No. S211708

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BENNIE JAY TEAL, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; THE PEOPLE OF THE STATE OF CALIFORNIA, Real Party in Interest.	(Court of Appeal, Second Appellate District, Division Two, No. B247196) (Los Angeles Superior Court No. NA026415, Hon. William C. Ryan, Judge)

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

PETITIONER HAS THE RIGHT TO APPEAL THE DENIAL OF HIS MOTION

As respondent summarizes her argument, where the defendant does not qualify for recall of his sentence, he does not have the right to file the motion seeking recall, and thus, does not have the right to appeal, since the denial of such a motion cannot, by definition, affect his substantial rights. (Answer Brief on the Merits, hereinafter referred to as "ABM," p. 2.)

Respondent's entire argument is that, unless a defendant can "win" on the first part of his recall motion by showing eligibility under the statute, he cannot appeal the court's denial of it because, unless he is eligible, his substantial rights are not implicated so as to trigger his right to appeal under Penal Code section 1237, subdivision (b). (ABM, pp. 2-3)

Respondent's argument proves too much. No defendant who loses on appeal has his substantial rights affected by a correct judicial ruling. Thus, Penal Code section 1237, subdivision (b) would never permit an appeal unless reversal of the ruling being appeal is required. But, the threshold question of appealability cannot require resolution of the merits of the case. Rather, the threshold question assumes that the court below erred.

In the instant case, respondent agrees with petitioner that Penal Code section 1170.126 bestows on a defendant the right to seek a post-judgment recall of his sentence. (ABM, p. 6) Respondent also agrees that the denial of such a post-judgment motion is review by way of appeal. (ABM, p. 7) The only disagreement is whether a defendant who is not eligible for recall, and yet files the motion which is subsequently denied, has the right to have that denial reviewed on appeal.

Respondent argues that a defendant who is ineligible does not have the right to file such a motion. He equates this defendant's filing of a recall motion with motion's to recall determinate term sentences under the Uniform Determinate Sentencing Act. (Pen. Code, § 1170, subd. (d).) (ABM, p. 7) But this comparison is not a valid one. Penal Code section 1170, subdivision (d) does not now give, and never has given, the defendant the right to file such a motion. Rather, that statute gives the sentencing court the power to

initiate a recall and gives the Director of the Department of Corrections and Rehabilitation the right as well. It does not give the defendant any right to initiate the recall process. (*Thomas* v. *Superior Court* (1970) 1 Cal.3d 788, 790.; see also case cited by respondent at ABM, p. 7-8.)

In contrast to section 1170, subdivision (d), section 1170.126, the statute at issue here, specifically gives defendants serving a third "strike" sentence the right to file the motion seeking recall of that sentence. Respondent argues that the right is limited because the statute only authorizes those who are eligible the right to file such a motion. (ABM, p. 8) He argues that petitioner's argument ignores this limitation, instead basing the appealability question on the issue of the trial court's jurisdictuion to grant the motion. (ABM, p. 9) This is not correct.

Petitioner does not dispute that the recall statute limits applicability of the recall remedy to only those defendants who are eligible to seek recall, meaning that they are now serving a third "strike" sentence and neither their current offense nor their prior offenses disqualify them from the recall process. Rather, the issue in this case turns on the remedy available to a defendant who files a motion believing that he qualifies but who is found by the court not to qualify.

Respondent argues that the court's eligibility determination is not a determination on the merits, but is more a determination of the court's jurisdiction to consider the motion. (ABM, pp. 10-11) But, he ignores the fact that the only way for the court to determine eligibility is for the court to examine the defendant's criminal record and make

a finding whether his current or prior convictions disqualify him. If that is not a determination on the merits, what is it?

Respondent tries to distinguish this Court's decision in *People* v. *Totari* (2002) 28 Cal.4th 876, but his attempt must fail. The issue in *Totari* was whether a defendant could appeal the denial of his post-judgment motion to vacate his conviction under Penal Code section 1016.5 for the failure of the court which took his guilty plea to advise him of the immigration consequence of that conviction. This Court held that the denial was appealable as a post-judgment order affecting substantial rights, notwithstanding the fact that the defendant in that case lost on the merits because he was in fact advised of the consequences. Respondent argues that this Court's decision does not require the same result here because the determination in *Totari* was a "determination on the merits" whereas the determination here was a "threshold determination." (ABM 13)

Respondent's argument notwithstanding, there is no difference between these two cases. Penal Code section 1016.5 gives a defendant who was not advised of immigration consequences the right to file a post-judgment motion. The "threshold" determination, that is, what gives such a defendant the right to file the motion, is that he was not given the required warnings. If he was so warned, he doesn't just lose the motion on the merits; rather, he had no right to bring the motion in the first place, which is exactly what respondent's office argued in this Court in *Totari*. (*People* v. *Totari, supra*, 28 Cal.4th at pp. 884-885.)

But, as this Court recognized, that would make appealability turn on the issue of whether the defendant loses on the merits. (*Ibid.*) Similarly, as respondent recognizes and argues in the instant case, whether one characterizes it as the first part of the recall process, or as a "threshold" determination, the issue of eligibility turns on whether the defendant has disqualifying current or prior convictions, which is a determination of a legal question and thus is a determination of the merits of the defendant's position.

Respondent contends that the issue of eligibility is "straightforward and beyond dispute" and does not require a court to look beyond examining the statutory elements of the offense. (ABM, p. 14) She is wrong. The issue is not as simple as she avers. The determination of whether a defendant's present conviction is a serious felony is not simply a matter of looking at the penal statute which defendant was convicted of violating. Given that serious felonies are sometimes determined by the facts of the crime, rather than the elements of the statutory offense, the court, in the recall situation, will be called upon at times to make its determination based on a view of the "entire record of conviction" rather than simply the statutory definition of the charged crime. (See Pen. Code, § 1192.7, subd. (c)(8), (23); *People v. Rodriguez* (1998) 17 Cal.4th 253 [assault is only a serious felony under some circumstances]; *People* v. *Banuelos* (2005) 130 Cal.App.4th 601 [same]; *People* v. *Garcia* (1999) 21 Cal.4th 1 [juvenile adjudication is only a serious felony under some circumstances]; *People* v. *Superior Court* (*Andrades*) (2003) 113 Cal.App.4th 817 [same].) Moreover, the law is not clear that, as respondent avers (ABM, p. 14), the determination of whether the current offense is serious is made

only with respect to the current list of serious felonies rather than the characterization of the felony as serious when it was committed. (See Pen. Code, § 1170.125.)

Beyond the question of how difficult the lower court's decision-making process may be, lies the fundamental question of whether appealability of a lower court's ruling should turn on the nature of the determination and the difficulty or complexity in making it. Respondent cites no case holding that appealability is limited to issues that are complex or difficult to determine, where the right of appeal is barred because the issue is a simple one.

Respondent argues that petitioner in the instant case has no right to appeal the denial of his petition because his current conviction is, in fact, a serious felony. (ABM, pp. 18-19) But, the determination of whether his offense is a disqualifying serious felony was not resolved in this case because the appellate court, rather than reviewing the merits of the lower court's ruling, dismissed the case on the grounds that the appeal was improper. While respondent argues that petitioner's offense qualifies as a serious felony, she recognizes that there is an argument that, because his crime was not classified as a serious felony at the time that it was committed, it is not a disqualifying current offense. (ABM, pp. 18-23; see Pen. Code, § 1170.125.) The fact that respondent refutes this claim on the merits and takes six pages to make her argument belies her claim that the issues of eligibility are straightforward and simple.

The rule established for appealability should be simple and clear. Where the statute provides a defendant with the right to file a post-judgment motion for relief, the

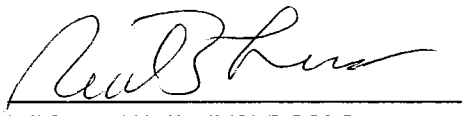
denial of that motion is appealable because the ruling may affect the defendant's substantial rights. Petitioner requests that this Court therefore reverse the dismissal of his appeal, and remand the matter to the appellate court to resolve the merits of his appeal.

Dated: December 10, 2013

Respectfully submitted,

CALIFORNIA APPELLATE PROJECT

JONATHAN B. STEINER
Executive Director



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WORD COUNT CERTIFICATION

People v. Bennie Jay Teal

I certify that this document was prepared on a computer using Corel Wordperfect, and that, according to that program, this document contains 1571 words.

RICHARD B. LENNON

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

On December 10, 2013, I served the within

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

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

Executed December 10, 2013 at Los Angeles, California.

Grace Medina

GRACE MEDINA