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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BENNIE JAY TEAL, Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY Respondent; THE PEOPLE, Real Party in Interest.	B24 7196 (Los Angeles County Super. Ct. No. NA026415)

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SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

PETITION FOR REVIEW

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PETITION FOR REVIEW

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TO: THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

PETITION FOR REVIEW

Petitioner, Bennie Jay Teal, petitions this Court to grant review pursuant to California Rules of Court, rule 8.500, following the published decision of the Court of Appeal, Division Seven, filed June 19, 2013. That decision transformed petitioner's appeal from the denial of a motion for recall of his sentence pursuant to Penal Code section 1170.126 into a petition for writ of mandate; once the transformation was complete, the Court of Appeal denied the writ. A copy of the Court's opinion – bearing its new writ caption – is attached as Exhibit A.

Petitioner seeks review because the question of what happens when the trial judge denies an 1170.126 recall petition is an important one affecting potentially thousands of inmates. (Cal. Rules of Court, rule 8.500(b)(1).) Review is also appropriate because the Court of Appeal opinion is in direct conflict with *People v. Hurtado* (2013) 216 Cal.App.4th 94 and *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279. (*Ibid.*) The Court of Appeal neither discussed nor distinguished these cases, instead, simply relegating *Hurtado*, to "but see" status at the end of a string cite. (Opn. at 3.)

NECESSITY FOR REVIEW AND ARGUMENT

In 1996, petitioner received a three-strike sentence after he was convicted of making a criminal threat in violation of Penal Code section 422. Following the November, 2012, passage of Penal Code section 1170.126, petitioner filed a motion to recall his sentence. Finding that his current conviction was for a serious felony, the trial court denied his motion. Petitioner then filed a timely notice of appeal. (Pen. Code, § 1237, subd. (b); *People v. Hurtado* (2013) 216 Cal.App.4th 941.)

Appellate counsel for petitioner filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Six days later, without soliciting briefing from either petitioner or the Attorney General, the Court of Appeal issued its opinion, holding that the trial court's order denying petitioner's motion was not appealable.[1]

The question of whether petitioner's case is appealable turns on the interpretation of Penal Code section 1237. Subdivision (b) of that statute provides simply that a defendant may take an appeal "from any order made after judgment, affecting the substantial rights of the party." Guided by this Court's opinion in *People v. Totari* (2002) 28 Cal.4th 876, the Court of Appeal in *Hurtado* concluded that section 1237,

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[1]/ In *Hurtado*, *supra*, both appellant and the Attorney General took the position that the appeal was proper. (*Id.* at 945.) By turning the appeal into a writ, the Court of Appeal ensured that no comparable briefing would be filed in this case. Rule 8.490(b)(1) of the California Rules of Court makes the denial of mandate final immediately, and rule 8.264(a) states that the Court may not order rehearing of any decision that is final immediately. The Court's action which foreclosed rehearing also eliminated the protective sweep of Government Code section 68081 [rehearing "shall be ordered upon timely petition of any party" if the appellate court decides an issue without affording the opportunity for briefing by the parties].

subdivision (b) gave inmates in petitioner's position a right to appeal. "[I]n enacting section 1170.126, the electorate provided a statutory procedure for inmates serving indeterminate life sentences imposed under the Three Strikes law before its amendment by Proposition 36 to obtain resentencing in accordance with the terms of the amended law. This conferred a substantial right upon such inmates to have a trial court consider whether they should be resentenced. Thus, a trial court's denial of a section 1170.126 petition to recall is an 'order made after judgment, affecting the substantial rights of the party' and is appealable pursuant to section 1237, subdivision (b)." (*Id.* at 945.)

This result in *Hurtado* was presaged by the decision in *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279, 1295. In that case, it was the prosecution that sought an appellate challenge to the trial court's grant of relief to a defendant under Penal Code section 1170.126.

Construing Penal Code section 1237's mirror image, the Court of Appeal held that the trial judge's ruling amounted to "a postjudgment order affecting the substantial rights of the people" under Penal Code section 1238 and was thus appealable. (*Id.* at 1295.) After concluding that the judge's modification had, in fact, resulted in an illegal sentence, the *Kaulick* Court went on to note that not only was an illegal sentence correctable at any time, but that "a *claim* of an unlawful sentence is appealable, even though the court may ultimately conclude that the sentence was not unlawful." (*Id.*, at 1295, n. 15; emphasis in original.)

Here, petitioner filed a postjudgment motion that was authorized by statute, after which the court issued an order substantially affecting his rights. His motion seeking

relief "claims" that his sentence was unlawful. As such, his challenge was properly the subject of an appeal.

The Court of Appeal, in reaching the opposite conclusion, delivered an opinion, the parameters of which are murky at best. The Court first says that section 1170.126, subdivision (a) "expressly limits the right to have the trial court consider whether an inmate should be resentenced to those individuals who satisfy the statutory eligibility requirements set forth in section 1170.126 subdivision (e). . ." Actually, subdivision (a) of the statute says nothing about consideration of motions; it simply defines those inmates to whom the statute is "intended to apply." Per section 11270.126, the statute is intended to apply to three-strike defendants who, under the new law, would be entitled to a two-strike sentence. The Court then repeats its theme: "Because inmates do not have a right to have the trial court consider whether they should be resentenced unless they meet the statutory eligibility requirements, the trial court's threshold eligibility determination, based on express objective criteria, is not a postjudgment order affecting the substantial rights of the party and is not appealable under section 1237, subdivision (b)." (Opn. at 3.)

There are two possible interpretations of this language, and each runs afoul of this Court's decision in *People v. Totari*, *supra*, 28 Cal.4th 876. If the Court of Appeal meant to deny appellate relief only to those inmates who are ultimately found not to qualify for resentencing, the conclusion ignores *Totari*'s admonition not to confuse a defendant's right to relief with his right to appeal the denial of relief.

In *Totari*, the defendant filed a petition to vacate a judgment under Penal Code section 1016.5, alleging that the trial court had failed to properly advise him of the

immigration consequences of his plea. In arguing that the defendant had no right to appeal the denial of his petition, the Attorney General repeatedly focused on the merits of the defendant's argument, suggesting that the defendant had indeed been aware of the immigration consequences of his plea. Noting that "the Attorney General confuses the contested issues on the merits with the procedural question of appealability" (*id.*, at 884), this Court rebuffed the Attorney General's suggestion that the question of the defendant's right to appeal should by answered by reference to the substantive merit of his petition.

The Court of Appeal in this case makes the same mistake as did the Attorney General in *Totari*. Only by looking to the merits of petitioner's appeal did it conclude that he had no right to appeal in the first place.[2]

Moreover, the cases cited by the Court following its "no right to appeal" language do not support its position. For example, the Court cites *People v. Loper* (2013) 216 Cal.App.4th 969; in that case the Department of Corrections sought compassionate release for the inmate who then appealed the denial of the Board's motion. In dismissing

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[2]/ Subdivision (e) of the statute describes those inmates eligible for resentencing; it limits the class of eligible to defendants based on both their current offenses and their prior convictions. Subdivision (b), however, uses different language in describing who "may file" a petition for recall. That subdivision refers only to those whose current convictions do not disqualify them; presumably a defendant whose prior convictions might disqualify him "may file" a petition for recall. Thus, if the Court of Appeal meant to rely on subdivision (b) to limit the right to appeal to only to those who "may file" petitions for recall, it would result in a three-tiered system, with only two of those tiers being allowed to appeal: those whose eligibility was wrongly denied by the trial court, and those who turn out to be ineligible only by virtue of their prior convictions. Aside from being wholly impractical, such a system would still require an assessment of the merits of a defendant's motion before the propriety of his appeal could be determined. For this reason, subdivision (b) should be interpreted in light of *Totari*.

the appeal, the Court of Appeal noted that, since the compassionate release statute gave the inmate no right to "initiate court proceedings" seeking relief, the denial of the motion filed by the Board did not affect his substantial rights within the meaning of section 1237, subdivision (b). An inmate's substantial rights "cannot be affected by an order denying that which he had no right to request." (*Id.* at 974; quoting *People v. Pritchett* (1933) 20 Cal.App.4th 190, 194.) Conversely where, as here, the statute specifically authorizes inmates, such as petitioner, to "initiate court proceedings," their substantial rights are affected by the ensuing ruling. The key, for determining the applicability of section 1237, subdivision (b) is who gets to "initiate" the proceedings, not whether the inmate's motion is substantively viable.

People v. Druschel (1982) 132 Cal.App.3d 667, 668, also cited by the Court (Opn. at 3), relies on the same theory as *Loper*. It, too, therefore, supports petitioner's position – not the Court's (Opn. at 3). In *Druschel*, the defendant sought sentence recall under a statute that allowed only the trial court to initiate sentence recall proceedings. And, because the defendant had no right to initiate the proceedings, he could not appeal when the trial court reached an unfavorable result in those proceedings.[3]

Finally, the result reached by the Court of Appeal can only wreak havoc on the lower courts. Again, assuming that the Court of Appeal intended only to deny the possibility of appellate relief to those inmates whose appeals lacked substantive merit, its opinion provides no guidance for how lower courts should implement its ruling. The

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[3]/ *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980-981, also cited by the Court, deals with *coram nobis*, a slightly different area of law with its own rules.

opinion does not clarify who would identify those defendants whose appeals could proceed, nor how that identification would be made. The Court's comment that "[petitioner's] notice of appeal is improper" (Opn. at 3) gives superior court clerks no roadmap for what they should do when they encounter similar notices. Should the superior courts have an array of Penal Codes at the ready so that they can determine which defendants were wrongly denied relief, and then process only the notices of appeal from those defendants? In short, the Court of Appeal's opinion is neither legally sound, nor practically efficient. The opinion declares that its mandate procedure would both protect inmates and result in more "timely and cost-effective" decisions (Opn. at 4, n. 3), but it does not explain why that assertion holds water. Making the defendant prepare the record and file the writ might affect costs by keeping some defendants from reaching the appellate court altogether, but it seems unlikely to do much in the way of protecting inmates.

The other possibility, of course, is that the Court of Appeal's language isn't just an attempt to deny an appellate remedy to some defendants. Rather, the Court may be saying that, because the question of eligibility is so simple and straightforward, no defendant should be allowed to appeal the trial court's denial of relief. Again, the key language is at page 3 of the Court's opinion: ". . . the trial court's threshold eligibility determination, *based on express objective criteria*, is not a postjudgment order affecting the substantial rights of the party and is not appealable under section 1237, subdivision (b)." (*Ibid.*, emphasis added.) It is the Court's reference to "express objective criteria" that is so troubling. It suggests that the Court may mean that since the eligibility decision

is so simple, why allow a defendant to appeal it? Of course, such an interpretation would again violate this Court's holding in *Totari*.

There can be no question that section 1170.126 gives some defendants the right to initiate section 1170.126 proceedings, and, per *Totari*, a defendant who has the right to go into court to seek relief, has the right to appeal the denial of relief (*Id.* at 886-887); *Totari* made no exceptions for motions that were denied based on "express, objective criteria." If this is the Court's holding, it would mean that an inmate who was clearly entitled to relief, but whose motion was wrongly denied, would have no avenue of appeal. The Court did not explain why such an inmate would not fall squarely within section 1237, subdivision (b), nor, if he did, why the law should sacrifice him to administrative expedience.[4]

As shown above, this case is ripe for review. The question presented is important, and the Courts of Appeal are squabbling amongst themselves. Nevertheless, should this Court grant review, it is likely that, by the time it could reasonably be expected to issue its opinion, the cases will have largely played out in the lower courts. One way or another, defendants will have had appeals or filed writs, and the appellate courts will have

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[4]/ The Court of Appeal may also have been a bit hasty in suggesting that eligibility determinations are simple and straightforward. The question of whether a defendant's current conviction for a violation of Penal Code section 12021 disqualifies him under Penal Code sections 1170.126(e)(3) and 667(e)(2)(C)(iii) on the theory that he was armed during the crime cannot be decided by "express, objective, criteria." Similarly, the fact that the Court found it necessary to add that the statute under which petitioner was convicted reads differently today than when he was convicted (Opn. at 4, n. 4), also indicates the Court's recognition that eligibility determinations may require judicial interpretation of those "express, objective criteria."

ruled. Thus, the long-term effect of this opinion will be felt, not in the 1170.126 arena, but in greater right-to-appeal landscape. And it is there that this opinion has the potential for its most pernicious effects. Petitioner urges this Court to grant review and reaffirm its holding that in *Totari* that a defendant's right to appeal under section 1237, subdivision (b) does not depend on the substantive merit of his argument. Should this Court deny review, however, petitioner urges this Court to do the next best thing – to order immediate depublication of the Court of Appeal opinion.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court grant review; in the alternative, petitioner respectfully requests that this Court depublish the opinion of the Court of Appeal.

Dated: July 28, 2013

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

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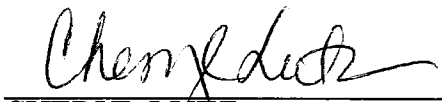

CHERYL LUTZ

On Behalf of Petitioner
Bennie Teal

WORD COUNT CERTIFICATION
People v. Bennie Teal

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 2,543 words.

CHERYL LUTZ

EXHIBIT A

Filed 6/19/13

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BENNIE JAY TEAL,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

THE PEOPLE,

Real Party in Interest.

B247196

(Los Angeles County Super. Ct. No. NA026415)

ORIGINAL PROCEEDINGS in Mandate. William C. Ryan, Judge. Petition Denied.

Richard B. Lennon, under appointment by the Court of Appeal, for Petitioner.

No appearance by Respondent.

No appearance by Real Party in Interest.

Bennie Jay Teal is serving an indeterminate life term under the Three Strikes law following his conviction in 1996 for making a criminal threat. On January 22, 2013 the trial court denied Teal's petition for recall of sentence pursuant to Penal Code section 1170.126[1] on the ground Teal is ineligible for resentencing. (§ 1170.126, subd. (f).) Teal filed a notice of appeal on February 21, 2013; we appointed counsel to represent Teal on appeal; counsel filed an opening brief on June 13, 2013 pursuant to *People v. Wende* (1979) 25 Cal.3d 436, which raised no issues and asked this court to independently review the record.

The order denying Teal's petition is not appealable but may be reviewed by a petition for writ of mandate. Accordingly, we treat the purported appeal as a petition for writ of mandate and summarily deny the petition. (See generally *Olson v. Cory* (1983) 35 Cal.3d 390, 401.)

The right of appeal is statutory, and a judgment or order is not appealable unless expressly made so by statute. (*People v. Totari* (2002) 28 Cal.4th 876, 881; *People v. Mazurette* (2001) 24 Cal.4th 789, 792.) As relevant here, an inmate like Teal may appeal from "any order made after judgment, affecting the substantial rights of the party." (§ 1237, subd. (b).)

Proposition 36 (the Three Strikes Reform Act of 2012) amended sections 667 and 1170.12 to limit Three Strikes sentences to current convictions for serious or violent felonies and a limited number of other felonies (for example, a felony offense that results in mandatory registration as a sex offender [§§ 667, subd. (e)(2)(C)(ii), 1170.12, subd. (c)(2)(C)(ii)]) unless the offender has a prior strike conviction that falls within one of several enumerated categories (for example, offenses punishable by life in prison [§§ 667, subd. (e)(2)(C)(iv)(VIII), 1170.12, subd. (c)(2)(C)(iv)(VIII)]). Section 1170.126 establishes a procedure for qualified inmates serving indeterminate life sentences under the Three Strikes law to seek resentencing under the terms of the amended law. However, section 1170.126, subdivision (a), expressly limits the right to have the trial

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[1] Statutory references are to the Penal Code.

court consider whether an inmate should be resentenced to those individuals who satisfy the statutory eligibility requirements set forth in section 1170.126, subdivision (e): "The resentencing provisions under this section and related statutes are intended to apply exclusively to persons presently serving an indeterminate term of imprisonment pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, whose sentence under this act would not have been an indeterminate life sentence." (§ 1170.126, subd. (a).)

Because inmates do not have a right to have the trial court consider whether they should be resentenced unless they meet the statutory eligibility requirements, the trial court's threshold eligibility determination, based on express objective criteria, is not a postjudgment order affecting the substantial rights of the party and is not appealable under section 1237, subdivision (b). (See, e.g., *People v. Loper* (2013) 216 Cal.App.4th 969, 97_ [2013 Cal. App. Lexis 418] [order denying recall of sentence under the compassionate release provisions in § 1170, subd. (e), is not appealable];[2] *People v. Druschel* (1982) 132 Cal.App.3d 667, 668 [because defendant has no right to move for recall of sentence pursuant to § 1170, subd. (d), denial of such a motion does not affect the defendant's substantial rights and is not appealable]; cf. *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980-981 [order denying a petition for writ of *coram nobis* is not appealable absent showing petition stated a prima facie case for relief]; see also *People v. Totari, supra,* 28 Cal.4th at p. 885, fn. 4; but see *People v. Hurtado* (2013) 216 Cal.App.4th 941.)

Although Teal's notice of appeal is improper, under the circumstances we may treat it as a petition for writ of mandate or habeas corpus. (See *People v. Segura* (2008)

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[2] The court in *Loper*, quoting *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980, explained, "If interpreted broadly, the phrase 'affecting the substantial rights of the party' in section 1237, subdivision (b) 'would apply to any postjudgment attack upon the conviction or sentence' because '[t]he court's denial of relief in any such situation could affect the defendant's substantial rights. However, decisional authority has limited the scope of the phrase, defining appealability more narrowly.'" (*People v. Loper, supra,* 216 Cal.App.4th at p. ___.)

44 Cal.4th 921, 928 [treating purported appeal from nonappeable order as petition for writ of habeas corpus in the interest of judicial economy]; *Drum v. Superior* Court (2006) 139 Cal.App.4th 845, 853 [uncertainty in the law respecting appealability of the order in question is proper ground for treating a purported appeal as a petition for a writ of mandate]; *H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367 [same; "appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate"].)[3]

We have read and considered Teal's petition for recall of sentence and other materials from the trial court, including its memorandum of decision denying the petition, submitted as part of the purported record on appeal. One of Teal's prior strike convictions was for violating section 262, subdivision (a), rape of a spouse, a "sexually violent offense,"[4] which makes him ineligible for resentencing under section 1170.126, subdivision (e)(3). Accordingly, the petition is denied.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J.*

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[3] By seeking writ review of the summary denial of a petition for recall of sentence pursuant to section 1170.126, subdivision (f), inmates should be protected from incorrect eligibility determinations and are likely to receive decisions in these cases in a more timely and cost-effective manner.

[4] When Teal was convicted of violating section 262, subdivision (a), in 1984, the statute did not include the language now found in subdivision (a)(2) & (3), which arguably falls outside the definition of a "sexually violent offense." (See Stats. 1982, ch. 1113, § 1, pp. 4031-4032.)

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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 California Appellate Project, 520 South Grand Avenue, 4th Floor, Los Angeles, California 90071. I am employed by a member of the bar of this court.

On June 28, 2013, I served the within

PETITION FOR REVIEW

in said action, by placing a true copy thereof enclosed in a sealed envelopes, addressed as follows, and deposited the same in the United States Mail at Los Angeles, California:

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For Delivery to:
Hon. William C. Ryan

Bennie Teal, K-33097 (D-4-215L)
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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 28, 2013, at Los Angeles, California.

Paula Dilworth

PAULA DILWORTH