In the Supreme Court of the State of California

BENNIE JAY TEAL, **Petitioner,** **v.** **SUPERIOR COURT OF LOS ANGELES COUNTY,** **Respondent,** **THE PEOPLE,** **Real Party in Interest.**	Case No. S211708

SUPREME COURT
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ISSUE PRESENTED

Did petitioner have the right to appeal the trial court's denial of his petition to recall his sentence under Penal Code section 1170.126, part of the Three Strikes Reform Act of 2012, when the trial court held he did not meet the threshold eligibility requirements for resentencing?

STATEMENT OF THE CASE

On April 1, 1996, a Los Angeles County jury convicted petitioner of one count of making criminal threats (Pen. Code, § 422). (1CT 2, 10.) The trial court found that petitioner had suffered four prior convictions within the meaning of the Three Strikes Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). (1CT 3-4.) On November 18, 1996, the trial court sentenced petitioner to a total of 25 years to life in state prison pursuant to the Three Strikes Law. (1CT 3, 10.)

On December 6, 2012, petitioner filed a petition for recall of sentence in the trial court pursuant to Penal Code section 1170.126. (1CT 1-26.) On January 22, 2013, the trial court considered and denied the petition on the ground that petitioner's "current offense is a serious and/or violent felony." (1CT 28.)

Petitioner filed a timely notice of appeal, purporting to appeal the trial court's denial of his petition to recall sentence. On June 13, 2013, petitioner filed an Opening Brief in the Court of Appeal presenting no arguable issues and requesting that the Court conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

On June 19, 2013, the Court of Appeal issued an order concluding that the trial court's order denying petitioner's petition to recall sentence was not appealable. (Opn. at 2.) The Court of Appeal construed the petition to recall petitioner's sentence as a petition for writ of mandate and denied the petition. (Opn. at 3-4.)

On July 1, 2013, petitioner filed a petition for review in this Court. On July 31, 2013, this Court granted the petition for review.

SUMMARY OF ARGUMENT

Where, as in the instant case, a defendant's triggering offense under the Three Strikes Law was for an offense that is currently defined as a serious and/or violent felony (Pen. Code, §§ 667.5, subd. (c), 1192.7, subd. (c)), the defendant has no statutory right to file a petition for recall of sentence pursuant to Penal Code section 1170.126 in the first instance. (Pen. Code, § 1170.126, subd. (b).) Moreover, Penal Code section 1170.126 does not give the trial court the authority to consider a defendant's eligibility for relief or to exercise discretion to resentence a defendant on its own motion. Accordingly, a trial court's threshold determination that a defendant's triggering offense is currently defined as a serious and/or violent felony constitutes a finding that a petition for recall of sentence should not have been filed in the first instance, and such an order does not affect that defendant's substantial rights and is not appealable. (Pen. Code, § 1170.126, subd. (b); see *People v. Totari* (2002) 28 Cal.4th 876, 883, 886-887; *Thomas v. Superior Court* (1970) 1 Cal.3d 788, 790; *People v. Leggett* (2013) 219 Cal.App.4th 846, 850-854; *People v. Pritchett* (1993) 20 Cal.App.4th 190, 193-195.)

Petitioner's triggering offense under the Three Strikes Law was for making criminal threats in violation of Penal Code section 422. (1CT 2, 10.) Because this offense is currently defined as a serious felony (Pen. Code, § 1192.7, subd. (c)(38)), petitioner had no standing to file his recall petition in the first instance, and the trial court's denial of his recall petition is not appealable.

ARGUMENT

I. BECAUSE PETITIONER'S TRIGGERING OFFENSE UNDER THE THREE STRIKES LAW IS CURRENTLY DEFINED AS A SERIOUS AND/OR VIOLENT FELONY, HE HAD NO STATUTORY RIGHT TO FILE A PETITION FOR RECALL OF SENTENCE IN THE TRIAL COURT, AND THE TRIAL COURT'S DENIAL OF HIS PETITION DOES NOT CONSTITUTE AN APPEALABLE ORDER

Petitioner contends that whenever a criminal defendant files a petition for recall of sentence pursuant to Penal Code section 1170.126, and the trial court concludes that the defendant is statutorily ineligible for resentencing, the trial court's denial of the petition implicates the substantial rights of that defendant and constitutes an appealable order. (POBM 1-13.)[1] Real party in interest disagrees. Where, as in the instant case, a defendant's triggering offense under the Three Strikes Law was for a felony that is currently defined as serious and/or violent, that defendant has no statutory right to file a petition for recall of sentence in the first instance, and as such, the denial of that petition does not implicate the defendant's substantial rights and is not appealable.

A. The Three Strikes Reform Act of 2012

On November 6, 2012, the electorate approved Proposition 36, the Three Strikes Reform Act of 2012 (hereafter the "Act"), which amended Penal Code sections 667 and 1170.12, and added section 1170.126 to the Penal Code. The Act's effective date was November 7, 2012. Prior to the Act's enactment, the Three Strikes Law provided that a recidivist offender with two or more prior qualifying strikes was subject to an indeterminate life sentence if convicted of any new felony offense. (See *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1285-

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[1] "POBM" refers to petitioner's Opening Brief on the Merits.

1286; *People v. Yearwood* (2013) 213 Cal.App.4th 161, 167-168.) The Act now reserves

> the life sentence for cases where the current crime is a serious or violent felony or the prosecution has pled and proved an enumerated disqualifying factor. In all other cases, the recidivist will be sentenced as a second strike offender.

(*People v. Yearwood, supra*, 213 Cal.App.4th at pp. 167-168; see also Pen. Code, § 667, subd. (e)(2)(C) [a defendant with two prior strikes whose current conviction is not defined as a serious or violent felony shall be sentenced as a second strike offender], 1170.12, subd. (c)(2)(C) [same].)

The Act also created a procedure for "persons presently serving an indeterminate term of imprisonment" under the former Three Strikes Law "whose sentence under this [A]ct would not have been an indeterminate life sentence." (Pen. Code, § 1170.126, subd. (a).)[2] Under the Act, any

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[2] Penal Code section 1170.126 provides, in relevant part:

(a) 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.

(b) Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section.

(continued...)

person serving a Three Strikes sentence, whose triggering offense is not defined as serious or violent (see Pen. Code §§ 667.5, subd. (c), 1192.7, subd. (c)), may file, before the court that entered the judgment of conviction, a "petition for a recall of sentence" within two years of the date

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(...continued)

(c) No person who is presently serving a term of imprisonment for a "second strike" conviction imposed pursuant to paragraph (1) of subdivision (e) of Section 667 or paragraph (1) of subdivision (c) of Section 1170.12, shall be eligible for resentencing under the provisions of this section.

(d) The petition for a recall of sentence described in subdivision (b) shall specify all of the currently charged felonies, which resulted in the sentence under paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12, or both, and shall also specify all of the prior convictions alleged and proved under subdivision (d) of Section 667 and subdivision (b) of Section 1170.12.

(e) An inmate is eligible for resentencing if:

(1) The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(2) The inmate's current sentence was not imposed for any of the offenses appearing in clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clauses (i) to (iii), inclusive, of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

(3) The inmate has no prior convictions for any of the offenses appearing in clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667 or clause (iv) of subparagraph (C) of paragraph (2) of subdivision (c) of Section 1170.12.

(f) Upon receiving a petition for recall of sentence under this section, the court shall determine whether the petitioner satisfies the criteria in subdivision (e). If the petitioner satisfies the criteria in subdivision (e), the petitioner shall be resentenced pursuant to paragraph (1) of subdivision (e) of Section 667 and paragraph (1) of subdivision (c) of Section 1170.12 unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.

of the Act or at a later date on a showing of good cause. (Pen. Code, § 1170.126, subd. (b).)

Pursuant to Penal Code section 1170.126, a defendant is eligible for resentencing if: (1) the defendant is serving an indeterminate term of life imprisonment imposed under the Three Strikes Law for a conviction of a felony that is not defined as serious and/or violent (see Pen. Code, §§ 667.5, 1192.7, subd. (c)); (2) the defendant's current sentence was not imposed for disqualifying offenses specified in Penal Code sections 667, subdivision (e)(2)(C), and 1170.12, subdivision (c)(2)(C); and (3) the defendant has no prior convictions for offenses listed in Penal Code sections 667, subdivision (e)(2)(C)(iv), and 1170.12, subdivision (c)(2)(C)(iv). (Pen. Code, § 1170.126, subd. (e).)

If a trial court determines that the defendant satisfies this criteria, then it shall resentence the defendant as a second strike offender, "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (Pen. Code, § 1170.126, subd. (f).) In exercising its discretion, the trial court may consider the defendant's criminal conviction history, disciplinary record and record of rehabilitation while incarcerated, and any other evidence the court, in its discretion, determines to be relevant. (Pen. Code, § 1170.126, subd. (g).)

B. A Defendant Who Is Statutorily Ineligible to File a Petition for Recall of Sentence under Penal Code Section 1170.126, Subdivision (b), May Not Appeal a Trial Court's Order Denying the Petition Because Such an Order Does Not Affect His Substantial Rights

An order is not appealable unless it has been "declared to be so by the Constitution or by statute." (*People v. Keener* (1961) 55 Cal.2d 714, 720; see also *People v. Totari*, *supra*, 28 Cal.4th at pp. 881-882; *People v.*

Mazurette (2001) 24 Cal.4th 789, 792.) The Act does not address whether a trial court's denial of a petition to recall sentence under Penal Code section 1170.126 is appealable. However, Penal Code section 1237, subdivision (b), provides that an appeal may be taken by a defendant, "[f]rom any order made after judgment, affecting the substantial rights of the party." A defendant's "substantial rights" include those involving "the charge against [him] or his rights affected by that charge." (*People v. Tuttle* (1966) 242 Cal.App.2d 883, 885; see also *People v. Beck* (1994) 25 Cal.App.4th 1095, 1104.)

Where the Legislature or electorate has bestowed a statutory post-judgment right upon a specific class of defendants, it is appropriate to review the denial of that right by way of appeal. (See *People v. Totari, supra*, 28 Cal.4th at pp. 883, 886-887; see also *People v. Leggett, supra*, 219 Cal.App.4th at pp. 850-851; *People v. Pritchett, supra*, 20 Cal.App.4th at pp. 193-195.) However, where a particular class of defendants has no statutory right to seek post-judgment relief, a trial court's denial of such a defendant's request for relief does not implicate the defendant's substantial rights and does not constitute an appealable order. (See *Thomas v. Superior Court, supra*, 1 Cal.3d at p. 790 [the denial of a motion to recall sentence under a former version of Penal Code section 1168 does not constitute an appealable order because the Legislature "did not intend that a proceeding under the provision be initiated by a prisoner but rather by the court or the Director of Corrections"]; *People v. Pritchett, supra*, 20 Cal.App.4th at p. 194 [the denial of a motion to recall sentence under Penal Code section 1170, subdivision (d), does not implicate a defendant's substantial rights because a defendant has no standing to make such a motion in the first instance]; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1726 [same]; *People v. Gainer* (1982) 133 Cal.App.3d 636, 640-642 [same]; *People v. Druschel* (1982) 132 Cal.App.3d 667, 669 [same]; *People v. Niren* (1978) 76

Cal.App.3d 850, 851 [same]; *People v. Tuttle*, *supra*, 242 Cal.App.2d at p. 885 [defendant's post-trial motion for the return of property remaining in the custody of the police "was without statutory authorization," and the trial court's order denying the motion "could not have affected any substantial right subject to that action"].) A defendant's "'substantial rights' cannot be affected by an order denying that which he had no right to request." (*People v. Pritchett*, *supra*, 20 Cal.App.4th at p. 194.)[3]

Penal Code section 1170.126 authorizes only those defendants serving an indeterminate term of imprisonment under the Three Strikes Law, whose triggering offense is not currently defined as a serious and/or violent felony, to file a petition for recall of sentence. (Pen. Code, § 1170.126, subd. (b).) Penal Code section 1170.126, subdivision (b), provides:

> Any person serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or paragraph (2) of subdivision (c) of Section 1170.12 upon conviction, whether by trial or plea, of a felony or felonies that are not defined as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7, may file a petition for a recall of sentence, within two years after the effective date of the act that added this section or at a later date upon a showing of good cause, before the trial court that entered the judgment of conviction in his or her case, to request resentencing in accordance with the provisions of subdivision (e) of Section 667, and subdivision (c) of Section 1170.12, as those statutes have been amended by the act that added this section.

The statute, by its express terms, permits only those individuals serving an indeterminate term under the Three Strikes Law, whose

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[3] This Court is currently considering whether a trial court's order denying the recall of an inmate's sentence for compassionate release purposes under Penal Code section 1170, subdivision (e), constitutes an order appealable by the inmate himself, in *People v. Loper* (2013) 216 Cal.App.4th 969, review granted Sept. 11, 2011 (S211840).

triggering offense is not currently defined as a serious and/or violent felony offense, to file a petition for recall of sentence. (Pen. Code, § 1170.126, subd. (b); *People v. Leggett, supra*, 219 Cal.App.4th at p. 852 [Penal Code section 1170.126, subdivision (b), "expressly limits the right to petition the court."].) A defendant serving an indeterminate term of imprisonment under the Three Strikes Law whose triggering offense is currently defined as a serious and/or violent felony may not file a petition for recall of sentence, and as such, a trial court's denial of such a petition does not implicate the substantial rights of that defendant, and the trial court's order is not appealable. (*People v. Leggett, supra*, 219 Cal.App.4th at p. 852 ["Since the statute creates the substantial right essential for appealability, it would be anomalous to include within the class of persons that may appeal a person who should *not* have filed a petition for recall of a sentence under the plain language of section 1170.126 in the first instance"], italics in original; see also *People v. Totari, supra*, 28 Cal.4th at pp. 881-883, 886-887; *Thomas v. Superior Court, supra*, 1 Cal.3d at p. 790; *People v. Pritchett, supra*, 20 Cal.App.4th at p. 194; *People v. Chlad, supra*, 6 Cal.App.4th at p. 1726; *People v. Gainer, supra*, 133 Cal.App.3d at pp. 640-642; *People v. Druschel, supra*, 132 Cal.App.3d at p. 669.)

Petitioner appears to cast the issue of appealability as hinging on the trial court's jurisdiction or authorization to provide relief to the defendant, rather than on a defendant's ability to seek relief on his own motion. (POBM 11.) However, Penal Code section 1170.126 does not provide a trial court with the power to initiate recall proceedings, or to resentence a defendant pursuant to the Act, on its own motion. The statute expressly provides that such proceedings may only be initiated by those defendants serving an indeterminate term of imprisonment under the Three Strikes Law whose triggering offense is not currently defined as a serious and/or violent felony. (Pen. Code, § 1170.126, subd. (b).) Penal Code section

"1170.126 confers on the trial court limited jurisdiction to consider petitions by inmates with indeterminate sentences under the three strikes law, provided the current conviction is not for a serious or violent felony." (*People v. Leggett, supra,* 219 Cal.App.4th at p. 853; compare *People v. Carmony* (2004) 33 Cal.4th 367, 375-376 [because a trial court may, on its own motion, order an action dismissed in furtherance of justice under Penal Code section 1385, and because a defendant has a right to invite the trial court to exercise that power, a trial court's order denying to exercise such discretion on behalf of a defendant is appealable]; *People v. Stein* (1948) 31 Cal.2d 630, 633 [where the trial court had the discretion to relieve a defendant of a determination of habitual criminal status under former Penal Code section 644, within a given time period, an order denying a defendant's motion for relief, rendered within the applicable time period, constituted an appealable order].)

Because a defendant whose triggering offense under the Three Strikes Law is currently defined as a serious and/or violent felony has no standing to file a petition for recall of sentence in the first instance, and because a trial court has no power to initiate those proceedings on a defendant's behalf or provide relief to such a defendant on its own motion, a trial court's order denying a recall petition based on the "jurisdictional" ground that the defendant's triggering offense is currently defined as a serious and/or violent felony does not constitute an appealable order. (See *People v. Stein, supra,* 31 Cal.2d at p. 633; *People v. Leggett, supra,* 219 Cal.App.4th at pp. 853-854; *People v. Chlad, supra,* 6 Cal.App.4th at p. 1726 [where the trial court lacks jurisdiction to grant post-conviction relief to a defendant, the denial of the defendant's motion does not affect that defendant's substantial rights and is not appealable]; *People v. Morgan* (1957) 148 Cal.App.2d 871, 872 [the trial court's denial of defendant's motion to vacate the judgment did not constitute an appealable order where

the trial court lacked jurisdiction to entertain the motion]; *People v. Bachman* (1955) 130 Cal.App.2d 445, 451 [trial court's denial of defendant's motion to determine whether he was a sexual psychopath under former Welfare and Institutes Code section 5501, subdivision (c), did not constitute an appealable order, because the trial court lacked jurisdiction to make such a determination].)

Petitioner errs in suggesting that a trial court's conclusion that a defendant's triggering offense is currently defined as serious and/or violent is appealable because it constitutes an "examination of the issue on the merits." (POBM 12.) For the purposes of determining appealability, a finding on a threshold legal issue pertaining to the defendant's authorization to file a motion requesting relief should be distinguished from a determination of the merits of a particular claim to which a defendant is entitled by statute to raise in a trial court, even if those determinations might overlap. (See *People v. Totari, supra*, 28 Cal.4th at p. 885, fn. 4; *Rescue Army v. Municipal Court* (1946) 28 Cal.4th 460, 464, [a trial court "has jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and it must have authority to decide that question in the first instance."].)

In *People v. Totari, supra*, 28 Cal.4th 876, this Court concluded that the defendant was entitled to appeal from the trial court's denial of his statutory motion to vacate a judgment under Penal Code section 1016.5. The statute required that, before accepting a plea of guilty or no contest to a criminal offense, a trial court must advise the defendant that if he or she is not a United States citizen, conviction of the offense may result in deportation, exclusion from admission to the United States, or denial of naturalization. (*Id.* at p. 879; Pen. Code, § 1016.5, subd. (a).) The statute also provided a remedy in cases where the trial court failed to provide the required advisements to a defendant, stating:

> If, after January 1, 1978, the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.

(*Id.* at p. 881; Pen. Code, § 1016.5, subd. (b).)

The defendant in *Totari*, "documented that the reporter's transcript and court reporter's notes of [his] guilty plea hearing had been destroyed, as authorized by Government Code section 68152." (*People v. Totari*, *supra*, 28 Cal.4th at p. 880.) Thereafter, the trial court considered and denied the defendant's motion to vacate the judgment on the grounds that the defendant had been unreasonably dilatory in seeking relief. (*Ibid.*)

On appeal, this Court concluded that the trial court's order denying the motion to vacate the judgment was an appealable order, and in so doing, it rejected the People's argument that the defendant's substantial rights had not been violated by the trial court's ruling because the record established that the defendant knew of the immigration consequences of his plea before entering that plea, and as such, he could not establish prejudice, a necessary element for relief on a motion to vacate a judgment. (*People v. Totari*, *supra*, 28 Cal.4th at pp. 884-885.) This Court concluded that,

> "If we accept the Attorney General's argument, an issue to be determined on the merits is itself the test of appealability. Because the procedural question depends on a resolution of the merits, that question must be made on a case-by-case basis. We decline to adopt the Attorney General's proposal."

(*Id.* at p. 884.)

Unlike the underlying ruling in *Totari*, the threshold determination made by the trial court in this case was not a determination on the merits, but a finding that petitioner was not entitled to file the recall petition in the first instance. (See Pen. Code, § 1170.126, subd. (b); see *People v. Leggett*, *supra*, 219 Cal.App.4th at p. 853 ["whether a petitioner was qualified to file the petition in the first instance" constitutes a "threshold determination"]; see also *People v. Totari*, *supra*, 28 Cal.4th at p. 886 ["the issue of jurisdiction is a legal one," which may be decided on a case-by-case basis]; *People v. Thomas* (1959) 52 Cal.2d 521, 528 ["When the question of jurisdiction is presented . . . by appeal from the order of denial, the appellate court's determination as to the appealability of the order will ordinarily depend upon its decision of the merits of the appeal, i.e., upon its determination whether there was indeed a jurisdictional defect"]; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 985 ["appealability depends upon the nature of the decision made, not the court's justification for its ruling"].)

Unlike the statute at issue in *Totari*, Penal Code section 1170.126, subdivision (b), specifically excludes a particular class of defendants from seeking relief in the first instance. A trial court's threshold legal determination regarding whether a defendant is included in a class of defendants precluded from seeking relief under a statute is not a determination on the merits of that defendant's request for relief.[4]

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[4] While Penal Code section 1170.126, subdivision (f), requires the trial court, upon receiving a petition for recall of sentence, to make determinations regarding a defendant's eligibility for resentencing under the statute, including the determination that the triggering offenses is not for an offense that is defined as a serious and/or violent felony, once the trial court has made the threshold determination that a defendant's triggering offense is for an offense that is defined as serious and/or violent, it should dismiss the petition. (See Pen. Code, § 1170.126, subds. (b), (e) & (f).) Stated differently, the statute creates a class of defendants

(continued...)

The determination regarding whether a defendant's triggering offense under the Three Strikes Law is currently defined as serious and/or violent under Penal Code sections 667.5, subdivision (c), and 1192.7, subdivision (c), is "straightforward and beyond dispute." (*People v. Leggett*, *supra*, 219 Cal.App.4th at p. 853.) It is purely a legal inquiry, and to the extent it requires any factual determinations, theses are facts that are "readily ascertainable upon an examination of court documents." (*People v. Wiley* (1995) 9 Cal.4th 580, 590; see also *People v. McGee* (2006) 38 Cal.4th 682, 706 [the determination of whether a prior conviction qualifies as a serious and/or violent felony is "a limited one and must be based upon the record of the prior criminal proceeding, with a focus on the elements of the offense of which the defendant was convicted."].) A trial court's determination on this issue does not require it to make findings beyond the established elements of the defendant's triggering convictions and any attendant enhancements found true by the trier of fact. In the vast majority of cases, a trial court must simply determine whether a defendant's triggering offense is, on its face, one of the offenses listed as a serious and/or violent in Penal Code sections 667.5, subdivision (c), or 1192.7, subdivision (c). Moreover, the act of determining whether a triggering felony is serious and/or violent is manifestly less involved that determining whether a prior offense constitutes a strike under the Three Strikes Law, because no foreign convictions are involved, and because, as explained in subsection (c), *post*, the determination regarding the nature of the triggering offense is to be made with respect to the current enumerated lists of serious and violent

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(...continued)
authorized to file petitions for recall of sentence (Pen. Code, § 1170.126, subd. (b)), and a subclass of persons who are eligible for resentencing pursuant to such petitions (Pen. Code, § 1170.126, subd. (e)).

felony offenses. The fact that a trial court has to make legal findings in determining whether a defendant was authorized to file his petition in the first instance should not render the trial court's decision appealable. (See *People v. Chlad, supra,* 6 Cal.App.4th at p. 1725 [the determination that the trial court's order denying defendant's motion to modify sentence was not appealable because the trial court lacked jurisdiction to modify the sentence necessarily included the threshold finding that the trial court lost jurisdiction based on the passage of time between the date of sentencing and the date the defendant filed his motion in the trial court].)

Division Four of the First Appellate District recently concluded that all statutory eligibility determinations under Penal Code section 1170.126 are appealable. (*People v. Wortham* (Oct. 24, 2013, A138769) ___ Cal.4th ___, ___ [2013 WL 5755193, *1-3]). Real party in interest disagrees with the rationale of *Wortham*, as it failed to consider subdivision (b) of Penal Code section 1170.126, which specifically precludes those defendants whose triggering offense is for a serious and/or violent crime from filing the petition for recall in the first instance. (*Ibid.*) Instead, *Wortham* comingles all eligibility determinations made by a trial court under subdivisions (b), (f), and (e)(1)-(3), and concludes, without elaboration or specification, that because "some" eligibility determinations "may not be straightforward," a mistake would "affect a petitioner's substantial rights because the mistaken determination would foreclose the possibility of a reduced sentence." (*Id.* at *2.) Real party in interest does not challenge the appealability of a trial court's eligibility determination under Penal Code section 1170.126, subdivisions (f) and (e)(2)-(3), only the initial determination under subdivisions (b) and (e)(1), which would render a petition improperly filed.

Wortham also misapprehends who is eligible to file a recall petition in the first instance. (*People v. Wortham, supra,* ___ Cal.4th ___ [2013 WL

5755193, *1] [stating that the Penal Code section 1170.126 "allows inmates sentenced under the previous version of the Three Strikes Law to petition for a recall of their sentence if they would not have been sentenced to an indeterminate life sentence under the Reform Act (§ 1170.126, subds. (a)-(b).)"].) In actuality, it is only those inmates whose triggering offense is currently defined as serious and/or violent, and any other defendant not sentenced to an indeterminate term as a third striker under the Three Strikes Law, who are precluded from filing the petition in the first instance. (Pen. Code, § 1170.126, subd. (b).) Simply put, *Wortham* errs in concluding that a trial court's "consideration of a petition under the Reform Act is a two-step process." (*People v. Wortham, supra,* ___ Cal.4th ___ [2013 WL 5755193, *1].) It is a three-step process, with the first step being the threshold determination as to whether the petition is properly filed in the first instance. (Pen. Code, § 1170.126, subd. (b)). If it is not, it should be dismissed.

Moreover, the court's conclusion in *Wortham* that it perceives "little practical difference in reviewing a trial court's order for correctness before dismissing it as nonappeablable and in reviewing the order for correctness before affirming it" (*People v. Wortham, supra,* ___ Cal.4th ___ [2013 WL 5755193, *1]), should not drive this Court's determination on the question of appealability. Where, as in the instant case, and in *Wortham* itself, a defendant is statutorily ineligible to file the recall petition in the first instance because his triggering offense is currently defined as a serious and/or violent felony, any purported appeal resulting from the trial court's denial of relief should be dismissed. (See *People v. Leggett, supra*, 219 Cal.App.4th at p. 853.) In such instances, a reviewing court's act of dismissing the appeal would be similar to dismissals of appeals from coram nobis petitions where a defendant has failed to state a prima facie case for relief. (See *People v. Totari, supra*, 28 Cal.4th at p. 885, fn. 4; *People v.*

Gallardo, *supra*, 77 Cal.App.4th at p. 983; *People v. Williams* (1965) 238 Cal.App.2d 585, 587 ["[a]lthough the appealability of the order may depend on the substance of the facts alleged in or adduced in support of the petition, the matter must be entertained in any event to determine whether dismissal or review on the merits is proper."].) Such a dismissal would also be consistent with the principle that statutes create the substantial right essential for appealability. (See *People v. Totari*, *supra*, 28 Cal.4th at pp. 883, 886-887; see also *People v. Leggett*, *supra*, 219 Cal.App.4th at pp. 850-851; *People v. Pritchett*, *supra*, 20 Cal.App.4th at pp. 193-195.)

Petitioner errs in asserting that the question of appealability "must be made in the abstract and based upon the assumption that the ruling was erroneous." (POBM 12.) Where a defendant is not entitled to file a petition for relief in the first instance, a reviewing court need not presume that he was, in fact, entitled to seek relief. (See *In re Kathy P.* (1979) 25 Cal.3d 91, 102 [error must be affirmatively shown and will not be presumed].) Although a particular defendant may be able to conceive of a claim as to why his triggering offense is not one that is currently defined as a serious and/or violent felony despite the record of his conviction demonstrating that the offense is, in fact, one that is currently defined as a serious and/or violent felony, a defendant's ability to conjure up any legal claim does not mean that the trial court's denial of that claim is appealable. Just as a defendant who was not sentenced pursuant to the Three Strikes Law may not file a petition for relief under Penal Code section 1170.126, so too are those defendants whose triggering offenses under the Three Strikes Law are currently defined as serious and/or violent felonies precluded from filing an application for relief. (Pen. Code, § 1170.126, subd. (b).) Under neither circumstance is the trial court's determination that the defendant is ineligible for relief an appealable order.

In any event, a defendant, such as petitioner, who believes that a trial court has erred in concluding that his or her triggering offense under the Three Strikes Law constituted a serious and/or violent offense, rendering him ineligible to file a petition for recall of sentence under Penal Code section 1170.126, subdivision (b), still has a remedy in the form of extraordinary writ relief. Such a defendant may file a petition for writ on mandate or a petition for writ of habeas corpus challenging the trial court's determination that the defendant's triggering offense under the Three Strikes Law is currently defined as a serious and/or violent felony. (See *People v. Picklesimer* (2010) 48 Cal.4th 330, 338-339; *People v. Superior Court* (*Kaulick*), *supra*, 215 Cal.App.4th at pp. 1295-1296.)

C. Petitioner Had No Statutory Right to File a Petition to Recall Sentence under Penal Code Section 1170.126, Because His Triggering Offense Is Based on the Commission of a Crime Currently Defined As a Serious Felony, and As Such, the Denial of the Petition Did Not Affect His Substantial Rights and Does Not Constitute an Appealable Order

In the instant case, petitioner's triggering offense under the Three Strikes Law was for making criminal threats in violation of Penal Code section 422. (1CT 2, 10.) A violation of Penal Code section 422 constitutes a serious felony within the meaning of Penal Code section 1192.7. (Pen. Code, § 1192.7, subd. (c)(38).) On appeal, petitioner did not purport to challenge the trial court's finding that his current conviction was defined as a serious felony, rendering him ineligible for resentencing under the Act, but instead, filed a brief pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436, raising no arguable issues.

In petitioner's recall petition filed in the trial court, he asserted that his current offense could not be considered serious and/or violent within the meaning of Penal Code section 1170.126, because the offense of making criminal threats was not a serious felony offense on the date of his

conviction in 1996, but rather, was added to the list of serious felonies qualifying as strikes in 2000 with the passage of Proposition 21. (1CT 3-4; see *People v. Ringo* (2005) 134 Cal.App.4th 870, 884 ["Proposition 21 expanded the list of serious felonies to include section 422 as of March 9, 2000"]; see also *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 574 [Proposition 21 modified the list of "serious felonies" under Penal Code section 1192.7].)

The fact that petitioner committed his triggering offense of making criminal threats prior to the enactment of Proposition 21 is of no consequence to whether his triggering offense constituted a serious felony for the purposes of determining whether he is authorized to file a petition for recall of sentence under Penal Code section 1170.126. Section 1170.126, subdivision (b), provides that "any person serving a term of life imprisonment" imposed pursuant to Penal Code sections 667, subdivision (e)(2), or 1170.12, subdivision (c)(2), "whether by trial or plea, of a felony or felonies that *are not defined* as serious and/or violent felonies" by Penal Code sections 667.5, subdivision (c) or 1192.7, subdivision (c), "may file a petition for recall of sentence . . . ." (Italics supplied.) The statute plainly refers to the enumerated lists of serious and violent felonies in the present tense, and contemplates that those individuals whose triggering offenses are currently defined as serious and/or violent may not file a petition for recall of sentence.[5] (Pen. Code, § 1170.126, subd. (b).)

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[5] Penal Code section 1170.126, subdivision (e)(1), also refers to the enumerated lists of serious and violent felonies in the present tense, providing that a defendant is eligible for resentencing if:

> The inmate is serving an indeterminate term of life imprisonment imposed pursuant to paragraph (2) of subdivision (e) of Section 667 or subdivision (c) of Section 1170.12 for a conviction of a felony or felonies that *are not*

(continued...)

In interpreting a voter initiative, a reviewing court applies the "same principles that govern statutory construction." (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901; see also *People v. Park* (2013) 56 Cal.4th 782, 796.) Thus, a reviewing court looks "first to the language of the statute, giving the words their ordinary meaning." (*People v. Birkett* (1999) 21 Cal.4th 226, 231.) If there is no ambiguity in the statutory language, a reviewing court presumes that "the lawmakers meant what they said, and the plain meaning of the language governs." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272; see also *Kwitset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 321.) The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme in light of the intent of the electorate. (See *Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 901.) When the language of a statute enacted by initiative is ambiguous, a reviewing court looks "to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet." (*People v. Birkett*, *supra*, 21 Cal.4th at p. 243.) A reviewing court must interpret the initiative's language so as to effectuate the electorate's intent. (See *Robert L. v. Superior Court*, *supra*, 30 Cal.4th at p. 901; see also *Hodges v. Superior Court* (1999) 21 Cal.4th 109, 114 ["we may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less."].)

The plain, unambiguous language of Penal Code section 1170.126, subdivision (b), demonstrates that the electorate intended that only those

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(...continued)

> *defined* as serious and/or violent felonies by subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(Italics supplied.)

individuals serving indeterminate terms under the Three Strikes Law whose triggering offense is not defined as serious and/or violent under the current definitions of those terms may file a petition for recall of sentence. Had the drafters of the initiative intended the statute to permit those defendants whose triggering offenses were not defined as serious and/or violent felonies at the time of their commission to file recall petitions, they would have drafted subdivision (b) of the statute to permit only those inmates whose triggering offenses "*were not defined as serious and/or violent felonies at the time the inmate committed the crimes*" to file a petition. That they chose not to do so demonstrates their intent to preclude those defendants serving Three Strikes sentences whose triggering offenses are currently defined as serious and/or violent from filing a petition for recall of sentence. (See *People v. Superior Court* (*Kaulick*), *supra*, 215 Cal.App.4th at p. 13, fn. 26; see also *People v. Yearwood*, *supra*, 213 Cal.App.4th at p. 171, quoting Voter Information Guide, Gen. Elec. (Nov. 6, 2012) argument in favor of Prop. 36, p. 52. [noting that the Act's proponents argued that "'Criminal justice experts and law enforcement officials carefully crafted Prop. 36 so that truly dangerous criminals will receive no benefits whatsoever from the reform.'"].)

Real party in interest's interpretation of Section 1170.126, subdivision (b), fully comports with the intent of the electorate to provide an avenue of potential relief to certain defendants whose triggering offenses are considered to be less significant felonies, while keeping those defendants whose triggering offenses are considered to be dangerous incarcerated for their full indeterminate terms. (See *People v. Yearwood*, *supra*, 213 Cal.App.4th at pp. 171, 175; *People v. Superior Court* (*Kaulick*), *supra*, 215 Cal.App.4th at p. 1293, fn. 12.) The intent of the electorate in enacting the Act was to "ensure dangerous criminals remain in prison," while ensuring that non-violent offenders, such as those "'convicted of shoplifting

a pair of socks, stealing bread or baby formula'" are not sentenced to life in prison. (*People v. Yearwood, supra*, 213 Cal.App.4th at p. 171, quoting Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 36, p. 52.) Proponents of the Act insisted that the Act requires that "'dangerous criminals serve their full sentences,'" and that it "'prevents dangerous criminals from being released early.'" (*People v. Yearwood, supra*, 213 Cal.App.4th at pp. 171, 175, quoting Voter Information Guide, Gen. Elec., *supra*, rebuttal to argument in favor of Prop. 36, p. 53.)

Construing Penal Code section 1170.126, subdivision (b), to refer to those triggering offenses that are currently defined as serious and/or violent supports the Act's public safety purpose by reducing the likelihood that defendants who are currently dangerous will be released from prison due to the Act. The electorate would have had no basis to conclude that a defendant who committed his triggering offense prior to March 9, 2000, should be considered any less dangerous than a defendant who committed his triggering offense after that date.[6] (See *People v. Walker* (2002) 29 Cal.4th 577, 581 [in construing a statute, a reviewing court must select the interpretation that comports with the intent of the electorate and avoid an interpretation that would "lead to absurd consequences"].)

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[6] Real party in interest notes that the purpose of Proposition 21 was "to increase public safety." (*People v. James* (2001) 91 Cal.App.4th 1147, 1151.) In addition to defining criminal threats as a serious felony, the initiative also added other offenses to the list of enumerated serious felonies, including: intimidation of a victim or witness (Pen. Code, § 136.1), assault with a deadly weapon or firearm (Pen. Code, § 245, subd. (a)(1)), assault with acid or a flammable substance (Pen. Code, § 244), shooting from a vehicle (Pen. Code, § 26100, subds. (c)-(d)), and discharge of a firearm at an inhabited dwelling, vehicle, or aircraft (Pen. Code, § 246). (See *People v. Neely* (2004) 124 Cal.App.4th 1258, 1267-1268.)

Moreover, the Act, considered in its totally, demonstrates that the electorate intended to go beyond the enumerated offenses in Penal Code sections 667.5, subdivision (c), and 1192.7, subdivision (c), to include other triggering offenses that would ultimately disqualify a defendant from resentencing. (See Pen. Code, § 1170.126, subd. (e)(2); see also Pen. Code §§ 667, subd. (e)(2)(C)(i)-(iii), 1170.12, subd. (c)(2)(C)(i)-(iii).) The structure of the statutes comprising the Act, together with the relevant indicia of the electorate's intent, demonstrates that the electorate intended that any defendant considered to be currently dangerous would receive no benefit from the Act's enactment. Considered in this light, it makes no sense that the electorate would have intended to permit those individuals whose triggering offenses were defined as serious and/or violent felonies on the date of the Act, but not at the time of conviction, to qualify for resentencing under Penal Code section 1170.126.[7] (See *People v. Walker*, *supra*, 29 Cal.4th at p. 581.)

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[7] Nothing in Penal Code section 1170.125 alters this conclusion. Section 1170.125, which was amended by the Act, now provides:

> Notwithstanding Section 2 of Proposition 184, as adopted at the November 8, 1994, General Election, for all offenses committed on or after November 7, 2012, all references to existing statutes in Sections 1170.12 and 1170.126 are to those sections as they existed on November 7, 2012.

The Act also amended Penal Code section 667, subdivision (h), to provide that "[a]ll references to existing statutes in subdivisions (c) to (g), inclusive, are to statutes as they existed on November 7, 2012." The amendments to Penal Code sections 667 and 1170.125 were merely intended to ensure that the Act is not altered by the Legislature, or by the initiative process, via future changes expanding or restricting the enumerated felonies considered to be serious and/or violent in Penal Code sections 667.5, subdivision (c), and 1192.7, subdivision (c). (See *People v. Acosta* (2002) 29 Cal.4th 105, 121.)

Because petitioner lacked standing to file a petition for recall of sentence in the first instance since his current conviction was for an offense defined as a serious felony conviction under Penal Code section 1192.7, subdivision (c), the trial court's order denying the petition did not affect petitioner's substantial rights and does not constitute an appealable order. (*People v. Leggett*, *supra,* 219 Cal.App.4th at pp. 852-54; see *People v. Totari*, *supra*, 28 Cal.4th at pp. 881-883, 886-887; *Thomas v. Superior Court*, *supra*, 1 Cal.3d 788, 790; *People v. Pritchett*, *supra*, 20 Cal.App.4th at p. 194; *People v. Chlad*, *supra*, 6 Cal.App.4th at p. 1726; *People v. Gainer*, *supra*, 133 Cal.App.3d at pp. 640-642; *People v. Druschel*, *supra*, 132 Cal.App.3d at p. 669.)

CONCLUSION

Accordingly, for the reasons stated, real party in interest respectfully requests this Court to affirm the judgment of the Court of Appeal.

Dated: November 8, 2013

Respectfully submitted,

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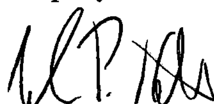

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13-point Times New Roman font and contains 6,557 words.

Dated: November 8, 2013

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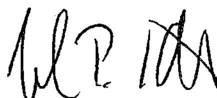

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Bennie Jay Teal v. Superior Court of Los Angeles County**
Case No.: **S211708**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 8, 2013, at Los Angeles, California.

K. Amioka	
Declarant	Signature

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