

FIRST DISTRICT APPELLATE PROJECT

730 Harrison Street, Suite 201 • San Francisco, California 94107 • (415) 495-3119 • Facsimile: (415) 495-0166

*, 2007

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Re: *People v. **, A*, S#

Dear *:

I'm sorry to report that the California Supreme Court has dismissed review in your case. As you know, the Supreme Court was "holding" your case (and many others) pending its decisions in other cases raising similar sentencing issues under *Blakely v. Washington* and *Cunningham v. California*. In July, the Supreme Court issued its decision in *People v. Black* (2007) 41 Cal.4th 799 ("*Black I*"). Because of its importance to your case, I'm enclosing a copy of the *Black II* opinion. The California Supreme Court took a narrow view of the *Blakely-Cunningham* rules, which will result in very few California defendants being resentenced. As I've mentioned in many previous letters, the *Blakely-Cunningham* jury trial right does not apply to use of prior convictions as an aggravating factor. In *Black II*, the California Supreme Court ruled that as long as the sentencing court relied on at least one "valid" factor, such as numerous prior convictions, there is no error and no right to resentencing – even if the sentencing court also relied on additional factors.

Now that the California Supreme Court has decided *Black II*, it has "cleaned house" of the many cases like yours which it was holding. The Supreme Court has issued the enclosed order disposing of 145 cases, including yours. As stated in the order, the Court dismissed review in all these cases in light of its *Black II* decision. Ordinarily, the Supreme Court lets its orders speak for themselves and doesn't elaborate. But, in light of the number of cases affected, the Court took the unusual step of also issuing the enclosed press release describing the dispositions.

The California Supreme Court's dismissal order brings your state appeal to an end. That raises the question of whether to attempt to seek further review in the U.S. Supreme Court by filing a "petition for writ of certiorari." We expect there will be certiorari petitions in some other California cases, challenging aspects of the *Black II* decision. However, in my opinion, your case would not be a good candidate for U.S. Supreme Court review. **{Add text re the specific aggravating reasons cited (e.g., numerous prior convictions as primary factor) & reasons for concluding cert. petition not viable.}** For these reasons, I do not see any realistic prospect of obtaining a better result through a U.S. Supreme Court petition. For these reasons, I am not planning to file a petition for writ of certiorari in the U.S. Supreme Court.

Although I am not planning to seek review in the U.S. Supreme Court, you are still free to file a petition for a writ of certiorari on your own ("in pro. per.") if you wish. The deadline for filing a certiorari petition on your own would be * (90 days after the California Supreme Court's dismissal order). I am mentioning this possibility simply because you have a right to file a U.S. Supreme Court petition on your own, if you wish. But, as I've explained in this letter, in my opinion, there is no realistic chance of obtaining relief in your case, because the sentencing court based the upper

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term primarily on your prior convictions. However, if you would like additional information on the procedure for seeking U.S. Supreme Court review on your own, please let me know.

Another possibility would be to file a petition for a writ of habeas corpus in U.S. District Court. Unfortunately, however, that appears to be an even less promising remedy than U.S. Supreme Court. A federal court can grant habeas relief only if the state court's decision was an "unreasonable" application of U.S. Supreme Court decisions. Because the relevant Supreme Court decisions create an exception for "prior convictions," I don't believe that a federal court would find the state courts' affirmance of your upper term "unreasonable." Nonetheless, you are still free to file a district court habeas petition, on your own, if you wish. The deadline for such a petition would be *. If you would like additional information on this option, please let me know.

_____ Because your state appeal has been concluded and I am not planning to file a petition in the U.S. Supreme Court, my role in your case has come to an end. I'm returning the transcripts for your own records.

Please let me know if you have any questions about the California Supreme Court's dismissal order or anything else in this letter. I've enjoyed representing you in this appeal, and I'm very sorry that we weren't able to reduce your sentence. As you can see from the California Supreme Court's order, you have plenty of company. All those other defendants' *Cunningham* claims have been rejected as well. Best wishes on completing your sentence and resuming your life on the outside.

Sincerely,

J. Bradley O'Connell
Staff Attorney

Encl.