history is 'incompatible with the very nature of sentencing discretion; the *entire picture must remain exposed.*' ([*People v. Superior Court (Alvarez), supra*, 14 Cal.4th] at 981.)" (*In re Saldana, supra*, 57 Cal.App.4th at 626 [emphasis added].) In *Saldana*, the factors the trial court properly used in striking a "strike" prior apparently included the defendant's in-prison behavior after he was first sentenced in the case and before the re-sentencing hearing conducted some two years later. (*Id.*, at 624.)

The application of the strikes law in this case resulted in a mandatory prison sentence of at least two years, eight months. This sentence would yank appellant away

from his current family and deprive him of his ability to support them. It would take him from a stable environment and put him in prison, away from an environment in which he was succeeding and into an environment of failure. Thus, instead of taking a dangerous person off of the streets for as long as possible in order to protect society from his probable recidivism, it would operate to disrupt appellant's stable and productive life for as long as possible and render his positive prospects less likely. (Compare, *People v. Williams, supra*, 17 Cal.4th at 163 [where the defendant had a family, but was unemployed and his substance abuse was out of control demonstrating that there was "little favorable" in the defendant's prospects]; *People v. Gaston* (1999) 74 Cal.App.4th 310, 322 [where the defendant's prospects were "grim" as defendant was homeless, unemployed and had a lengthy unabated criminal history]; *People v. Thornton* (1999) 73 Cal.App.4th 42, 44-45, 49 [where the defendant was unemployed, homeless and engaged in uninterrupted criminal behavior rendering his prospects "dismal"]; see also *People v. Bishop, supra*, 56 Cal.App.4th at 1251 [where the court considered the likelihood that the defendant would re-offend to be an appropriate factor in ruling on a *Romero* motion].)

The application of the strikes law in this case does not further its objectives or the interests of society in curbing recidivist activity. (See *People v. Sipe* (1995) 36 Cal.App.4th 468, 483 [the Legislature's goal in enacting the strikes law was to curb recidivist activity].) Accordingly, the trial court abused its discretion in failing to consider appellant's prospects for the future, which demonstrated that the *Romero* motion should have been granted in this case, and strike appellant's prior serious felony

conviction.

Appellant's sentence should therefore be reversed and the matter remanded to the trial court with directions to exercise its discretion, after consideration of all the relevant factors, to strike appellant's prior serious felony conviction and then reconsider a grant of probation or the imposition of a lesser term.



## II.

THE CAUSE MUST BE REMANDED FOR A NEW SENTENCING HEARING BECAUSE THE COURT ERRED BY REFUSING TO CONSIDER APPELLANT'S CIRCUMSTANCES IN THE THREE YEARS BETWEEN HIS CONVICTION AND SENTENCING IN DECIDING WHETHER TO STRIKE EITHER APPELLANT'S "STRIKE" OR PENAL CODE SECTION 667.5 SUBDIVISION (B) PRIOR

Assuming *arguendo* that the trial court could have properly denied appellant's *Romero* motion, the sentence must be reversed and the cause remanded because the court failed to consider all of the appropriate circumstances in ruling on appellant's requests that it strike the allegations relating to his priors. As noted above, in imposing sentence following the denial of the motion to strike the "strike," the trial court stated that it would not impose the low term without the Penal Code section 667.5 enhancement because "[appellant] should [not] really benefit from the fact that he failed to appear at his sentencing back in 1999 in June. To his credit, he has apparently done better in Hawaii, although certainly not as good as he could have done, but he should not be in a better position, it seems to me, having failed to appear than he would have had he appeared at that time." (RT 25) In so limiting the consideration of factors in deciding whether to strike the section 667.5 enhancement, the court erred. (*In re Saldana, supra*, 57 Cal.App.4th at 626; see also *People v. Superior Court (Alvarez), supra*, 14 Cal.4th at 981-982.)

The authority to strike a Penal Code section 667.5 enhancement comes from

Penal Code section 1385. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 395-396.)

And, as noted above, in the exercise of discretion under section 1385 the court is required to consider and weigh *all* the relevant factors. (*In re Saldana, supra*, 57 Cal.App.4th at 626.) These factors should include appellant's likelihood of recidivism. (See *People v. Williams, supra*, 17 Cal.4th at 161; see also *People v. Bishop, supra*, 56 Cal.App.4th at 1251.)

The trial court, however, mistakenly concluded that appellant's current circumstances and most recent behavior, which would be good indicator of his potential future behavior, should not be considered. "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (*In re Cortez, supra*, 6 Cal.3d at 85-86; see also *People v. Cluff, supra*, 87 Cal.App.4th at 998.) By failing to recognize its obligation to consider these important factors and to consider them, the trial court abused its discretion. (*Ibid.*)

The abuse requires a remand because, for the reasons discussed above, it is likely that, upon consideration of these factors, the court would exercise its discretion to strike the "strike" prior or, at least, the one year enhancement imposed pursuant to Penal Code section 667.5 subdivision (b) in the interest of justice. Appellant appears to be a rehabilitated drug addict, who for the last three years, had been a stable, employed, husband and father. In light of this and the facts that appellant's prior record was not lengthy and his "strike" involved minimal violence, it is probable that the court would

find that justice demanded an act of lenience that would result in a grant of probation or a minimal prison sentence. Thus, had the trial court not improperly felt constrained not to consider these important factors, it is reasonably probable that a different sentence would have resulted. Accordingly, the sentence must be vacated, and the cause remanded for a new sentencing hearing. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

CONCLUSION

For the foregoing reasons, the sentence in this case should be vacated, and the case remanded to the trial court for re-sentencing.

Dated: September 9, 2002

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT  
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WORD COUNT CERTIFICATION  
*People v. John Doe*

I certify that this document was prepared on a computer using Corel Word Perfect, and that, according to that program, this document contains 3244 words.

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## PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, and not a party to the within action; my business address is \*. I am employed by a member of the bar of this court.

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### APPELLANT'S OPENING BRIEF

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