

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN MAMEA,

Defendant and Appellant.

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APPELLANT'S PETITION FOR REVIEW

After an Unpublished Decision by the Court of Appeal,  
Fifth Appellate District - F067261 -  
Filed on November 26, 2014

Elaine Forrester  
CSB # 104429  
2930 Shattuck Ave., Suite 200  
PMB No. 44  
Berkeley, CA 94705  
(510) 990-6104  
elaineforrester@yahoo.com

Attorney for Appellant  
By Appointment of the Court of  
Appeal Under the Central  
California Appellate Program

## TABLE OF CONTENTS

ISSUES PRESENTED FOR REVIEW	1
NECESSITY OF REVIEW	2
STATEMENT OF PROCEEDINGS	3
ARGUMENT	
REVIEW SHOULD BE GRANTED AND THE CASE TRANSFERRED BACK TO THE COURT OF APPEAL WITH DIRECTIONS THAT THE COURT PROVIDE DEFENDANT WITH THE RECORD OF CONVICTION AND THE OPPORTUNITY TO FILE SUPPLEMENTAL BRIEFING.	5
DEFECTS IN THE PROCEDURAL DUE PROCESS ON APPEAL DEPRIVED DEFENDANT OF THE DUE PROCESS RIGHTS CONTAINED IN ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION AND THE 14 <sup>TH</sup> AMENDMENT OF THE UNITED STATES CONSTITUTION.	9
CONCLUSION	10
CERTIFICATE OF COMPLIANCE	10
EXHIBIT – Copy of the Opinion of the Court of Appeal	

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

Pursuant to California Rules of Court, rule 8.500, defendant John Mamea petitions for review of a Court of Appeal opinion affirming the denial of his Penal Code section 1170.126 petition for resentencing. A copy of the opinion, filed November 26, 2014, is attached as an exhibit. Defendant's petition for rehearing was denied on December 18, 2014.

**ISSUES PRESENTED FOR REVIEW**

1. Was defendant denied procedural due process during the appeal where: (1) the trial court based its ineligibility finding on the singular fact that the offense involved a weapon – here, being a felon in possession of a firearm ; (2) the Court of Appeal made factual findings on a record that was not presented in the trial court nor provided to defendant on appeal; (3) deferred ruling on respondent's motion to grant

judicial notice of the record of conviction until after oral argument and when the case had been submitted for decision; (4) limited its review of the record of the conviction to the opinion, ignoring evidence, arguments and instructions presented to the jury; and (5) denying defendant's petition for rehearing, where he requested the opportunity to review the record of conviction, and permission to file supplemental briefing on evidence of whether he was "armed" during his offenses.

2. Was defendant denied due process under Article I, Section 7 of the California Constitution and the 14<sup>th</sup> Amendment of the United States Constitution where he did not get a full and fair hearing on his petition for resentencing under the Three Strikes Reform Act of 2012?

#### NECESSITY OF REVIEW

This case addresses appellate procedures that denied defendant due process during his appeal, a significant issue of law within the meaning of California Rules of Court, Rule 8.500(b)(1), and thus review is necessary.

Although there is a principle of appellate review that a ruling, if correct in law, will not be disturbed on appeal merely because it was based upon a wrong reason if it was right upon any theory of law applicable to the case, that principle is inapplicable in cases such as the instant case, where the theory was not advanced in the trial court and on which the correctness of the ruling depends involves controverted questions of fact or mixed questions of law and fact. (*Cramer v. Morrison* (1979) 88 Cal.App.3d 873, 887.)

## STATEMENT OF PROCEEDINGS

On November 28, 2012, defendant filed a pro-per petition for the recall of his April 1996 indeterminate life sentences – the court had imposed two consecutive 25 years to life terms – pursuant to Penal Code section 1170.126. (CT 4-7.) His petition listed his current offenses: two convictions of being a felon in possession of a firearm and his two “strike” priors were for robbery. (CT 5-6.)

On May 10, 2013, the Honorable Jonathan B. Concklin, Judge, relying upon the Proposition 36 language contained in the voters’ pamphlet 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 7:11-4.) He concluded: “*And for that reason and that reason alone*, I am finding that each of Mr. Avila, Mr. Mamea – defendant -, 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.)

On appeal, defendant argued that the trial court’s categorical finding that his offenses disqualified him from resentencing was error. He argued that remand to the trial court was necessary because Penal Code section 1170.126, subdivision (f) requires the trial judge to examine and weigh the particular facts of the current offense in order to determine whether defendant was armed.

Respondent made the following observation in her filed brief in this case:

“Whether appellant was armed during the commission of his second possession offense on August 17, 1995, is a closer question because it is not clear from this Court’s opinion whether he had the .38-caliber revolver available for offense of [sic] defensive use before he left the motel room.” (RB 21-22.) The footnote to this statement provides: “The record from appellant’s trial shows that, when police entered appellant’s motel room after his arrest outside the room, they discovered two loaded Smith & Wesson revolvers in plain view on the box spring of a bed with the mattress pushed to the side, exposing the firearms. (Case No. F025939, 1RT 110-112, 115, 117.)”

Following the Court of Appeal’s opinion affirming the denial of defendant’s petition for resentencing, defendant filed a petition for rehearing. He asserted that the proceedings on appeal violated basic principles of due process. Specifically, the court’s determination of factual issues never adjudicated by the trial court and the effect of its late and limited granting of judicial notice – Court relied solely on its 1997 prior opinion rather than the evidence, argument and instructions heard by the jury during the three day trial. He also asserted that the appellate court proceedings were fundamentally unfair because he was never provided the “record of conviction” nor provided an opportunity to present supplemental briefing as to the effect of the facts and theories of liability - constructive possession and aiding and abetting - relied on by the prosecution for the current offenses. The petition for rehearing was denied.

## ARGUMENT

### I.

REVIEW SHOULD BE GRANTED AND THE CASE TRANSFERRED BACK TO THE COURT OF APPEAL WITH DIRECTIONS THAT THE COURT PROVIDE DEFENDANT WITH THE RECORD OF CONVICTION AND THE OPPORTUNITY TO FILE SUPPLEMENTAL BRIEFING.

According to recent court of appeal cases, whether a conviction for being a felon in possession of a firearm will disqualify an inmate from the resentencing provisions of the Three Strikes Reform Act of 2012 depends on whether the “possession” of the firearm was under circumstances that constitute “arming.” In *People v. White* (2014) 223 Cal.App.4<sup>th</sup> 512 the trial court found, based on evidence of the record of conviction, that the defendant, a convicted felon, had been seen carrying a firearm. It concluded that he was disqualified from resentencing under Penal Code section 1170.126 because he was “armed” within the meaning of the statutory exclusion. Based on its review of the record of conviction, the appellate court agreed. Significantly, the Court of Appeal was careful to distinguish “arming” – requiring actual possession of the firearm – from constructive possession, which does not involve arming. (*Id.*, at p. 525.) The appellate court pointed to specific facts in the record of conviction, the same record and facts relied on by the trial court, that demonstrated the defendant was personally armed with the firearm, i.e. the testimony from who saw the defendant carrying the firearm. (*Ibid.*)

Here, the trial court’s finding that Mr. Mamea was ineligible for resentencing was not based on evidence contained in the record of conviction, but instead on an erroneous legal conclusion that the law “excluded any individual petitioning from resentencing for

any weapon related felony. . . ” (RT 7:11-14.) The trial judge candidly submitted that “[if] a higher court finds and disagrees with that, then obviously, we start back at ground zero, and we move through the same process.” (RT 8: 19-21.)

And here, a higher court did disagree with the trial court’s conclusion: “As this court has recently held, a defendant is not automatically disqualified for purposes of resentencing under the Act by his or her current conviction for being a felon in possession of a firearm. (*People v. Blakely* (2014) 225 Cal.App.4<sup>th</sup> 1042, 1-51-1057.)” (Typ. opn. p. 5.) But rather than accepting the trial judge’s invitation and remanding the case to the trial court, the court engaged in factual findings without providing the defendant an opportunity to show that he was not armed.

The appellate court’s actions were particularly egregious and unfair in the instant case because not only did the trial court not have the record of conviction before it but neither did he; the record of conviction was never provided to defendant in the trial court or on appeal. In respondent’s request for judicial notice of record of conviction, she requested the appellate court include the reporter’s transcript of the jury trial as well as the appellate court’s opinion. However, no copy of the reporter’s transcript from the trial or the opinion accompanied the motion nor any explanation for why it was not; 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 to explain why it is not practical to do so. (Rule 8.252(a)(3).) And, because the trial court did not judicially notice the record of conviction defendant was unable to move to augment the record with it.



The Court of Appeal's decision to defer ruling on the request for judicial notice until after the case was submitted by the parties and then limiting judicial notice to its own prior decision decidedly implicated notions of fundamental fairness and accuracy of the proceedings. Defendant was never given the opportunity to point to evidence in the record that would have demonstrated the possessory convictions were based on liabilities involving constructive possession and/or aiding and abetting.

At oral argument defendant insisted that remand to the trial court was necessary because the judge had not analyzed the evidence in the record of conviction: Robert Solis' testimony that the guns found under a mattress in the motel room on August 17<sup>th</sup>, belonged to him; 9 millimeter bullets on the floor of a front seat passenger in the car on August 14<sup>th</sup>; jury instructions on constructive possession and aiding and abetting and the prosecutor's reliance on constructive possession.<sup>1</sup> Denying defendant a second proceeding in the trial court at where he would have had the opportunity to show the relevance of this evidence on the issue of whether he was armed was unfair. Moreover, unlike the situation in *People v. Woodell* (1998) 17 Cal.4<sup>th</sup> 448, where the record of conviction involved an out-of-state conviction, here the complete record of conviction, including transcripts from the jury trial, is located at the offices of the Court of Appeal. Furthermore the opinion, unlike in *Woodell*, was not highly probative on the nature of the

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<sup>1</sup> Court appointed counsel for defendant on appeal briefly reviewed his record of conviction at the Court of Appeal the day before argument; references as to Mr. Solis and ammunition next to the passenger, jury instructions and prosecution's argument was in the court's reporter's transcript from the jury trial.

conviction; defendant's appeal raised the sole issue of whether his sentence violated principles of cruel and unusual punishment.

In defendant's petition for rehearing he requested the opportunity to file supplemental briefing as to the significance of facts contained in the record of conviction. He emphasized the need to examine what was presented to the jury – testimony, physical evidence or lack thereof, the prosecution and defense arguments and the court's instructions. Permitting defendant the opportunity to provide supplemental briefing, and providing to him a complete record of conviction, would have enhanced the accuracy of the proceeding by ensuring that the determination was made on the basis of competent evidence. By disallowing briefing and a complete record of conviction the Court of Appeal violated defendant's due process right to a fundamentally fair proceeding on appeal.

The significance of the Court of Appeal's factual findings that defendant was "armed" cannot be understated. They do not simply involve a trial court's discretionary determination that an aggravating factor mandates an upper term rather than a middle term. Instead these findings will determine whether Mr. Mamea will continue to serve two consecutive 25years-to-life sentences or whether he should be resentenced to a significantly reduced sentence. Moreover it would carry out the policy of the voters that third strike inmates, whose current offenses are non-serious, non-violent felonies, would receive shorter sentences thereby saving dollars provided by the taxpayers of California.

The Court of Appeal's failure to provide defendant procedural due process during the appeal, raises an important question of law. Both parties have an interest in an accurate finding. Accordingly, Mr. Mamea requests this Court grant this petition.

## II.

### DEFECTS IN THE PROCEDURAL DUE PROCESS ON APPEAL DEPRIVED DEFENDANT OF DUE PROCESS RIGHTS CONTAINED IN ARTICLE I, SECTION 7 OF THE CALIFORNIA CONSTITUTION AND THE 14<sup>TH</sup> AMENDMENT OF THE UNITED STATES CONSTITUTION.

A state may not administer its appellate review system in a manner that offends the Due Process and Equal Protection Clauses of the U.S. Constitution. (*Griffin v. Illinois* (1956) 351 U.S. 12, 18; *Lane v. Brown* (1963) 372 U.S. 477, 484-486.) As discussed above, defective procedures of the Court of Appeal denied Mr. Mamea due process on appeal; made factual findings based on a record never proffered in the trial court and it failed to provide him with the opportunity for a full and fair hearing on the issue of whether he was armed.

CONCLUSION

For the reasons stated herein, this petition for review should be granted.

Dated: January 5, 2015

Respectfully submitted,

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Elaine Forrester  
Attorney for Appellant  
John M. Mamea

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

I certify that Appellant's Petition for Review contains 2,465 words.

Dated: January 5, 2015

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Elaine Forrester

PROOF OF SERVICE BY MAIL