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8 **SUPERIOR COURT OF CALIFORNIA**  
9 **COUNTY OF MERCED**  
10

11 PEOPLE OF THE STATE OF CALIFORNIA, )  
12 )  
13 Plaintiff, )  
14 vs. )  
15 Taylor, Alexander )  
16 )  
17 Defendant. )  
18 )  
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Case No.: MF49924

**STATEMENT IN MITIGATION AND  
INVITATION TO THE COURT TO  
STRIKE PRIOR "STRIKE" OFFENSE  
UNDER PENAL CODE §1385 AND  
PEOPLE v. ROMERO (1996) 13  
Cal.4th 497.**

Date: May 8, 2009  
Time: 8:15a.m.  
Dept: 2

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21 TO THE HONORABLE JUDGE OF THE ABOVE-ENTITLED COURT, AND TO LARRY  
MORSE, DISTRICT ATTORNEY FOR THE COUNTY OF FRESNO, AND TO STEPHEN  
22 SLOCUM, DEPUTY DISTRICT ATTORNEY:

23 PLEASE TAKE NOTICE that on May 8, 2009, in Department 2 at 8:15 a.m. or as soon  
24 thereafter as the matter may be heard, the defendant Alexander Taylor, will ask the Court to  
25 order the following alleged prior conviction(s) to be stricken for sentencing: "Strike Prior" on  
26 July 1, 2003 in Alameda County Case No. 145371B for robbery in violation of Penal Code §211.  
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## STATEMENT OF THE CASE

In this matter, Alexander Taylor is charged with petty theft with a prior in violation of PC 666/488. According to the police reports, Alexander appropriated a bicycle which was parked in front of a liquor store.

Alexander immediately owned up to the theft. In plea negotiations, culpability was never in dispute. The only question, really, is whether prison is appropriate.

In 2003, Alexander was convicted of PC 211, a "strike" in Alameda County. Alexander was with a group of guys when a pizza delivery man was relieved of his delivery. A BB-gun was used. The theory of culpability was aiding and abetting.

Taylor also served a prison term after violating probation.

## POINTS AND AUTHORITIES

I. **ALEXANDER TAYLOR ASKS THAT HIS "STRIKE" PRIOR BE DISMISSED IN THE INTERESTS OF JUSTICE**

In *People v. Superior Court (Romero)* (1996) 13 Cal.4<sup>th</sup> 497, the California Supreme Court settled the question of whether a trial court may dismiss "strike" priors in "Three Strikes" cases in the furtherance of justice, pursuant to Penal Code section 1385(a): "[W]e conclude that section 1385(a) does permit a court acting on its own motion to strike prior felony conviction

1 allegations in cases brought under the Three Strikes law.” (*People v. Superior Court (Romero)*,  
2 *supra*, at p. 530.)

3 The trial court, in deciding whether to exercise this discretion, must take into account  
4 both “the constitutional rights of the defendant and the interest of society represented by the  
5 People.” (*Id.* at p. 530.) The trial court abuses its discretion if it dismisses a strike prior “solely  
6 to accommodate judicial convenience or because of court congestion;” or if it does so “simply”  
7 because a defendant pleads guilty; or if it does so “guided solely by a personal antipathy for the  
8 effect that the three strikes law would have on a defendant, while ignoring defendant’s  
9 background, the nature of his present offenses, and other individualized considerations.”  
10 [Citations.] (*Id.* at p. 531.)

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12 The power to strike may be exercised before, during, or after trial, up to the time  
13 judgment is pronounced. (*Id.* at p. 524, fn. 11.) The reasons for dismissal must be written in  
14 the court’s minutes. An oral statement of reasons is not enough. (*Id.* at p. 531, Penal Code  
15 section 1385(a).)

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17 *People v. Bishop* (1997) 56 Cal.App.4<sup>th</sup> 1245, provides examples of factors which the trial  
18 court may use as a basis for dismissing strikes even in cases where the defendant’s criminal  
19 history is lengthy. Mr. Bishop committed a petty theft days after being released from prison.  
20 He had three strike priors (two robberies, one assault), at least six prison priors, a prior federal  
21 drug conviction, as well as other prior convictions for theft. He had never successfully  
22 completed parole. He was 50 years old at the time of the present offense.

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24 The trial court dismissed two of the defendant’s strike priors and sentenced him to a  
25 twelve-year term based on the remaining strike and six prison priors. The court gave as its  
26 reasons the age of the strike (17- 20 years old), and the nature of the present charge. The trial  
27 court commented that a twelve-year sentence would “stop the revolving door of the defendant  
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1 because it will keep him in prison for significant period of time [in this case until nearly the age  
2 of sixty...]" (*Bishop* at p. 1248.)

3 The court of appeals in *Bishop* cited *Romero* and *Alvarez* for the standard of review for  
4 abuse of discretion. (*Bishop* at p. 1249-1250.) The court of appeal found no abuse of discretion  
5 by the trial court despite the defendant's record:

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7 To be sure, once a defendant has qualified for three strikes sentencing, the number of  
8 his prior convictions operates as a factor in aggravation, as may the nature of his prior  
9 and present crimes and the timing with which they were committed. However, the  
10 nature and timing of a defendant's crimes may also operate as mitigation, such as in this  
11 case where the present crime is a petty theft and the prior violent offenses are remote.  
12 The length of the sentence to be imposed also presents an open-ended inquiry because,  
13 when considered in conjunction with the defendant's age, it presents the trial court with  
14 an opportunity to evaluate factors such as how long the state maintains an interest in  
15 keeping the defendant as a public charge and after what period of incarceration he is no  
16 longer likely to offend again. (*Bishop* at p. 1250-1251.)

17 In *In re Saldana* (1997) 57 Cal.App.4<sup>th</sup> 620, the defendant had been convicted of  
18 possession of a small quantity of heroin (Health and Safety Code section 11350) with two strike  
19 priors- residential burglary in 1977 and robbery in 1981. At sentencing, defense counsel argued  
20 that the defendant had stayed out of trouble while in prison, was on a waiting list for a  
21 methadone program in prison, and still had the support of his family. The trial court dismissed  
22 the 1977 burglary prior, stating that the current offense was relatively minor, the burglary  
23 conviction was sixteen years old, the defendant was married and had two children, cared about  
24 his family, and was older and less likely to commit crimes now. (*Saldana* at p. 624.) The  
25 defendant was sentenced to a four-year term, based on the remaining strike. The court of  
26 appeal cited *Romero* and *Alvarez* for the standard of review. "Considering only a defendant's  
27 criminal history is 'incompatible with the very nature of sentencing discretion; the entire  
28 picture must remain exposed.'" ([Citing *Alvarez, supra*, at p. 981] *Saldana* at p. 626.) The  
court of appeal upheld the trial court's decision finding it was based on the "entire picture" of  
the case. (*Saldana* at p. 627.)

1 In *People v. Banks* (1997) 59 Cal.App.4<sup>th</sup> 20, the defendant had been convicted of  
2 attempted residential burglary and residential burglary. He had five prior strikes (each also a  
3 five-year prior) and three prison priors. The trial court, acting before the Supreme Court's  
4 decision in *Romero* denied the defendant's request that it dismiss some or all of the strikes,  
5 stating that it lacked the power to do so. The defendant was sentenced to a term of 75 years to  
6 life.

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8 On appeal, after *Romero*, the Attorney General argued remand was unnecessary because  
9 it would be an abuse of discretion to dismiss strikes considering Banks' "extensive criminal  
10 history [which] spans 25 years and involves 10 felonies and 7 misdemeanors." (*Banks* at p. 23.)  
11 The Court of Appeals remanded the case to the trial court for reconsideration in light of  
12 *Romero*. In doing so, the appellate court listed a number of factors the trial court should  
13 consider, along with the defendant's criminal history, in deciding whether to grant relief under  
14 *Romero*:

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16 We believe it inappropriate, on this record, to prejudge the matter. The trial court  
17 should first decide whether the circumstances of the instant offenses (no entry and no  
18 damage to the Goldstein residence; only a few small items taken from the Seidenschnur  
19 residence). The absence of violence or the threat of violence, the appellant's willingness  
20 to undergo psychotherapy and drug counseling, appellant's computer skills, and all  
21 other relevant considerations justify dismissal of one or more strikes. (*Banks* at p. 24.)

22 In *People v. Williams* (1998) 17 Cal.4<sup>th</sup> 148, the Supreme Court did find that the trial  
23 court had abused its discretion by dismissing a strike prior. Mr. Williams had been convicted  
24 of driving under the influence of PCP, as a felony. He had three prior DUI's within the  
25 preceding seven years. His strike priors were attempted robbery and rape, both from 1982. He  
26 had twice been convicted of being a felon in possession of a firearm, in 1988 and 1989. He had  
27 misdemeanor convictions for burglary in 1981, possession of a controlled substance in 1995,  
28 and spousal battery, also in 1995. He also had numerous parole violations.

1 While the Supreme Court did find an abuse of discretion in this particular case, it  
2 reaffirmed the balance it had said in *Romero* must be struck between the defendant's  
3 constitutional rights- including the "guarantees against disproportionate punishment of the  
4 Eighth Amendment to the United States Constitution and Article I, Section 17 of the California  
5 Constitution" [citation] and society's legitimate interest in the prosecution of crimes. (*Williams*  
6 at p. 160.) The court also reaffirmed that the particulars of the defendant's "background,  
7 character, and prospects" must go into the balance along with the defendant's past and present  
8 criminal record.  
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10 The Supreme Court made its decision in *Williams* based on the facts of the case, which  
11 were not good. The Court focused on the defendant's three prior DUI convictions in 1991 and  
12 1992, from which he evidently learned nothing. (*Williams* at p. 163.) The fact that the present  
13 DUI involved PCP could not have helped. The Court found nothing mitigating about the strike  
14 offenses themselves or about their age, since the defendant had an almost unbroken string of  
15 arrests, convictions, and violations from 1982 until the time of the present offense in 1995.  
16 (*Williams* at p. 154, 163-164.) The Court also focused on the spousal battery- "plainly a crime  
17 involving actual violence"- which occurred just three months before the present felony.  
18 (*Williams* at p. 164.) The Court concluded, "*Williams* cannot be deemed outside the spirit of  
19 the Three Strikes law in any part, and hence may not be treated as though he... had not  
20 previously been convicted of those serious and/or violent felonies. (*Williams* at p. 163.)  
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23 The inquiry in *Williams* was "intensely fact-bound." (*Alvarez, supra*, at p. 981.) It  
24 should not be read as applying to defendants whose "background, character, and prospects are  
25 not as negative as those in *Williams*, and who may be wholly or partially "outside the spirit" of  
26 the Three Strikes law. It does not expressly or impliedly overrule *Alvarez, Bishop, Saldana*, or  
27 *Banks*.  
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1 In addition to the *Romero* guidelines, the Court should also be guided by the general  
2 objectives of sentencing set forth in California Rules of Court 4.410<sup>1</sup>, as well as matters to be  
3 considered at the time of sentencing under Rules 4.433 and 4.408(a). When making its  
4 sentencing decision, the Court must also consider any circumstances in aggravation and/or  
5 mitigation as set out in Rules 4.423 and 4.421. Furthermore, since all discretionary authority is  
6 contextual, those factors that direct similar sentencing decisions continue to be relevant,  
7 including consideration of defendant's appreciation of, and attitude toward, the offense and his  
8 traits of character as evidence by his behavior and demeanor in front of the court. (*People v.*  
9 *Morales* (1967) 252 Cal.App.2d 537, 547.) "To judicially mandate that a single factor  
10 predominates the trial court's exercise of discretion would eviscerate the essence of its  
11 statutory authority." (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4<sup>th</sup> 968.)  
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#### 16 **NATURE OF CURRENT OFFENSE**

17 But for Taylor's history, the present offense would be a misdemeanor. High on cocaine,  
18 Taylor gave in to a momentary impulse and took a bicycle not belonging to him. Caught, he  
19 made no attempt to deny culpability.  
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24 <sup>1</sup> California Rule of Court 4.410 states: "General objectives of sentencing include: (a) Protecting society;  
25 (b) Punishing the defendant; (c) Encouraging the defendant to lead a law-abiding life in the future and  
26 deterring him from future offenses; (d) Deterring others from criminal conduct by demonstrating its  
27 consequences; (e) Preventing the defendant from committing new crimes by isolating him for the period  
28 of incarceration; (f) Securing restitution to the victim; (g) Achieving uniformity in sentencing. Because  
in some instances these objectives may suggest inconsistent dispositions, the sentencing judge shall  
consider which objectives are of primary importance in the particular case. The sentencing judge should  
be guided by statutory statements of policy, the criteria of these rules, and the facts and circumstances of  
the case."



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**NATURE AND CIRCUMSTANCE OF STRIKE PRIORS**

Taylor's prior "strike" is for PC 211, robbery. The bounty was pizza and the means was BB-gun. Taylor was not holding the gun, and his culpability is accessorial, not primary.

**DEFENDANT'S BACKGROUND**

Taylor is from Oakland, California where his mother and siblings currently reside. His mother is a career employee of Alameda County. His father lives in Louisiana, but keeps in touch with Taylor. Both parents are apprised of Taylor's present peril.

Taylor has two children: Alahjah, age 1, and Alexis, age 2.

**FACTORS IN MITIGATION**

The probation report is unusually even-handed in this case. It faithfully reports that "[when the arresting] officer contacted the defendant...he admitted he took the bike....The bike was returned to the owner..."

Yet, an important fact in mitigation relating to the defendant is not acknowledged. Rule 423(b)(3) provides mitigation for a defendant who voluntarily acknowledges wrongdoing prior to arrest or at an early stage of the criminal process.

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**ARGUMENT**

Taylor is a mild-mannered young man with a knack for bad association. His level of criminal sophistication is low and he has little stomach for crime. He is misguided, young, not dangerous or incorrigible.

He has the support of his parents, a resource unavailable to most who enter the criminal justice system.

**CONCLUSION**

For these reasons, the Court is asked to strike the "strike" prior and find Taylor amenable to probation. Taylor should be sent to Delancey Street.

Dated: May 4, 2009

Respectfully Submitted,

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Hayden Smith  
**Law Office of Hayden Smith**  
Attorney for Defendant