

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

March 4, 2015

The Honorable Frank A. McGuire
Clerk, California Supreme Court
Supreme Court of California
455 Golden Gate Ave., Ground Floor
San Francisco, CA 94102

Please respond to:
JOHN T. PHILIPSBORN
Law Offices of J.T. Philipsborn
507 Polk Street, #350
San Francisco, CA 94102

Re: *Pedro Jesus Gomez v. Superior Court*, 223799 (Sixth District Case No. H039679; Monterey County Superior Court Case No. HC4944)

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY PEDRO JESUS GOMEZ, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

Dear Mr. McGuire:

This letter, permitted by the California Rules of Court, Rule 8.500(g), is submitted by California Attorneys for Criminal Justice (hereafter 'CACJ') in support of the Petition for Review filed by Pedro Jesus Gomez (hereafter referred to as 'Petitioner').

Identification of Amicus Curiae

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes 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," and the improvement of "the quality of the administration of criminal law." (Article IV, CACJ By Laws). CACJ's membership consists of approximately 1700 criminal

RECEIVED

MAR -4 2015

CLERK SUPREME COURT

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 35 years, CACJ has appeared before this Court as an *amicus curiae* on matters of importance to the administration of justice, and to its membership.¹

Interest of CACJ in this matter

CACJ has as one of its main purposes the protection of the constitutional rights of individuals. CACJ often appears as an *amicus curiae* before this Court in matters concerning criminal procedure, substantive criminal law, and constitutional law as applied to criminal courts. CACJ indicated its interest in the issues surrounding the litigation of habeas corpus in California courts in a number of cases, including in this Court's ruling in *In re Reno* (2012) 55 Cal.4th 428, 442.

This case presents a matter of concern for the criminal defense Bar generally, and to habeas corpus petitioners specifically, where, in post-conviction review, habeas corpus petitioners are focused on obtaining a full and fair review of a claim of a prosecutor's withholding of evidence that was favorable, and/or impeaching, within the meaning of *Brady v. Maryland* (1963) 373 U.S. 83, 87, and its progeny.

In the above-captioned case, Petitioner has brought a claim that discoverable material was not timely and properly presented to defense counsel for use at trial. CACJ's members regularly defend cases in which prosecutors' compliance with *Brady* is a matter of interest, and also litigate, where and when necessary, applications and petitions for relief, including petitions for habeas corpus, raising failures of timely *Brady* disclosure in post-conviction litigation.

¹ The undersigned Chair of the CACJ Amicus Curiae Committee certifies by his signature as an officer of this Court that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

The question framed here is whether it is possible, given California's statutory scheme, for a habeas corpus petitioner to challenge an entire county-wide Superior Court bench, based on the appearance of impropriety, and related matters, where the credibility of a sitting Judge would need to be weighed and determined by another Judge of the same court. The Superior Court and Sixth District Court of Appeal ruled that there is no mechanism by which Petitioner can get relief under California's current statutes. That said, however, as Petitioner notes (and the Sixth Appellate District concedes), this Court has in fact upheld the recusal of an entire county's bench for the purposes of allowing a reference hearing on a *Brady* claim made post-conviction in a capital case. *In re Bacigalupo* (2012) 55 Cal.4th 312, 316-17.

Petitioner frames a compelling issues that, as he states, merits consideration by this Court given that this Court has ruled that recusal of an entire bench is permissible under California law.

ARGUMENT AND AUTHORITIES

While Petitioner has well covered the issues of concern to him in addressing his Petition for Review to this Court, CACJ offers this submission in large measure to underscore that, clearly, one of the purposes of procedures that allow the disqualification of a judge, or more than one judge, on a particular bench is the maintenance of public confidence in the judicial system. The United States Supreme Court has observed that: "...a fair trial and a fair tribunal is a basic requirement of due process." *In re Murchison* (1955) 349 U.S. 133, 136. "Our system of law has endeavored to prevent even the probability of unfairness." *Id.*, at 136. California has a statutory procedure for the exercise of either a challenge for cause, or a peremptory challenge, to disqualify a judicial officer. Disqualification of a judicial officer under California Code of Civil Procedure § 170.1 can occur on bases that are generally acknowledged in case law as bearing on the integrity of court proceedings. When Congress broadened the statutory basis for disqualification of Federal judges by incorporating the objective standard into Federal law – a standard akin to that embodied in California Code of Civil

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

Procedure § 170.1(a)(6)(A)(iii) – the United States Supreme Court explained that the change was made in order to “...promote public confidence in the integrity of the judicial process....” *Liljeberg v. Health Services Acquisition Corporation* (1988) 486 U.S. 847, 848, fn.7. Elsewhere, the United States Supreme Court has noted that: “What matters is not the reality of bias or prejudice but its appearance.” *Liteky v. United States* (1994) 510 U.S. 540, 548-49.

The California Constitution, statutory scheme, and case authority clearly recognizes the importance of both the objective appearance of impartiality and fairness in proceedings. California has procedures, such as those embodied in Code of Civil Procedure §§ 170.1 and 170.3 that promote both the appearance and substance of impartiality and fairness in judicial proceedings.

CACJ respectfully submits that this Court’s acquiescence, and indeed apparent approval, of disqualification of the entire Santa Clara County Superior Court in *In re Bacigalupo, supra*, 55 Cal.4th 312, 316-17, opens to question the Court of Appeal’s unpublished Order in this case, and especially its reliance on an Ethical Opinion from the California Judges’ Association as a definitive interpretation of the California Code of Civil Procedure that is worthy of deference and controlling on the subject matter at issue.

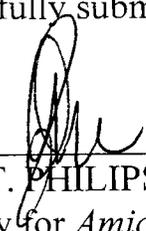
The Sixth District’s failure to show deference to this Court’s apparent approval of the procedure used in *Bacigalupo* is problematic. As Petitioner solidly argues, the Court of Appeal’s ruling demonstrates that there is a lack of clarity, at the very least, in California law as to whether a court can, given the statutory scheme embodied in California Code of Procedure §§ 170.1, et seq., and under the guidance furnished by this Court in *Bacigalupo*, order recusal of an entire bench where a sitting Judge of that bench is a witness in a post-conviction procedure in which that Judge’s behavior while a prosecutor is at issue – and where the Judge’s credibility (and integrity) will be at issue given the facts framed by a habeas corpus petition.

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

CONCLUSION

For all of the reasons set forth here, and in the Petition, this Petition should be granted.

Respectfully submitted,



JOHN T. PHILIPSBORN
Attorney for *Amicus Curiae* CACJ

Please respond to:

JOHN T. PHILIPSBORN
Law Offices of J.T. Philipsborn
507 Polk Street, #350
San Francisco, CA 94102

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within documents entitled:

**LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR
CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR
REVIEW FILED BY PEDRO JESUS GOMEZ (CALIFORNIA
RULES OF COURT, RULE 8.500(g))**

(X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;

Joel Franklin
Law Offices of Joel Franklin
2100 Garden Road, Suite G
Monterey, CA 93940-5393

Glenn Paul Pesenhofer
Monterey County District Attorney's Office
230 Church St. Bldg 3
Salinas, CA 93901-5103

Joseph Courtney Shevelson
PMB 187
315 Mid Valley Center
Carmel, CA 93923
**Counsel for Petitioner
Pedro Jesus Gomez**

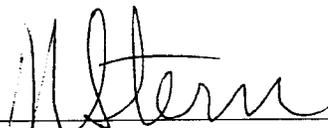
Attorney General - San Francisco Office
455 Golden Gate Ave., Ste 1100
San Francisco, CA 94102
**Counsel for The People: Real Party in
Interest**

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

Rick W. Jarvis
Jarvis Fay Doporto & Gibson
492 Ninth Street, Suite 310
Oakland CA 94607-4055
Counsel for Respondent
Superior Court of Monterey County

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

Executed this 4th day of March, 2015, at San Francisco, California.

Signed: 
Melissa Stern