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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

F067261

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN MAMEA,

Defendant and Appellant.

APPELLANT'S PETITION FOR REHEARING

On Appeal from the Judgment of the Superior Court of the
State of California, County of Fresno
Case No. CF95545799

The Honorable Jonathan B. Conklin, Judge

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Appeal Under the Central
California Appellate Program



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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIFTH APPELLATE DISTRICT

F067261

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

Fresno County
No. CF95545799

v.

JOHN MAFUA MAMEA,
Defendant and Appellant.

PETITION FOR REHEARING

TO THE HONORABLE JUSTICE BRAD R. HILL, PRESIDING JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL,
FIFTH APPELLATE DISTRICT:

Pursuant to Rule 8.268 of the California Rules of Court and Government Code section 68081, defendant John Mamea respectfully seeks rehearing of this court's November 26, 2014 decision. In affirming the lower court's judgment, the opinion relies on materials never proffered and reasons never considered by the trial judge, who summarily ruled that weapon offenses/offenders were categorically excluded from relief under the Three Strikes Reform Act of 2012. Indeed the material was not even made part of the appellate record until after the case was submitted for decision and defendant was neither provided a copy of the judicially noticed record nor the opportunity to file supplemental briefing as to the significance of facts from the primary source and best evidence, i.e., the jury trial transcript. (*People v. Woodell* (1998) 17 Cal.4th 448.)

ARGUMENT

REHEARING IS NECESSARY AS A MATTER OF LAW BECAUSE THE OPINION INTRODUCES MATERIALS NEVER CONSIDERED BY THE TRIAL COURT; FACTUAL DETERMINATIONS WERE MADE BY THIS COURT WITH NO OPPORTUNITY FOR SUPPLEMENTAL BRIEFING .

Under Government Code section 68081, a reviewing court cannot resolve an appeal without ensuring the parties' rights to brief the issues upon which the decision rests:

Before the Supreme Court, a court of appeal, or the appellate division of a superior court renders a decision in a proceeding other than a summary denial of a petition for an extraordinary writ, based upon an issue which was not proposed or briefed by any party to the proceeding, the court shall afford the parties an opportunity to present their views on the matter through supplemental briefing. If the court fails to afford that opportunity, a rehearing shall be ordered upon timely petition of any party.

Mr. Mamea submitted briefing in accordance with California Rules of Court, rule 8.204(a)(2)(C) which required that he: "Provide a summary of the significant facts limited to matters in the record." The reporter's transcript from the trial court proceedings is eight pages; on May 10, 2013, counsel for defendant and three other defense counsel appeared before the Honorable Jonathan B. Concklin, Judge. The trial court, relying upon the language contained in the voters' pamphlet for Proposition 36, and "making it an exhibit to the court's record in each case", found "that the electorate's intent was to exclude from consideration any individual petitioning from resentencing for any weapons related felony, gun related felony in most of these cases." (RT 7: 11-14.) The judge concluded: "*And for that reason and that reason alone*, I am finding that each of Mr. Avila, Mr. Mamea, Mr. Moton and Mr Uribe are statutorily ineligible for

resentencing. If a higher court finds and disagrees with that, then obviously, we start back at ground zero, and we move through the same process. So that's the Court's ruling in each of those cases." (Emphasis added; RT 8:16-22.)

The function of an appellate court in reviewing a trial court judgment on direct appeal is limited to matters contained in the record. (*In re James V.* (1979) 90 Cal.App.3d 300, 304-305; see also *In re Zeth S.* (2003) 31 Cal.4th 396, 405-406 [an appeal reviews the correctness of a judgment based on the record which was before the trial court.]; *Sabrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 235 ["it is not the function of an appellate court to make . . . evidentiary rulings in the first instance." .) In *People v. Bradford* (2014) 227 Cal.App.4th 1322, an appeal following the denial of a Penal Code section 1170.126 petition to recall the sentence, the trial court found petitioner was ineligible because he was armed with a deadly weapon in his current offense. The appellate court observed that while a record of conviction is "set", when matters of eligibility turn on facts that were not actually adjudicated and issues not addressed in the petition, the trial court should invite further briefing by the parties before finding the petitioner ineligible for resentencing. (*Id* at p. 1341.) The appellate court reversed the trial court's factual finding on the grounds of insufficient evidence of arming.

Here, the trial court did not review the record of conviction and made no factual determinations. Mr. Mamea asserts that under section 1170.126, subdivision (f), it was the trial judge who was required to examine and weigh the particular facts of the current offenses . Theories on which the prosecution relied as well as jury instructions given by the trial court will indicate whether defendant actually or constructively possessed the

possessed the weapons; did a single witness testify at his jury trial that he was seen possessing the firearm?; was any physical evidence introduced at trial, fingerprints, photographs, establishing the firearms were in petitioner's actual possession? Because the lower court judgment of ineligibility was not based on admissible portions of the record of conviction, the case should have been remanded to the trial court.

The Court's Limited Granting of Respondent's Request for Judicial Notice was Improper.

Evidence Code section 459 specifies matters that an appellate court may take judicial notice. In requesting an appellate court take judicial notice, a party must serve and file a separate motion with a proposed order. (California Rules of Court, rules 8.252(a)(1), 8.366(a).) The motion must explain why the matter is subject to judicial notice under Evidence Code sections 451, 452 or 453, why it is relevant to the appeal, whether the matter was presented to the trial court, and if so, whether judicial notice was taken. (Rules 8.252(a)(2), 8,366(a).) If the material to be noticed does not appear in the record, the party requesting judicial notice must serve and file a copy of the material with a copy of the motion or explain why it is not practical to do so. (Rule 8.252(a)(3).) Here, without explanation as to why it was not practical, respondent provided appellant no copy of the material upon which judicial notice was requested. And, because the material on which respondent requested judicial notice was not considered by the trial court he could not move to augment the record with it.

Appellate courts generally do not take judicial notice of matter not presented to and considered by the trial court. (See *People v. Peevy* (1998) 17 Cal.4th 1184, 1207-1208

and fn. 4; *People v. Jackson* (1992) 7 Cal.App.4th 1367, 1373.) The trial court here did not take judicial notice of the record of conviction, nor was it asked to. The taking of judicial notice in this appeal violates the elementary principle that the function of an appellate court, in reviewing a trial court judgment on direct appeal, is limited to matters contained in the record of the trial court proceedings. (*People v. Pena* (1972) 25 Cal.App.3d 414, 422-423; *People v. Szeto* (1981) 29 Cal.3d 20, 25 [material that was not before the trial court cannot be part of the appellate record]; Rule 8.204(a)(2)(C).)

Significantly, the particular matters respondent requested this court take judicial notice of was the records of conviction from case number F025939, included the reporter's transcript of the jury trial. It explained the reporter's transcript of Mr. Mamea's trial was relevant to the issue because it "may shed additional light on whether appellant was armed in connection with [the] offenses." And, "*[a]lthough the superior court did not refer to the particular circumstances of appellant's offenses in denying his request for resentencing, the People's position is that they are essential in determining whether a defendant was 'armed' during his offenses.*" (Italics not in original.)

This court deferred ruling on respondent's request for judicial notice until after the case was submitted; footnote two in the typed opinion, page three, the court granted the motion in part – "[t]hus we take judicial notice of our prior decision in *People v. Mamea* (August 6, 1997 F025939)." In so ruling, it virtually ignores respondent's request that the court take notice of the reporter's transcript from the jury trial "as it may shed additional light on whether appellant was armed in connection with those offenses."

A fundamental problem is the court's failure to give Mr. Mamea an opportunity to

present supplemental briefing of his views on the factual evidence contained in the record of conviction. At oral argument he stressed the need for remand in order for the trial court to determine the facts and their relevance: significance of Robert Solis' testimony the guns found in the hotel room on August 17th were his; the front seat passenger in car on August 14th had 9 millimeter bullets under his feet; jury instructions on constructive possession and prosecutor's reliance on constructive possession during closing argument. Questions at oral argument went to the degree of proof required to establish substantive facts; given the trial court's ruling, appellant was surprised by this court's opinion.

Even assuming judicial notice was properly granted, as respondent recognized and expressly requested, this court should have considered the full record of conviction contained in case number F025939, i.e., before making factual determinations the entire relevant record of conviction should have been analyzed and not merely the summary of facts contained in the appellate opinion. (*Neder v. United States* (1999) 527 U.S. 1, 19 [reviewing court typically must conduct a thorough examination of the record; *People v. Guiton* (1994) 4 Cal.4th 1116, 1130 [reviewing court must analyze entire relevant record]; *People v. Giardino* (2000) 82 Cal.App.4th 4554, 467.) This is particularly true where a single issue was raised on appeal in case number F025939: whether Mr. Mamea's 52 years to life sentence violated the United States Constitution's Eighth Amendment or the California State Constitution's prohibition against cruel or unusual punishment. In *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620, the Supreme Court held: "An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' [citations.]" Since the trial court never

considered the record of conviction and Mr. Mamea was never provided the record of conviction on appeal, the petition for rehearing should be granted in order to provide him an opportunity for the parties to present their views on the facts through supplemental briefing. (*People v. Alice* (2007) 41 Cal.4th 668, 679.)

The significance of the findings cannot be understated. They do not simply involve a trial court's discretionary determination that an aggravating factor mandates an upper term sentence rather than a middle term. Instead these findings will determine whether Mr. Mamea will continue to serve a sentence of 52 years to life or whether he should be resentenced to a significantly reduced sentence. Principles of due process require that he be provided a reasonable opportunity to present information to the court, including excerpts from the reporter's transcript from his trial, before the case is decided.

In short, the sheer absence of any evidence of arming before the trial court and Mr. Mamea's lack of a fair and reasonable opportunity to contest and discuss the significance of relevant evidence available in the entire record of conviction requires that this court grant rehearing.

CONCLUSION

For the reasons explained above, defendant respectfully requests that this Court grant rehearing.

Dated: December 10, 2014

Respectfully submitted,

Elaine Forrester
Attorney for Appellant

CERTIFICATE OF COMPLIANCE
(CALIFORNIA RULES OF COURT, RULE 8.204)

I certify that Appellant's Petitioner for Rehearing contains 2,093 words.

Dated: December 10, 2014

_____ /

Elaine Forrester