

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

JAMES ALDEN LOPER,
Defendant and Appellant.

Case No. S211840

Court of Appeal
No. D062693

San Diego County
Superior Court
No. SCD225263

ON REVIEW FROM
THE FOURTH APPELLATE DISTRICT, DIVISION ONE
AND THE SAN DIEGO COUNTY SUPERIOR COURT
THE HONORABLE LAURA PARSKY, JUDGE

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

APPELLANT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

The right to appeal an order after judgment is, always has been, and always will be directly dependent upon the nature of the personal interest at stake. The express requirement under Penal Code section 1237, subdivision (b), that the order “affect[] the substantial rights of the party” to be appealable leaves no room for any other conclusion.¹ The denial of a request for compassionate release under section 1170(e) necessarily affects the inmate’s “substantial rights” because it implicates the most fundamental of all personal interests. The legislative history of the compassionate release law makes clear that it is to be interpreted broadly to best effectuate the Legislature’s end goal of alleviating the state of the tremendous burdens associated with caring for chronically ill inmates, like appellant, “who could, by any rational standard, be released without posing a threat to the public.” (Rep. on Sen. Bill No. 1399 (2009-2010 Reg. Sess.), p. 4; see also *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 592.)

This case is not about whether some *other* remedy may serve as a viable means to challenge an order denying compassionate release. It is about whether such an order is *appealable* under section 1237(b). The

¹ Statutory citations are to the Penal Code. Sections 1237, subdivision (b), and 1170, subdivisions (d) and (e), are hereafter cited in short form.

answer to that question is surely yes. Respondent completely misses the mark in setting out to prove that direct appeals can and should be banned through judicial proclamation because, in respondent's view, inmates have the "far more efficient remedy" of a petition for a writ of mandate. Respondent's position ultimately does nothing but reinforce the conclusion that such orders must be deemed appealable, because following its beleaguered supporting rationale would risk completely depriving inmates of any ability to personally challenge the order, effectively insulating from any review the vast majority of orders denying compassionate. There is simply no justification for cutting off the traditional, fundamental means to seek redress from orders affecting one's "substantial rights." Moreover, while the appropriate standard of review is in fact de novo, under a proper construction of the eligibility criteria, as opposed to respondent's inappropriately narrow construction, it is clear that appellant qualifies for compassionate release regardless of which standard of review is applied.

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ARGUMENT

I

THE INDISPUTABLY “SUBSTANTIAL” NATURE OF THE RIGHTS AT STAKE COMPEL THE CONCLUSION THAT A TRIAL COURT’S DENIAL OF COMPASSIONATE RELEASE UNDER SECTION 1170(E) IS AN “APPEALABLE” ORDER

The discussion about the appealability of a trial court’s order denying a prison’s request for the compassionate release of an inmate under section 1170(e) begins and ends with the simple, yet fundamental question: Does such an order affect the inmate’s “substantial rights” so as to grant a statutory right of appeal under section 1237(b)? As the question itself implies, the determination of whether the order is appealable necessarily turns upon the nature of the interest at stake – i.e., whether the inmate has a personal interest in the outcome sufficiently worthy to permit a direct challenge to the order on appeal. The answer to this question seems so obvious that the question should simply be restated conversely: How could such an order *not* affect the inmate’s substantial rights when it so directly and palpably impacts the inmate’s most fundamental personal interest in freedom from incarceration? A debate nevertheless ensues, with respondent attempting to manufacture roadblocks and diversions along this otherwise clear path to direct appeals for inmates under section 1237(b). Attempting to follow respondent’s analysis would simply further frustrate the Legislature’s efforts to alleviate the state of the burdens of caring for these inmates with its already woefully inadequate resources. Ultimately, the simple, undeniable truth about the “substantial rights” at stake compels the simple, undeniable result that such an order is appealable by the inmate.

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A. The Issue is Whether Such Orders Are *Appealable*, Not Whether Some Other Process May Serve as a Substitute for an Appeal

In a nutshell, respondent's contends that this Court should construe orders denying compassionate release under section 1170(e) as nonappealable because inmates have no right to initiate the request in the first instance, and this read of the statute is the best construction because it would "ensure[] inmates like appellant will have an opportunity to pursue a for more efficient remedy – a writ of mandate." (RBOM 1-2, 8, 12-30.)

Respondent's attempt to focus the debate upon writs of mandate is a red herring. The issue is whether "a trial court's order denying the recall of a sentence under Penal Code section 1170, subdivision (e), is *appealable*" – not whether the writ of mandate process might be a viable alternative. The answer to the question on review resides in the statutory right to appeal post-judgment orders "affecting the substantial rights of a party" (§ 1237(b)). The inescapable effect of section 1237(b) is that an inmate must have the right to appeal an order denying compassionate release, because such an order necessarily affects the most "substantial" of all rights. Respondent is only able to purportedly arrive at a different conclusion through a fundamentally contradictory and misguided argument precariously focused upon the petition for writ of mandate as the exclusive means by which an inmate should be permitted to challenge such an order.

On the one hand, respondent declares that because the inmate has no right to initiate the request, the denial cannot affect his or her substantial rights, and consequentially there is no right of direct appeal. (RBOM 1, 8.) It would follow then that the nature of the personal interest at stake is neither controlling nor even relevant, because *regardless* of the nature or extent of the interest involved, the inmate has no right to appeal solely for the reason that the inmate has no right under section 1170(e) to initiate the request. Respondent even specifically sets out to dismantle the notion that

the ability to challenge the denial of such orders has anything to do with the interest at stake or related traditional precepts of “standing.” (RB 23-24.)

But then respondent turns around and makes precisely the opposite argument in support of its claim that a petition for a writ of mandate should be the sole remedy. It insists that an inmate would satisfy the “standing” requirement for a writ of mandate because the inmate would clearly have a “beneficial interest” in the outcome. So, in direct contradiction to its analysis of the direct appeal right, respondent argues that, *regardless* of whether the inmate had the right to initiate the request, the inmate has the right to proceed by way of a petition for a writ of mandate because *the nature of the interest* is sufficiently strong to warrant use of this remedy. (RBOM 18-19, 24.) Respondent specifically maintains that the inmate’s “beneficial interest” means he or she has a “special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.” (RBOM 18-19, quoting *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.)

Respondent’s analysis distorts the real issue. The focus here is upon the *appealability* of such orders, not whether some other remedy may serve as a viable substitute for a direct appeal. But even entertaining respondent’s misguided focus for a moment, respondent cannot have it both ways. The nature of the interest at stake either controls the determination of whether an inmate may personally challenge an order denying compassionate release or it does not. Under the operative language of section 1237(b), it does. And, of course, whether in the context of a direct appeal, a writ of mandate, or other challenge to such orders, the interest at stake is precisely the same: the fundamental personal interest in freedom from incarceration.

Evidently sensing the irreconcilable tension in its reasoning, respondent attempts to separate the “substantial rights” standing requirement for direct appeals from the “beneficial interest” standing

requirement for petitions for a writ of mandate, suggesting they can or should be placed into different categories related to different things. (RBOM 24-25.) But all respondent has to say in support of this strained notion is that they are “not coextensive,” with no explanation of how these concepts are supposedly not coextensive or otherwise meaningfully distinct from one another in determining whether an inmate has the right to personally challenge an order denying compassionate release. (*Ibid.*)

No such distinction exists. The requirement that an order affect the party’s “substantial rights” for purposes of a direct appeal and the requirement that the party have a “beneficial interest” for purposes of the writ of mandate process are two expressions of the fundamental concept that the right to challenge the order depends upon the nature of the interest in the outcome. And the two requirements serve the same fundamental purpose: to ensure that the interest in the outcome is sufficiently strong to warrant permitting a challenge to the order. Indeed, respondent’s misguided efforts to portray the writ of mandate process as a viable alternative remedy simply reinforce the reality that such orders affect the inmate’s “substantial rights.” For something to be “substantial,” it need only be “important,” “essential,” or “*not* imaginary or illusory” but “real” or “true.” (Merriam-Webster Online [<http://www.merriam-webster.com/dictionary/substantial>], italics added.) If, as respondent says, an inmate has a “*special interest* to be served or some *particular right* to be preserved or protected *over and above* the interest held in common with the public at large” so as to satisfy the “beneficial interest” standing requirement (RBOM 18-19, italics added), the inmate would clearly have a “real” or “true” right at stake and therefore necessarily satisfy the “substantial rights” requirement for a direct appeal.

Moreover, respondent does not even try to escape the fundamental point that the interest at stake in the context of *any* challenge to such an order, whether by direct appeal, petition for a writ of mandate, or otherwise,

is precisely the same. So even if there were some way to meaningfully distinguish “beneficial interest” from “substantial rights,” logic compels the same crucial conclusion: the ability to pursue a direct appeal is directly and inextricably tied to the nature of the interest at stake, and that interest – the most fundamental interest of all – is surely sufficient to not only warrant but command that the inmate has the right to personally pursue an appeal.

Respondent’s position also risks cutting off *any* ability for the inmate to personally challenge an order denying compassionate release. If, as respondent’s rationale dictates, such an order does not and cannot affect the inmate’s “substantial rights” simply because the inmate has no right to initiate the request in the first place, it would follow that the inmate has no “real” or true” right at stake. By this logic, the inmate necessarily does not have a “beneficial” or “*special*” interest in the outcome; the inmate has *no* interest in the outcome sufficient to warrant permitting him or her to personally challenge to the order through *any* means. Thus, under respondent’s rationale, a reviewing court that receives a petition for a writ of mandate from an inmate seeking redress from a denial of compassionate release would logically be compelled to refuse the petition simply because the inmate had no right to make the request in the first instance.

A judicial pronouncement purporting to establish respondent’s rationale as a basis for turning away an inmate who attempts to challenge such an order through a petition for a writ of mandate creates the further risk that the denial of the petition would be insulated from reversal. “Unlike the appeal following judgment, which is heard as a matter of statutory right, review by writ is at the discretion of the reviewing court.” (*People v. Mena* (2012) 54 Cal.4th 146, 153.) Relief is “extraordinary” and “rarely granted.” (*Cinel v. Christopher* (2012) 203 Cal.App.4th 759, 766, fn. 4; accord *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 663, *Resnik v. Superior Court* (1986) 185 Cal.App.3d 634, 636-637, and *Omaha Indem. Co. v.*

Superior Court (1989) 209 Cal.App.3d 1266, 1271 [“Approximately 90 percent of petitions seeking extraordinary relief are denied.”].) “[A] party seeking review by extraordinary writ bears the burden of demonstrating that appeal would not be an adequate remedy under the particular circumstances of that case.” (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113.) And the petitioner must make the preliminary showing of “standing” sufficient to constitute a *beneficial* or *special* interest in the outcome. (*Carsten v. Psychology Examining Com., supra*, 27 Cal.3d at p. 796.) Crucially, “[o]n appeal from the decision of that court either granting or denying the writ, its determination will not be disturbed in the absence of a showing of *abuse of discretion*.” (*Sutco Constr. Co. v. Modesto High Sch. Dist.* (1989) 208 Cal.3d 1220, 1227, internal quotations omitted, italics added.)

As such, *even if* the right of direct appeal is completely cut off as respondent proposes, an inmate faces the real prospect of being shut out of the writ process as well. While the inmate could possibly demonstrate there is no other adequate remedy available, he or she would not be able to carry the burden of showing a personal interest strong enough to warrant such a direct challenge to the order because, by respondent’s logic, the inmate necessarily has *no* interest at all, since he has no right to initiate the request. That same logic would compel, or at least reasonably support, a finding that the inmate cannot satisfy the basic standing requirement to challenge the order. So the reviewing court could not only deny the writ petition, but the denial would not be subject to any realistic challenge on appeal as an *abuse of discretion*, because the inmate could not show the denial was “arbitrary, capricious, or patently absurd.” (See *People v. Rodriguez* (1994) 8 Cal.4th 1060, 1124-1125 [this is the standard for an “abuse of discretion”].)

The only party who could satisfy the standing requirement under respondent’s reasoning and avoid this predicament of being barred from any right to challenge the denial of the request would be the prison itself,

since it is the one with the right to initiate the request. So even though it is obviously the *inmate* whose rights are truly at stake, the inmate would be left in the perverse situation of simply hoping the prison would deem *its own* interests sufficiently strong to justify waging a legal battle itself. This is a remote chance, at best, given that the resources of the prison system are already so severely overextended and mismanaged that it cannot even satisfy the most basic of its healthcare obligations to the critically overcrowded population of inmates. (See Opinion and Order Requiring Defendants to Implement Amended Plan in *Coleman v. Brown*, No. 2:90-cv-0520 LKK JFM P (E.D.Cal.), and *Plata v. Brown*, No. C01-1351 THE (N.D.Cal.), June 20, 2013 (“Combined Order”), at pp. 22-23 [where the receiver recently declared: “Simply put, we do not have appropriate and adequate healthcare space at the current population levels.”].)

Even if the inmate is not shut out of the writ process, there is certainly no guarantee of a more efficient or effective process. In fact, the writ process diminishes the likelihood of a proper and thorough review: “The Court of Appeal is generally in a far better position to review a question when called upon to do so in an appeal instead of by way of a writ petition . . .” because “the court has a more complete record, more time for deliberation and, therefore, more insight into the significance of the issues.” (*Omaha Indem. Co. v. Superior Court, supra*, 209 Cal.App.3d at p. 1273.)

Respondent’s central thesis in support of completely cutting off all direct appeals in favor of petitions for a writ of mandate must be rejected as a fundamentally misguided attempt to short circuit all direct appeals in a manner that would severely curtail and possibly foreclose any meaningful opportunity for review of an order denying a request for compassionate release despite the true “substantiality” of the personal interest at stake.

B. The Statutory Text, Legislative Intent, and Policy Considerations All Dictate the Conclusion that an Inmate May Personally Appeal an Order Denying Compassionate Release

Not only does the central foundation in support of respondent's position quickly crumble upon examination, but there is no other justification for completely cutting off the right of direct appeal. Everything, in fact, weighs heavily in favor of preserving that right.

"In California, the right to appeal is granted by law to every convicted person; it is one of the most important rights possessed by a convicted defendant, and *every legitimate element should be exercised in its favor.*" (*People v. Serrato* (1965) 238 Cal.App.2d 112, 115, italics added, citing *inter alia* *People v. Casillas* (1964) 61 Cal.2d 344; accord *People v. Pickett* (1972) 25 Cal.App.3d 1158, 1166.) So the direct appeal right should not be circumscribed, much less completely cut off, absent a strong justification for doing so – particularly where, as here, the appeal is from an order that plainly affects the party's most "substantial" of rights.

Respondent suggests one may infer an intent to completely cut off an inmate's right to appeal in this context from the mere *absence* of language in section 1170(e) *specifically granting* such a right. (RB 12-14.) Sure, the Legislature could have written this directly into the statute, but the same could be said of the countless statutory provisions that do not *expressly* grant a right to appeal an adverse order under the particular statutory scheme. There is obviously no need for an express declaration of a right already expressly conferred under 1237(b), the specific statutory provision granting the right of appeal. If anything, since "every legitimate element should be exercised in [] favor" of the right to appeal (*People v. Serrato, supra*, 238 Cal.App.2d at p. 115), courts should err on the side of finding a right of appeal absent an express intent to *preclude* such a right. The Legislature has used such express language when it has intended to prevent

certain direct appeals, such as under section 6259, subdivision (c), for orders denying access to public records under the Public Records Act. (See *Powers v. City of Richmond*, *supra*, 10 Cal.4th at p. 115 [the Legislature has expressly provided “that the mode of appellate review for superior court decisions in PRA cases shall be an extraordinary writ proceeding rather than direct appeal”].) There is no such express declaration in section 1170(e). And the fundamental personal interest of freedom from incarceration is obviously much more significant than someone’s “idle curiosity” in gaining access to public records. (See *Am. Civil Liberties Union of N. Cal. v. Superior Court* (2011) 202 Cal.App.4th 55, 67.)

Nor do the cases involving section 1170(d) warrant completely precluding the right to personally appeal a denial of a request for compassionate release in the face of the direct impact upon the inmate’s most “substantial” of rights, as respondent claims. (See RBOM 11-18, 25.) Even respondent is ambivalent here, as it simply reaches the ultimate conclusion that “the Legislature *presumably* intended for subdivision (e) to be construed like subdivision (d).” (RBOM 13, 21, italics added.) Indeed, however much respondent may try to characterize them as on point (RBOM 13), the cases on which it relies had a very different focus in mind.

At the outset, the design and effect of the recall process under section 1170(d) is quite distinct. That section empowers a sentencing court to recall and resentence a defendant for any purpose “rationally related to lawful sentencing” within 120 days of the original commitment. (*People v. Alanis* (2008) 158 Cal.App.4th 1467, 1476.) The Legislature separately enacted section 1170(e) to deal with the recall of a sentence for compassionate release purposes, even if that process is initiated within the first 120 days of commitment, showing that it obviously did not intend for the general recall power under section 1170(d) to apply in this context. More importantly though, an order denying relief under section 1170(d)

inherently does not have the kind of appreciable impact upon the defendant's substantial rights as an order denying relief under section 1170(e). The court's power to recall a sentence under section 1170(d) runs contemporaneously with the defendant's right to appeal the judgment itself. (See *Alanis*, at p. 1475 ["a court has 120 days to recall a sentence after commitment even if an appeal from the judgment is pending"].) The defendant may and invariably will raise *in the appeal from the judgment* any and all claims regarding the propriety of the sentence. So the defendant's inability to *directly appeal from the order denying relief under section 1170(d)* does not necessarily preclude a meaningful opportunity for appellate review because the defendant's concerns about the propriety of the sentence, which may have formed the basis for relief under section 1170(d), can be raised as bases for relief in appeal from the judgment.

By contrast, in the context of orders denying relief under section 1170(e), unless the inmate has the right to personally challenge *the order itself*, he or she would be deprived of any meaningful opportunity for appellate review except in the rare case that the prison appeals the order. This reveals a key fallacy in respondent's reliance upon the language in the section 1170(d) cases stating that a defendant has no right to appeal directly from an adverse order in that context to argue there is no right to directly appeal an adverse order in this context. (RBOM 1-8, 11-18, 25.) Unlike in that context, an inmate's ability to personally challenge *the order itself* in this context is absolutely crucial to providing a meaningful opportunity for appellate review of the "substantial rights" at stake. So section 1170(d) is simply not "crucial[ly] similar[]" to section 1170(e). (RBOM 13.)

Moreover, to whatever degree the section 1170(d) cases may have application in the very different context of the compassionate release law, despite what respondent may say (RBOM 14-18), the primary focus in most of those cases was not upon the appealability of the order itself but instead

upon the distinct concern of curtailing the abusive use of the section 1170(d) power to improperly extend the time to appeal the actual judgment or otherwise opening up the judgment to improper attacks (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 193-195; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725-1726; *People v. Gainer* (1982) 133 Cal.App.3d 636, 637-638, 640-642). The cases that actually focused upon the appealability of the order itself dismissed the matter following a purported appeal from an order upon the defendant's *own* motion, when the statute did not permit the defendant to bring such a motion; so there was no valid order from which to even pursue an appeal. (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 980-981; *People v. Niren* (1978) 76 Cal.App.3d 850, 850; *Thomas v. Superior Court* (1970) 1 Cal.3d 788, 790; *People v. Druschel* (1982) 132 Cal.App.3d 667, 668-669.) In cases such this one, however, the process *has been* properly initiated through a request by the appropriate prison officials in accordance with the terms of the statute, such that the order is in fact "appealable" under section 1237(b), and the only question is who may appeal that order. For the reasons already stated, the inmate whose release or continued incarceration is at stake surely has this right.

Also, while it is again quite clear that the key factor in determining the inmate's right to appeal is the nature of the right at stake, to the extent that his or her ability to initiate the process may have some bearing upon this analysis, section 1170(e) diverges from section 1170(d) here as well. Section 1170(e) specifically authorizes the inmate to "independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary . . ." and "[u]pon receipt of the request, the chief medical officer and the warden or the warden's representative *shall* follow the procedures described in paragraph (4)." (§ 1170(e)(6), italics added.) While the secretary must still determine that the "inmate satisfies the criteria set forth in paragraph (2)" to ensure he or she

is eligible for release consistent with the terms of the statute (*ibid.*), the inmate nevertheless has the ability to trigger this crucial preliminary stage of the process through which a determination of eligibility is made. This starkly contrasts with the recall process under section 1170(d), which does not provide the inmate any right to be involved at any stage. While respondent tries to spin the language of section 1170(e)(6) in its favor, it does so in the context of its unpersuasive attempt to suggest that the absence of a provision in the statute *expressly granting* the right to appeal justifies presuming an intent to *completely deny* that right. (RBOM 13-14.)

Respondent continues to miss the point in attempting to set aside appellant's case analogies on the basis that the cases involve different statutory sections or different circumstances. (RBOM 25-30.) These cases illustrate how courts view the issue of when an order is "appealable" as affecting a party's "substantial rights" under section 1237(b), and drive home the key point that the fundamental nature of the interest at stake -- which is equally if not substantially greater than the interests found sufficient there -- compels the finding that such orders are "appealable." (See *People v. Sword* (1994) 29 Cal.App.4th 614, 619, fn. 2 [denial of recommendation for outpatient status of an institutionalized defendant], *People v. Cross* (2005) 127 Cal.App.4th 63, 66 [same], *People v. Coleman* (1978) 86 Cal.App.3d 746, 750 [same], *People v. Herrera* (1982) 127 Cal.App.3d 590, 595-597 [denial of recall and resentencing under former section 1170(f)], *People v. Martin* (1986) 42 Cal.3d 437, 445-446, 450 [same], *In re Daniel K.* (1998) 61 Cal.App.4th 661, 667-670 [denial of motion for discovery of minor's personal information], and *People v. Connor* (2004) 115 Cal.App.4th 669, 677-687 [grant of motion to release to third party defendant's personal information in probation reports].)

So despite respondent's efforts to turn this into a truly debatable issue, a straightforward analysis of the question on review dictates only one

reasonable and acceptable conclusion consistent with the legislative intent: an inmate may directly appeal an order denying compassionate release.

II

THE PROPER STANDARD OF REVIEW IS DE NOVO

Respondent challenges the notion that the appropriate standard of review is de novo, arguing the trial court is entitled to deference in its order denying compassionate release based on the language of section 1170(e), the relevant case law, and the circumstances in this case. (RBOM 30-36.) The high level of deference for which respondent advocates is warranted for rulings based on “first-hand observations made in open court.” (*People v. Ault* (2004) Cal.4th 1250, 1257, quoting *People v. Cromer* (2001) 24 Cal.4th 889, 901.) Respondent tries to analogize to rulings upon such matters as competency to stand trial, suppression of evidence, juror misconduct, factual bases in support of guilty pleas, prosecutorial recusal, and the sentence to be imposed. (RBOM 32-34.) All such matters indeed involve “first-hand observations in open court” insofar as they are inextricably tied to events that occur or are developed in the trial court through the live testimony of witnesses or jurors, statements of the parties, or to the culpability of the defendant as it relates to the particular matter being litigated in that court. Many such matters require conflict resolutions and credibility determinations that inevitably leave the trial court “best positioned” to make the pertinent findings, since a “cold record” on appeal would not reveal all the relevant circumstances. (*Ault*, at p. 1267.)

The situation is inherently different in the context of rulings upon a recommendation for compassionate release under section 1170(e). The trial court renders its conclusions based upon facts and circumstances pre-determined to exist by the responsible prison officials in an entirely internal

process with which the court has no involvement. It is the Board of Parole Hearing who “*shall* make” the findings in the first instance regarding the inmate’s eligibility for release, and the Board in turn relies upon the opinions of treating physicians who determined whether the inmate is “terminally ill” or “permanently medically incapacitated.” (§ 1170(e)(2), italics added.) So the inherent design of the process is such that the key facts are developed and determined *outside* any court proceeding. Then, if the secretary or the Board concludes internally to recommend release, those findings are incorporated into written reports which are transmitted to the court. (§ 1170(e)(7) [“Any recommendation for recall submitted to the court by the secretary or the Board of Parole Hearings shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2).”].) And the statute does not require live testimony from anyone involved in the development of the pertinent evidence. Indeed, the prison and the personnel involved in this internal process may be located great distances away from the sentencing court, making it doubtful in many cases that they would be able and willing to attend the hearing in any event.

So, while the statute says the trial court “shall have the discretion to resentence or recall if the court finds the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) [the eligibility criteria] exist” (§ 1170(e)(2)), it is evident the statute envisions that those findings can and will be made based upon solely upon the findings in the documentary evidence developed through the prison’s internal review process. The fact is, in such cases “the usual deference that would apply to the review of a trial court’s ruling based on its superior ability to resolve *factual* questions (e.g., the credibility of witnesses appearing before it) is unwarranted.” (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1497, italics original.) Instead, *de novo* is the appropriate standard of review. (See *ibid.*, *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677, *In re Lowe* (2005) 130 Cal.App.4th 1405,

1420, *In re Ryner* (2011) 196 Cal.App.4th 533, 543, *In re Lazor* (2009) 172 Cal.App.4th 1185, 1192, *In re Hare* (2010) 189 Cal.App.4th 1278, 1291.)

Even if a de novo standard of review may not be appropriate in every case based upon what respondent sees as “more than just . . . a *theoretical* possibility” of live witnesses at such hearings (RBOM 32), what ultimately matters is the appropriate standard of review *in this case* (see *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 859-860 [“any determination underlying any order is scrutinized under the test appropriate to such determination”]). And all the pertinent evidence upon which the court here relied was documentary – reports and records from prison personnel concerning appellant’s medical conditions and the level of risk his release would pose. (CT 31-48, 55-58, 82-83; RT 2-7.) No witness testimony or other evidence requiring conflict resolution or credibility determinations was introduced. While respondent suggests the court may have relied upon information or knowledge about appellant’s “future dangerousness” that was outside the actual record (RBOM 35), below the parties never disputed the prison’s finding that appellant posed no danger to public, and respondent has made no attempt to do so in this appeal (see *People v. Duren* (1973) 9 Cal.3d 218, 238 [“Where there is no conflict in the evidence, there is no requirement that the reviewing court view it in the light most favorable to upholding the trial court’s determination.”]).

Moreover, a proper resolution of the issues on appeal certainly “requires the court to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests.” (*In re Lowe, supra*, 130 Cal.App.4th at p. 1421.) And, as discussed below, the trial court fundamentally misunderstood and misapplied the law. So to any extent there may have been a “factual conflict” in the documentary evidence or other circumstance possibly warranting deference (see RBOM 35), the appropriate standard of review is de novo (*Lowe*, at p. 1421 [de

novo review is appropriate when the ruling “is in contravention of controlling legal authority” concerning issues that involve significant legal and policy matters]). Review on a clean slate would provide the clearest and most effective form of guidance to the lower courts in resolving the numerous significant, multi-faceted issues and policy considerations here.

III

APPELLANT IS ENTITLED TO COMPASSIONATE RELEASE UNDER ANY STANDARD OF REVIEW

Whatever standard of review is applied here, the record establishes that appellant is eligible for compassionate release under a proper interpretation of section 1170(e)’s eligibility classifications designed to truly effectuate the Legislature’s end goal of releasing these inmates.

A. The “Liberal” Form of Interpretation that Respondent Concedes Must be Used to Read the Statute Inevitably Leads to the Broad Construction of the Eligibility Criteria

Respondent advocates for a narrow construction of the “terminally ill” and “permanently medically incapacitated” eligibility classifications, arguing that appellant’s construction is much broader than what the language or intent of the statute reasonably allows. (RBOM 41-43.) But respondent’s arguments are self-defeating. Specifically, it argues that the “terminally ill” classification “requires a *prognosis* from a Department physician that an inmate has a terminal illness that *would* produce death within six months.” (RBOM 37, italics added.) Appellant focuses upon the same terms in his construction of the statute. (See ABOM 26-28.) The only real difference between the parties’ positions is that respondent ignores the plain meaning and effect of the words “would” and “prognosis,” offers no other explanation for how these terms could be defined or understood, and

simply surges on with the bald assertion that appellant's construction incorporating the plain meaning of these terms is "absurd." (RBOM 41.)

As the plain meaning of the Legislature's own language dictates, the "terminally ill" classification necessarily includes inmates whose *actual* remaining life span from the point of "prognosis" is inherently uncertain. A "prognosis" is "[t]he forecast of the *probable* outcome or course of a disease" (<http://www.medterms.com/script/main/art.asp?articlekey=5061>, italics added) or "the act or *art of foretelling* the course of a disease" (<http://www.merriam-webster.com/medlineplus/prognosis>, italics added). And "would" is "[u]sed in the main clause of a conditional statement to express simply a *possibility or likelihood*"; it is also "[u]sed to indicate *uncertainty*." (American Heritage Dict. (4th ed. 2000), p. 1984, cols. 1-2, italics added; <http://www.merriam-webster.com/dictionary/would>, italics added ["would" is used "in auxiliary function to express *doubt or uncertainty*"].) So, taken together, as expressed in respondent's own definition – "a *prognosis* from a Department physician that an inmate has a terminal illness that *would* produce death within six months" – we have an uncertain prediction about an inherently uncertain outcome. And this leads right back to appellant's originally proposed construction: an inmate is "terminally ill with an incurable condition caused by an illness or disease *that would produce death* within six months, as determined by a physician employed by the department," when the character of the illness or disease itself *presents the possibility* of causing death within as little as six months.

This construction does not mean "the mere diagnosis with a terminal medical condition would be sufficient." (See RBOM 41-42.) The terminal illness must be so severe and pervasive that it presents the possibility of causing death within as little as six months. The classification just does not require a certainty or even a high probability of death within six months, since a *prognosis* of what *would* happen is a prediction that expresses

“doubt or uncertainty.” Such a construction advances the clear legislative intent. The Legislature certainly has not been “satisfied . . . with the trial courts’ application” of the statute, as respondent claims. (RBOM 42.) When it enacted the “medical parole” alternative in 2010, the Legislature expressed ongoing frustration with the application of the law: “last year only two such releases were approved and we continue to incarcerate inmates who could, by any rational standard, be released without posing a threat to the public.” (Rep. on Sen. Bill No. 1399 (2009-2010 Reg. Sess.), p. 4.) The Legislature has been frustrated specifically because it has sought the release of these inmates to “significantly increas[e] fiscal savings” (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007-2008 Reg. Sess.) Sept. 5, 2007, coms., p. 5) and to combat the “staggering” impact of “the population crisis” (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007–2008 Reg. Sess.), June 26, 2007, coms., p. 5).

The guiding principle behind the legislative measure is that “prisons should not act as *long term* health care providers for chronically ill prisoners.” (Sen. Com. on Appropriations, Rep. on Assem. Bill 29 (1997-1998 Reg. Sess.) July 14, 1997, p. 1, italics added.) This shows the Legislature has been focusing upon inmates who have chronic, irreversible medical conditions of the type that could cause death within six months but may actually persist for longer periods. A broad construction like the one proposed here would directly advance the primary goals of the law by releasing these inmates who pose no danger to the public and relieving the state of the tremendous burden of attempting to meet their constant costly medical needs with already woefully inadequate facilities and resources.

This legislative history equally informs the proper interpretation of the “permanently medically incapacitated” eligibility classification. Indeed, it was by the extension of the law to reach this group of inmates that the Legislature specifically sought to “significantly increase fiscal savings.”

Respondent nevertheless insists the language of section 1170(e)(2)(C) makes “clear” that the Legislature intended to include only inmates who are totally incapacitated to the point of being in a comatose or vegetative state. (RBOM 43.) The objections of the opponents to this expansion of the law show the language is subject to a much broader interpretation. (Sen. Rules Com., Sen. Public Safety Com., Report on Assem. Bill No. 1539 (2007–2008 Reg. Sess.), Third Reading, July 5, 2007, coms., p. 7 [noting that “24-hour total care” could be interpreted to mean the inmate merely “lives in his parents’ house where someone is on the premises at all times,” and the language “loss of muscular control or neurological function” could potentially be deemed include a very broad class of inmates].)

Ultimately, even respondent admits that “a *liberal* construction of the medical criteria would promote the Legislature’s purpose of saving money by expediting the release of prisoners and might help address problems with the prison healthcare system identified in federal litigation unrelated to this case and section 1170(e).” (RBOM 43, italics.) A “liberal construction” of this classification to apply to inmates whose chronic conditions require some form of continuous or constant care, treatment, or assistance in performing basic activities of daily living – “breathing, eating, bathing, dressing, transferring, elimination, arm use, or physical ambulation” (Cal. Code Regs., tit. 15, § 3076, subd. (b)(2)) – is not only a reasonable interpretation of the statute but the one that best advances the Legislature’s true purpose of alleviating the state of the tremendous burdens associated with attempting to provide these costly day to day services. Undeniably, an inmate who needs assistance with such basic activities would generally not only require a regimen of medications, medical devices and equipment, and other special accommodations, but also the constant monitoring by prison personnel to ensure proper compliance, administration, and use of those various treatments and accommodations.

In reality, the federal litigation is not “unrelated” to the issues here. The order that has been looming over California for several years now requires the state to identify and release inmates who are “unlikely to reoffend or who might otherwise be candidates for early release.” (Combined Order, *supra*, at pp. 26, 41-42, 51.) That is precisely what the Legislature has been trying unsuccessfully to achieve under the compassionate release law: to identify and release inmates who, “[b]ecause of their medical condition . . . are no longer a threat to society.” (Rep. on Sen. Bill No. 1399 (2009-2010 Reg, Sess.), p. 4.) The “liberal construction” of the eligibility criteria best effectuates these end goals, and it does not “upset[] the balance of competing interests” (RBOM 44) because, as the Legislature has explained, the taxpayers are the only ones being punished by the continued incarceration of such inmates whose release poses no risk to society (Rep. on Sen. Bill No. 1399 (2009-2010 Reg, Sess.), p. 4).

B. The Proper Construction of the Statute Compels the Conclusion that Appellant is Entitled to Compassionate Release

Appellant’s long and continuing history of multiple chronic and severely debilitating health conditions, at least two of which – coronary artery disease and advanced chronic obstructive pulmonary disease (COPD) – are irreversible and have set him on a downward spiral toward an inevitably premature death, resulting in the need for multiple forms of continuous treatment, care, and assistance despite which he may nevertheless suffer a rapid or sudden death. (CT 33-38, 43-44, 52, 58.) In fact, the initial request for compassionate release stated that, as a result of these conditions, appellant’s “life expectancy is short and possibly *less than* 6 months,” he is “at increased risk of sudden cardiac death,” and his condition is “likely to worsen” over time. (CT 58, italics added.) This stark reality remains a consistent theme throughout the record. The diagnostic

study reiterated these findings (CT 52, 56), and while Dr. Seeley stated that appellant's "current status does not indicate for or against a prognosis of less than six months to live," his otherwise brief, non-descript letter ultimately reaffirmed the essential fact that appellant is "an ill individual with disease processes that will continue to progress, despite treatment, leading to his eventual demise." (CT 60.) Appellant's multiple terminal conditions, which could lead to his death at *any* time, are certainly characteristic of conditions that *could* cause death within as little as six months even though the person may suffer with the condition for an extended period before dying – much like the inmates suffering with AIDS and HIV that the Legislature used to illustrate the sort of conditions with which it was concerned. (Rep. on Assem. Bill No. 29, *supra*, at pp. 1-2.)

Appellant's conditions not only render him eligible for release as a "terminally ill" inmate but also as a "permanently medically incapacitated" inmate under the proper construction of that term. Clearly, appellant is and has been suffering with numerous, severely debilitating conditions that require a host of various types of ongoing care, treatment, and assistance. This includes regular medicinal treatments to manage his otherwise "uncontrollable" and life-threatening high blood pressure, high cholesterol, and diabetes, as well as his "severe degenerative joint disease," severe gastrointestinal problems, and hypertension (CT 33, 35-37, 43-44, 52, 58); a "*continuous*" supply of oxygen through a ventilator (CT 52, italics added); and a wheelchair to assist with movement (CT 52). While respondent highlights Dr. Campbell's notation that appellant is "able to perform all ADLS's [activities of daily living]" (RBOM 39, quoting CT 58), it is obvious that appellant is only capable of doing so *with substantial assistance* on multiple levels. Respondent's reliance upon Dr. Campbell's statement here is especially misplaced given that it was made in the context of demonstrating how the dire nature and severity of appellant's state of

health warrants his release from prison. (CT 58.) It is abundantly clear that virtually all of appellant's conditions are simply being "managed" or "controlled" through a complex regimen of continuous, substantial, time-consuming, and undoubtedly costly treatment, care, and assistance.

Respondent's attempt to emphasize that these numerous treatments and services have been provided on an "outpatient" basis can only serve to further undermine its position. (RBOM 37, 40.) Appellant has been treated on an "outpatient" basis simply *by his choice*. The medical personnel have in fact *recommended* that he be admitted into the infirmary and kept there. (CT 58, 60.) This includes Dr. Seeley, whose most recent letter specifically stated appellant "has refused placement in our infirmary." (CT 60.) In other words, it is the opinion of the medical personnel themselves that appellant's conditions are so pervasive and require such a constant and invasive degree of assistance that he *should be* in a permanent hospitalized setting where he would receive an even greater level of constant care and supervision. So the evidence concerning appellant's decision to remain free of *recommended permanent hospitalization* simply highlights the dire nature of his situation. Hospitalized or not, it is undeniable that appellant has been and will continue to be in a dire state of health requiring a high degree of constant care and assistance with the most basic activities of daily living. He is the very sort of inmate whom the Legislature had in mind: one whose release would pose no risk to the public and would at the same time relieve the state of the tremendous burden of acting as the "*long term* health care provider" for appellant's chronic, pervasive, and terminal illnesses. Accordingly, appellant qualifies for release under both the "terminally ill" and the "permanently medically incapacitated" classifications for release.

The result is the same even if the standard of review were abuse of discretion. At most, that would require deference to the trial court's factual findings; its conclusions of law regarding the ultimate question of eligibility

for release under section 1170(e) based on the facts “are subject to de novo (i.e., independent) review on appeal.” (*Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1333-1334.) The clarity with which the record demonstrates appellant is “terminally ill” and/or “permanently medically incapacitated” under a proper interpretation of the law compels the ultimate legal conclusion that he is eligible for release. Indeed, the ruling here was the product of a fundamental misunderstanding and misapplication of the law and thus was necessarily an abuse of discretion. (See *Prigmore*, at p. 1334; *Aguilar v. Atl. Richfield Co.*, *supra*, 25 Cal.4th at p. 860.)

This was not just a matter of the trial court’s having “simply misspoke[n]” at an insignificant point in the analysis. (RBOM 44.) At the crucial point of rendering its ultimate order denying compassionate release, the court said the evidence failed to sufficiently establish appellant’s conditions “*will* produce death within six months.” (RT 6, italics added.) Just before the court rendered this ruling, defense counsel pointed out that, as Dr. Campbell had noted, it could not be said with certainty how much longer appellant had to live. (RT 5.) So the context of the court’s ruling shows it believed, contrary to what counsel said, that medical certainty of death within six months *was* required. Moreover, the entire foundation of the court’s analysis leading up to this point was based on the flawed premise that appellant’s eligibility for release was dependent upon whether he could be deemed “terminally ill.” The court never even mentioned the issue of whether appellant was eligible for release under the independent classification of “permanently medically incapacitated” – even though the diagnostic study specifically stated he could be considered *either* “terminally ill” *or* “permanently medically incapacitated.” (CT 56.)

That the parties focused upon the “terminally ill” classification does not absolve the court of its duty to have considered this independent basis for relief in the face of the diagnostic study placing this alternative directly

before the court, as respondent suggests. (RBOM 45.) ““The proper exercise of discretion *requires* the court to consider *all* material facts and evidence and to apply legal principles essential to an informed, intelligent, and just decision.”” (*People v. Stark* (2005) 131 Cal.App.4th 184, 205, internal quotes omitted, italics added.) That did not happen here. The court considered solely whether appellant fit the “terminally ill” classification and denied the request for release solely based upon its finding of insufficient evidence to show he fit *that* classification. (CT 83; RT 6-7.)

“[A] ruling otherwise within the trial court’s power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law.” (*Fletcher v. Superior Court* (2002) 100 Cal.App.4th 386, 392, quoting *People v. Penoli* (1996) 46 Cal.App.4th 298, 302.) That is because the “[f]ailure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal.” (*Ibid.*) Such is the case here. The trial court had the power to not only *consider* whether appellant was eligible for release on the independent basis that he qualifies as a “permanently medically incapacitated” inmate but to actually *release* him on that basis. In failing to consider this basis which would have led to a favorable result under a proper interpretation of the compassionate release law, appellant was unfairly deprived of the relief to which he was entitled. So the denial of compassionate release constituted an abuse of discretion.²

² The only other factor that the court cited concerning appellant’s eligibility for release was the adequacy of the post-release plan. (CT 83.) In his opening brief, appellant contended that the post-release plan described was more than adequate, such that there is no basis for a concern about this or any factor related to the public safety issue. (ABOM 34, citing CT 53, 56-57.) Respondent has made no attempt to dispute this contention and thus has conceded the point. (See *Williston v. Perkins* (1876) 51 Cal. 554, 556

CONCLUSION³

Appellant respectfully requests that this Court reverse the Court of Appeal's order dismissing his appeal and reverse the trial court's order denying the request for compassionate release with directions that it enter a new order immediately recalling his sentence and granting such release.

Dated: March 18, 2014

Respectfully submitted,



Raymond M. DiGuiseppe,
Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Reply Brief on the Merits is prepared with 13 point Times New Roman font and contains 8,394 words.

Dated: March 18, 2014

Respectfully submitted,



Raymond M. DiGuiseppe

[where “[t]he respondent in his printed points has not adverted to this position of the appellants[,]” that may be treated as a concession]; *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 80-81, quoting *Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050 [if no legal argument is made on a particular point, “the court may treat it as waived, and pass it without consideration.”].) In any event, the court did not rely upon the adequacy of the post-release plan in denying the request for release (RT 5-7), and there has never been any real dispute that appellant's release would not pose a risk to public safety.

³ Appellant may not have specifically addressed each point in respondent's brief. The lack of a direct response does not serve as a concession. It simply reflects appellant's conclusion that the point does not require a direct response based upon the existing analysis. Similarly, that appellant did not reiterate a particular point raised in the opening brief merely means he believes the matter has already been sufficiently treated.

DECLARATION OF SERVICE

Re: *People v. James Alden Loper* (S211840/D062693)

I, Raymond M. DiGuiseppe, declare that I am over the age of 18 and not a party to this case. My business address is: P.O. Box 10790, Southport, NC 28461.

Service By Mail

On March 19, 2014, I served the foregoing **Appellant's Reply Brief on the Merits** on each of the parties listed below, by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the United States Postal Service in Southport, North Carolina, to be delivered in the ordinary course of business:

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Electronic Service

I further declare that at or before the close of business at 5:00 p.m. on the same date, I served **the same document** electronically from my electronic service address of diguisepp228457@gmail.com to the following entities:

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Attorney General's Office: ADIEService@doj.ca.gov

California Supreme Court, via the e-submission procedures

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and was executed on March 19, 2014.

Raymond M. DiGuiseppe
Declarant


Signature