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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

CARL HAMPTON WADE,

Defendant and Appellant.

A133674

(Lake County
Super. Ct. No. CR2660)

I.

INTRODUCTION

Carl Hampton Wade (appellant) appeals from the trial court's denial of his motion for early compassionate release from state prison after a nearly unanimous en banc vote of the Board of Parole Hearings (Board) that he met the criteria for release set forth in Penal Code¹ section 1170, subdivision (e)(2)(A) and (B).

The parties disagree as to the standard of review to be applied by the trial court in conducting a hearing under section 1170, subdivision (e)(2), and the standard of review this court must apply in reviewing the trial court's determinations as to whether subparagraphs (A) and (B) of that provision exist. We conclude that the trial court's determinations of whether section 1170, subdivision (e)(2)(A) and (B) exist is to be decided de novo from the Board's initial determinations.

¹ All further undesignated statutory references are to the Penal Code unless otherwise indicated.

The parties also disagree as to the standard of review to be applied by this court in reviewing the trial court's determinations of whether subparagraphs (A) and (B) exist. Appellant argues that our review is de novo, while respondent contends we must apply the lower substantial evidence test. We need not and do not resolve this question because we conclude that the trial court's express or implied determinations that the criteria for compassionate release did not exist were not supported by the lower substantial evidence standard of review.

The parties similarly disagree whether the trial court has the discretion to deny a motion for early compassionate release if subparagraphs (A) and (B) exist. We need not and do not resolve this question because, assuming the trial court had such discretion, it was an abuse of discretion to deny appellant's motion on this record.

Accordingly, we reverse and direct the trial court to enter a new order forthwith granting appellant's motion for early compassionate release, and to recall his sentence as provided in section 1170, subdivision (e)(2). Good cause appearing, our decision is hereby ordered to become final as to this court immediately. (Cal. Rules of Court, rules 8.68, 8.264(b)(1), 8.366(b)(1).) The remittitur shall issue within 30 days, unless the parties stipulate to its immediate issuance. (Cal. Rules of Court, rules 8.272(c)(1), 8.366(a).)

II.

PROCEDURAL BACKGROUND

In February 1989, the Lake County District Attorney filed an information charging appellant with one count of murder in the first degree for the willful, deliberate, and premeditated killing of John Karns. (§ 187.) On April 28, 1989, a jury found appellant guilty of the crime alleged in the information, and found true allegations that appellant was armed with a firearm at the time of the offense (§ 12022, subd. (a)), that he used a firearm (§§ 1203.6, subd. (a)(1)(i), 12022.5), and that he intentionally inflicted great bodily injury (§ 1203.075, subd. (a)(1)). Appellant was subsequently sentenced to serve an aggregate state prison term of 32 years to life, to be served consecutive to a 16-year term of imprisonment he was serving for a first degree assault conviction in the State of

Colorado. This court affirmed his conviction and sentence in a nonpublished opinion filed on August 9, 1990 (A046253).

In 2011, the California Department of Corrections and Rehabilitation (CDCR) requested the Board to consider whether the sentence of appellant, who was then 65 years old and who was diagnosed as being “terminally ill with an incurable condition caused by an illness or disease that would produce death within six months,” should be recalled pursuant to section 1170, subdivision (e)(2)(A). On September 7, 2011, after “careful evaluation of this case” by the operations undersecretary of the CDCR, a recommendation was made to the Board that appellant’s sentence be recalled because he met the conditions for recall set forth in section 1170, subdivision (e)(2)(A).

At a hearing on October 18, 2011, the Board, sitting en banc, voted 10-1 to refer appellant’s case to the court after finding: (1) he was terminally ill as defined in section 1170, subdivision (e)(2)(A), and (2) “[t]he conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety as referenced in . . . section 1170[, subdivision] (e)(2)(B).” Thereafter, the Board wrote to the Lake County Superior Court notifying it of the Board’s findings, and requesting the court to conduct a hearing pursuant to section 1170, subdivision (e)(3).

A hearing was held on November 2, 2011 (the November 2 hearing), to consider appellant’s motion and the Board’s request that appellant’s sentence be recalled. After reviewing the materials submitted by the CDCR, the original probation report submitted at the time of appellant’s sentencing, and a letter from appellant’s sister, the court denied the motion and request. The following day, appellant filed his notice of appeal.

III.

FACTUAL BACKGROUND

A. Facts Underlying Appellant’s Conviction

We recite an abbreviated version of the facts relating to appellant’s murder of John Karns from our previous opinion:

“Appellant and John Karns, the victim of the homicide, were woodcutters living in appellant’s trailer home in the Elk Mountain area of Lake County, about a 30-minute

drive from the City of Upper Lake. Harold Torrone, the eyewitness to the crime, was also a woodcutter recently hired by appellant.

“In the late morning of June 6, 1986, appellant, Karns, Torrone and David Fitzwater met at Bert’s Bar in Upper Lake. After consuming some drinks, they went to appellant’s property to cut wood, but at around 3 or 4 p.m. they returned to the bar and continued drinking for the rest of the day. Several witnesses testified that throughout the entire evening appellant was making derogatory remarks to Karns. Karns tried to avoid the provocation by warning appellant to ‘get out of his face’ and to leave him alone. In response to the continuing insult, Karns hit appellant in the face bloodying his nose. Later, appellant and Karns had another scuffle outside the bar as a result of which the alarm of a nearby drugstore went off. At around 2 a.m. appellant, Karns and Torrone left the bar and headed home for appellant’s trailer in Karns’ car.

“On arrival Torrone was the first to leave the car and rush inside the trailer to use the bathroom. However, remembering that the toilet was not working, he turned around and went back outside the trailer to urinate against a tree which stood about 20 feet from the front door to the addition of the building. As he was relieving himself, he heard a gunshot and saw a muzzle flash inside the house. In the flash of light, Torrone saw Karns grabbing his stomach and appellant, standing seven to ten feet away, holding a pistol. Karns was in the doorway of the house, facing away from Torrone; appellant was inside, facing Torrone. Torrone got scared, ran to the back of the trailer and hid behind a water tank. After the second shot, appellant called for Torrone. Torrone asked if appellant was going to shoot him, too, but appellant said he was not because the quarrel was between himself and Karns.

“On entering the trailer, Torrone saw Karns kneeling on the wooden ramp leading up to the front door. His head was near the door and his torso was bloody. Torrone and appellant went inside and closed the front door. Appellant gave the gun to Torrone, who put it down on a speaker or shelf. Appellant said that Karns had ‘fucked up’ by hitting him in the nose.

“Approximately 15 to 20 minutes later, Torrone heard a ‘gurgling’ noise coming from outside the door. He believed the noise was caused by Karns’ effort to breathe. Appellant picked up the gun, opened the door, cocked the weapon, waited a few seconds and shot Karns in the head. At that time appellant was approximately three to four feet away from Karns and the latter was kneeling on the ramp with his head down on the ramp.

“Following the shootings, Torrone went to Karns’ bedroom and spent the night in the trailer. He woke up in the morning to find appellant sleeping on the couch. There were three cartridge casings on the floor near appellant.

“At approximately 9 a.m., Michael Robinson, another woodcutter, arrived at appellant’s property. Karns’ body was still on the ramp in a kneeling position face down. Robinson and appellant moved the corpse to the rear of the trailer and covered it with a blanket.

“Next, Robinson drove appellant and Torrone to Bert’s Bar where Anthony Carini joined them. Around 2 p.m. Carini and appellant returned to the property on Carini’s motorcycle. Appellant and Carini dug a hole and buried Karns approximately 100 feet from the trailer, covering the grave with twigs and leaves. They then drove Karns’ car to the nearby town of Nice and left it by the side of the road.”

B. Overview of the Statutory Scheme Under Section 1170, subdivision (e)

To put in proper context the Board’s recommendation that appellant’s sentence be recalled, we first must explain generally the statutory scheme underlying the action. Section 1170 was amended in 1997 to add subdivision (e), the so-called compassionate release provision. (*Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 590 (*Martinez*).²

² That provision provides in relevant part as follows:

“(e)(1) Notwithstanding any other law and consistent with paragraph (1) of subdivision (a), if the secretary or the Board of Parole Hearings or both determine that a prisoner satisfies the criteria set forth in paragraph (2), the secretary or the board may recommend to the court that the prisoner’s sentence be recalled.

“(2) The court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) exist:

“(A) The prisoner 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.

“(B) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.

“.....

“The Board of Parole Hearings shall make findings pursuant to this subdivision before making a recommendation for resentence or recall to the court. This subdivision does not apply to a prisoner sentenced to death or a term of life without the possibility of parole.

“(3) Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner’s sentence should be recalled.

“(4) Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden. Within 48 hours of receiving notification, the warden or the warden’s representative shall notify the prisoner of the recall and resentencing procedures, and shall arrange for the prisoner to designate a family member or other outside agent to be notified as to the prisoner’s medical condition and prognosis, and as to the recall and resentencing procedures. If the inmate is deemed mentally unfit, the warden or the warden’s representative shall contact the inmate’s emergency contact and provide the information described in paragraph (2).

“(5) The warden or the warden’s representative shall provide the prisoner and his or her family member, agent, or emergency contact, as described in paragraph (4), updated information throughout the recall and resentencing process with regard to the prisoner’s medical condition and the status of the prisoner’s recall and resentencing proceedings.

The expedited process for compassionate release commences whenever any physician employed by the CDCR determines that a prisoner “is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months” (§ 1170, subd. (e)(2)(A).) In those circumstances, the physician must advise the chief medical officer of the prognosis. If the chief medical officer concurs

“(6) Notwithstanding any other provisions of this section, the prisoner or his or her family member or designee may independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary. Upon receipt of the request, the chief medical officer and the warden or the warden’s representative shall follow the procedures described in paragraph (4). If the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner’s sentence be recalled. The secretary shall submit a recommendation for release within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section. The board shall consider this information and make an independent judgment pursuant to paragraph (2) and make findings related thereto before rejecting the request or making a recommendation to the court. This action shall be taken at the next lawfully noticed board meeting.

“(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).

“(8) If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner.

“(9) If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court’s order, unless a longer time period is agreed to by the inmate. At the time of release, the warden or the warden’s representative shall ensure that the prisoner has each of the following in his or her possession: a discharge medical summary, full medical records, state identification, parole medications, and all property belonging to the prisoner. After discharge, any additional records shall be sent to the prisoner’s forwarding address.

“(10) The secretary shall issue a directive to medical and correctional staff employed by the department that details the guidelines and procedures for initiating a recall and resentencing procedure. The directive shall clearly state that any prisoner who is given a prognosis of six months or less to live is eligible for recall and resentencing consideration, and that recall and resentencing procedures shall be initiated upon that prognosis.”

with the prognosis, within 48 hours he or she shall notify the warden of the institution where the prisoner is being held. (§ 1170, subd. (e)(C)(4).) Thereafter, where the prisoner is serving a determinate sentence, the secretary of the CDCR has 30 days to complete his or her investigation and to make a recommendation to the Board. (§ 1170, subd. (e)(C)(6).) The Board is then directed to take the matter up for consideration at its next regularly scheduled meeting. (*Ibid.*)

C. Record Evidence Relating to Board’s Recommendation to Recall Appellant’s Sentence

In this case, the consideration of a sentence recall under section 1170, subdivision (e), began on July 11, 2011, when Jarom Daszko, M.D., and California Medical Facility Chief Medical Executive Joseph Bick, M.D., opined in a “Compassionate Release Chrono” that appellant met the criteria under section 1170, subdivision (e)(2)(A) and (B). Specifically, the physicians noted that appellant, then 65 years old, was suffering from “severe chronic obstructive pulmonary disease with chronic hypoxia complicated by cor pulmonale.”³ As a result, appellant required the continuous administration of six liters of oxygen per nostril. Despite this regimen, he still suffered from “severe hypoxia and shortness of breath, even at rest.”

In addition, the physicians noted that appellant was also suffering from “severe coronary artery disease with associated ischemic cardiomyopathy⁴] and congestive heart failure with chronic angina occurring even at rest which classifies him as New York

³ Hypoxia is “a pathological condition in which the body as a whole or a region of the body is deprived of adequate oxygen supply” <<http://en.wikipedia.org/wiki/Hypoxia>> (as of May 17, 2012). “Cor pulmonale,” or pulmonary heart disease, “is enlargement of the right ventricle of the heart as a response to increased resistance or high blood pressure in the lungs” <http://en.wikipedia.org/wiki/Cor_pulmonale> (as of May 17, 2012).

⁴ Ischemic cardiomyopathy “is a term used to describe patients whose heart can no longer pump enough blood to the rest of their body due to coronary artery disease” <<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001213/>> (as of May 17, 2012).

Heart Association Class IV.⁵] He is essentially wheelchair bound. He is able to walk several steps to get from his wheelchair to his bed however even this minor exertion causes severe shortness of breath.”

After consulting with appellant’s pulmonologist and cardiologist at Queen of the Valley Medical Center in Napa where he was getting care, all four of the physicians were of the opinion that his prognosis “is less than 6 months of survival.” Based on these findings, the physicians felt appellant met the “criteria for compassionate release and should be strongly considered for this.”

In response to this report, the warden of the California Medical Facility in Vacaville undertook a diagnostic study to evaluate “[appellant]’s potential under sentence alternatives to state prison and the threat posed to the community should [appellant] not fulfill that potential.”

The warden’s report of the results of the study, dated August 12, 2011, began with a recitation of the facts leading to appellant’s current conviction and sentence. It also noted that appellant’s criminal history began in 1978 at age 32 when he was convicted for assault with a deadly weapon. Thereafter, he was convicted in Colorado “for crime[s] of violence, deadly weapon and serious bodily injury. [Appellant] does not have any convictions for arson, escapes, computer, or sex crimes.”

As to his adjustment to prison life, the report notes that appellant was received into CDCR in May 2000, and he has remained discipline free since that time. Although he worked as a clerk, library clerk, and as an outpatient clerk, and received satisfactory to above average work performance evaluations, he has been totally disabled since April 2007. Appellant was not a gang member, and has no “enemy concerns within CDCR.”

⁵ New York Heart Association Class IV is the most serious stage, and its symptoms are defined as “[u]nable to carry out any physical activity without discomfort. Symptoms of cardiac insufficiency at rest. If any physical activity is undertaken, discomfort is increased” <http://www.abouthf.org/questions_stages.htm> (as of May 17, 2012).

Appellant indicated that if he were released from prison, he planned to live with his sister, Kathy Fiscus, in Chico. An attempt to contact Ms. Fiscus, who is hearing impaired, was unsuccessful. However, Ms. Fiscus's daughter (appellant's niece), Wendy Gillespie, was contacted and verified appellant's release plan to reside at her mother's home.

The warden's diagnostic study was sent to the CDCR operations undersecretary who, after "careful evaluation," recommended to the Board that appellant's sentence be recalled. The undersecretary's findings were included in a report to the Board's chief of investigations on September 7, 2011. It reiterated the medical diagnoses joined in by appellant's physicians, adding that appellant is able to perform the activities of daily living, including feeding, bathing, and dressing himself with minimal assistance. In addition to the current offense of first degree murder, appellant had prior "arrests and/or convictions for cultivation of marijuana, drunk driving, public intoxication, and assault with serious bodily injury." The undersecretary noted again that appellant's adjustment to institution life was "acceptable," and that he had been discipline free during the 11 years he had served in prison. Consequently, the undersecretary concluded that appellant's life expectancy was less than six months, and his release to his sister's residence would not pose a threat to public safety.

The investigations division of the Board conducted its own investigation into whether appellant met the criteria for sentence recall under section 1170, subdivision (e). That investigation resulted in a report to the Board dated October 5, 2011. The report included much of the information detailed in the reports of appellant's doctors, the warden's diagnostic study, and the undersecretary's report. Some additional information learned through the investigation was included, however. For example, a correctional counselor met with appellant, who reiterated his plan to live with his sister if he were released. The counselor also observed that, although their interaction was limited, appellant used a wheelchair to move around. A license clinical social worker spoke to appellant's niece, Wendy Gillespie, who confirmed that arrangements were being made with Enloe Hospice in Chico for services if or when its services were needed. In

addition, Ms. Gillespie stated that her mother lives in a two-bedroom, one-bath home, and Fiscus's 46-year-old son also lives in his own home on the property. Appellant would have his own room next to the bathroom. The family planned to install wheelchair ramps so appellant could enter and exit the house, and they had already acquired a wheelchair, cane and shower chair for appellant's use. Gillespie confirmed that there would be someone in the home "at all times," because she and her brother work opposite shifts, and her mother does not work. She ended by noting that she would transport appellant to any needed medical appointments and she had received many offers of support from friends who work in the medical field.

The chief medical executive of the California Medical Facility, Dr. Joseph Bick, was also interviewed. He confirmed that there had been no change in appellant's condition since the last time the doctor saw him in September 2011. He added that if appellant were released "he will likely spend most of his time in bed or chair and would need help getting dressed." He added that appellant "can walk from his wheelchair to the bed or to the bathroom for basic showering or bathing, but will experience shortness of breath. [Appellant] cannot run or push his wheelchair on an incline and will continue to require oxygen around the clock. [Appellant]'s condition has steadily progressed and gotten worse over the years and he has no chance of recovering from his diagnosed illness."

The Board met on October 18, 2011, and by a vote of 10-1, passed a motion finding that appellant "is terminally ill as defined in Penal Code section 1170[, subdivision] (e)(2)(A). The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety as referenced in Penal Code section 1170[, subdivision] (e)(2)(B)."

Two days later, the Lake County Superior Court was notified by letter dated October 20, 2011, of the Board's findings and action, "warrant[ing] referral to the court, pursuant to [section] 1170[, subdivision] (e)(1), for commencement of a [section] 1170[, section] (e)(3) hearing."

The matter was assigned to Honorable Andrew S. Blum, who set a hearing for November 2, 2011.

D. The Superior Court Hearing On the Board's Recommendation, and the Court's Ruling

Both sides were represented by counsel at the November 2 hearing. The court accepted into evidence the CDCR packet, which included the reports and letters described earlier in this opinion. In addition, the court had the original 1989 probation report admitted into evidence, as well as a one-page letter from appellant's sister confirming her plan to care for her brother if he were released.

The only witnesses called to testify were the two sisters of the victim of the 1989 killing. The mother of John Karns was also present but did not testify. Essentially, the sisters testified concerning the impact of Mr. Karns's death and appellant's subsequent trial on them. They feared appellant might come back to Lake County if he were released, although neither had ever been threatened by appellant.

After hearing the arguments of counsel, the court summarized the first finding required to be made in order to recall appellant's sentence as "whether or not [appellant] is terminally ill and has six months [or] less to live that's determined by a physician employed by the Department." While acknowledging that the record contained medical opinions to this effect, the trial judge questioned the validity of the opinions by first noting he would have "liked actual medical reports, including previous medical reports to show the trajectory of his disease." The court noted that appellant had been suffering from these conditions for years, "and there's nothing in here indicating to the Court why they now think he comes within six months of death." Somewhat ambiguously, the court concluded on this question as follows:

"To the extent that I have the discretion to override the doctor's opinion, I'm obviously not a doctor, but I'm not persuaded with what's in front of me that they know that he now has six months or less to live. He has been living with these diseases for years . . . but I don't find this persuasive at all.

“But it does apparently meet the minimum criteria [*sic*], there is a doctor’s report in here or a summary of a doctor’s report saying he has less than six months to live. I don’t know to what extent I have the authority to impose my medical judgment over theirs, but what’s in front of me does not persuade me that they really have any idea how much longer he has to live having been told the same thing twice now in six months.”

The court then shifted its focus to the second question of whether appellant presented a threat to public safety if released:

“But secondly, and in this Court’s opinion far more importantly, I need to find whether or not he poses a threat to the public safety. I’m frankly a little bit surprised at how superficial the parole board’s analysis of that issue is. They state we do not feel he’s a risk to the public safety, but there’s really not much analysis in here. They tell me that he’s in a wheelchair, he has oxygen. He’s not bound to the wheelchair, he’s not crippled, he can get up and walk around but he can’t walk far without being severely short of breath. They give me no indication as to how far he can get in the wheelchair. He can stay in the wheelchair and go for blocks for all I know.

“Furthermore, they tell me that he’s not able to run or push his wheelchair up an incline. That doesn’t come across to me as being highly incapacitated, he’s simply out of breath and mostly spends his time in a wheelchair.

“They also apparently did not even go to the home where he would be kept. They made a phone call with his niece who says we’ll take care of him; and I don’t doubt that the niece, Ms. Gillespie, and his sister are completely sincere; but they’ve never had custody of this individual—they’ve never [taken] care of this individual, I should say, they don’t know what it takes. They can’t watch him 24/7.

“His sister, tragically, is deaf, according to the report here, which tells me—and the two would be living together alone in a home, which tells me he could wheel himself right out the front door and she’ll never know, she’s not going to hear it.

“I don’t know if there’s a liquor store down the street. I don’t know if there’s alcohol in the home. I don’t know if there are firearms or other dangerous weapons in the

home, and apparently neither does the Board of Parole Hearings because they never bothered to check.

“I don’t know if he has friends on the outside that might pick [him] up and take him to the bar down the street and have a good time, I don’t know any of that. It has been made clear from the records and arguments here when he drinks he becomes extremely dangerous. I agree with [the prosecutor], I have no reason to believe he’s no longer an alcoholic. Just simply because it’s not been available to him in prison doesn’t mean that once it becomes available to him he won’t become a heavy drinker again.”

The trial judge went on to comment on the absence of a psychological evaluation in the record or “indication that he lacks hand/eye coordination, he could still hold a gun and pull a trigger as far as I can tell.” Ultimately, he stated that even if the “facts” required for recall or resentencing were proven, the judge would exercise his discretion and not release appellant: “In this Court’s view, [appellant] is exactly where he belongs, he’s in custody and he should stay there.”

IV.

DISCUSSION

A. Legislative History and Purpose in Enacting Section 1170, subdivision (e)

The addition of subdivision (e) to section 1170 was passed by the Legislature and signed by Governor Wilson in 1997 to lessen the crushing cost to the state to continue to incarcerate and care for terminally ill prisoners who pose no threat to public safety because of their condition. The legislative history and purpose of the new law was explained in detail by our colleagues in the Third District in *Martinez, supra*, 183 Cal.App.4th at pp. 590-591:

“The purpose of [section 1170, subdivision (e)] was not just compassion; it was to save the state money. An Assembly Committee on Public Safety analysis states: ‘According to the author, “Prisons were never intended to act as long term health care providers for chronically ill prisoners. As the prison population ages, we will be faced with this situation more often. These inmates consume a disproportionate amount of the CDC[R]’s budget. The current release program operated by CDC[R] needs to be

streamlined and codified. If this bill is enacted, the state will be able to release these prisoners and recover 50 percent of their health care[] costs through Medicaid.’ [¶] . . . [¶] The bill is frankly an attempt to fast track the release of prisoners with AIDS and other terminal illnesses if the CDC[R] and/or the [Board] recommend release via the recall procedure. . . . [¶] . . . According to the author, health care costs alone in California prisons cost the state \$372 million, more than 36 states spend on their entire prison budgets. . . . [¶] . . . According to the sponsor, Catholic Charities of the East Bay/AIDS in Prison Project, ‘The annual cost of incarcerating a healthy prisoner is \$21,000; a terminally ill prisoner incurs costs of over \$75,000 annually. Outside hospital visits for prisoners (contract hospital bed plus custody costs) total more than \$4,000 per day.’ ’ (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 29 (1997-1998 Reg. Sess.) Apr. 15, 1997, p. 2.) A Senate Appropriations Committee analysis reported that there ‘would be unknown cost savings due to reduced incarceration. In addition, to the extent that medical care provided outside a penal institution is less expensive due to the absence of security personnel, and security measures, there would be unknown, potentially significant, medical care cost savings.’ (Sen. Com. on Appropriations, Rep. on Assem. Bill No. 29 (1997-1998 Reg. Sess.) as amended July 1, 1997, p.1.)

“Ten years later, the Legislature passed Assembly Bill No. 1539 (2007-2008 Reg. Sess.), which an Assembly Committee on Public Safety analysis referred to as the ‘Medical Release and Fiscal Savings Bill.’ (Assem. Com. on Public Safety, Conc. In Sen. Amends. to Assem. Bill No. 1539 (2007-2008 Reg. Sess.) as amended July 5, 2007, coms., p. 6.) The Legislative Counsel’s Digest summarized the bill as amending section 1170, subdivision (e) to ‘extend those provisions for early release to prisoners who are permanently medically incapacitated and whose release is deemed not to threaten public safety.’ (Legis. Counsel’s Dig., Assem. Bill No. 1539 (2007-2008 Reg. Sess.)) In pertinent part, the bill amended section 1170, subdivision (e)(2) to add another circumstance in which CDCR or [the Board], or both ‘may recommend to the court that the prisoner’s sentence be recalled,’ and the ‘court shall have the discretion to resentence or recall’: ‘(C) The prisoner is permanently medically incapacitated with a medical

condition that renders him or her permanently unable to perform activities of basic daily living, and results in the prisoner requiring 24-hour total care, including, but not limited to, coma, persistent vegetative state, brain death, ventilator-dependency, loss of control of muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing,’ and ‘(B) The conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.’ (Stats. 2007, ch. 740, § 1.)

“Again, the legislative history reflects that the purpose of the provision is not just compassion; it is to save the state money. The Senate Rules Committee Floor Analysis reported that, in support of the bill, the Los Angeles County District Attorney’s Office stated: ‘ “The release of terminally ill and permanently medically incapacitated prisoners who pose no risk to the public will result in substantial cost savings to the State and will help to reduce prison overcrowding.” ’ (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 1539 (2007-2008 Reg. Sess.) as amended July 5, 2007, p. 7.) An Assembly Committee on Public Safety analysis said: ‘According to the author, “The compassionate release law was enacted because prisons should not act as long term health care providers for terminally ill prisoners. Their care comprises a disproportionate portion of the CDCR’s budget. This bill, the Medical Release and Fiscal Savings Bill, seeks to modify the CDCR compassionate release process by increasing the awareness of CDCR staff and families of terminally ill prisoners regarding the compassionate release process, and to extend the reach of the law to include prisoners who are permanently medically incapacitated, significantly increasing fiscal savings from their release.” ’ (Assem. Com. on Public Safety, Conc. in Sen. Amends. to Assem. Bill No. 1539 (2007-2008 Reg. Sess.) as amended July 5, 2007, coms., p. 6.)” (*Martinez, supra*, 183 Cal.App.4th at pp. 590-592, fn. omitted.)

B. Standard of Review

The parties disagree as to the standards of review applicable both to the trial court determinations as to whether the criteria in section 1170, subdivision (e)(2)(A) and (B) exist, and to our appellate review of those determinations. As to the trial court’s standard of review, appellant urges us to limit the trial court’s review to the administrative record,

and to apply the “some evidence” standard, relying on *Martinez, supra*, 183 Cal.App.4th 578, to support his argument. In *Martinez*, the Board had denied a request for compassionate release under section 1170, subdivision (e)—the very mirror image of this case. The trial court granted the prisoner’s petition for writ of mandate, reversing the Board’s decision not to recommend recall or resentencing, after concluding, in part, that the Board abused its discretion in not finding the criteria for compassionate release had been met. (*Id.* at p. 581.) In reversing the trial court, the Third District concluded that the standard of review of the Board’s decision is the same as that applicable to the judicial review of the Board’s denial of parole:

“When [the Board] declines to recommend a prisoner for recall of sentence because it finds the prisoner could pose a threat to public safety if released from state prison, the standard of judicial review is the same as that used when reviewing a decision by [the Board] to deny parole, i.e., ‘whether “some evidence” supports the conclusion’ of [the Board] that the prisoner does not come within the statutory criteria. (See [*In re*] *Lawrence* [2008] 44 Cal.4th [1181,] 1191.) This standard of review is ‘highly deferential’ to [the Board’s] factfinding. (*Id.* at p. 1204.) It does not permit a court to second-guess [the Board’s] factfinding. Our role is narrow. A court has the authority to do no more than ‘ensure that [the Board’s] decision reflects “an individualized consideration of the specified criteria’ and is not ‘arbitrary and capricious,’” ’ (*id.* at p. 1205), i.e., that [the Board’s] decision is supported by ‘some evidence’ viewed in the light most favorable to the decision (*id.* at p. 1204.)” (*Martinez, supra*, 183 Cal.App.4th at pp. 593-594.)

But, because the Board did not “recommend to the court that the prisoner’s sentence be recalled,” the *Martinez* court had no occasion to decide the converse proposition: where the Board *does* recommend release, how does the trial court satisfy its statutory inquiry to determine “that the facts described in subparagraphs (A) and (B) . . . exist[?]” (§ 1170, subd. (e)(2).)

The plain wording of the statute directs the trial court to hold a hearing to determine whether subparagraphs (A) and (B) exist. Section 1170, subdivision (e)(1),

and the governing regulations provide that the Board's role is to marshal evidence, determine if subparagraphs (A) and (B) of subdivision (e)(2) are "satisfied," and if so, then only to *recommend* to the court that the inmate's sentence be recalled. (See Cal. Code Regs., tit. 15, § 3076.4.) It is for the trial court to adjudicate in the first instance whether subparagraphs (A) and (B) exist. While the court can rely exclusively on the record prepared by the Board, as the trial court did in this case, there is nothing in the statute that limits the trial court from considering other, admissible evidence, if it is presented. For these reasons, the trial court is to make its determinations de novo.⁶

As to the standard of review on appeal, appellant contends that we must independently review the administrative record de novo to determine if the request/motion should have been granted. Thus, in his view we are not compelled to defer to the trial court's determinations as to whether appellant "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 [CDCR]," or whether "the conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety." (§ 1170, subd. (e)(2)(A), (B).) Alternatively, he argues that even if the most deferential abuse of discretion standard is applied, discretion was abused in this instance.

The Attorney General claims that, like appeals from other sentencing issues, we are to defer to the trial court's factual findings, and can reverse only if those findings are

⁶ We note that the petition in *Martinez* was for a peremptory writ of mandate, and not for a hearing under section 1170, subdivision (e)(2). (*Martinez, supra*, 183 Cal.App.4th at pp. 581, 597.) As we have noted, under section 1170, subdivision (e), the Board only recommends release to the court, it does not adjudicate any factual issue. Therefore, rules applicable to judicial review of administrative mandamus (Code Civ. Proc., § 1094.5) are not applicable because the court is not reviewing a final administrative decision or action. (See, e.g., *Lanigan v. City of Los Angeles* (2011) 199 Cal.App.4th 1020.) Similarly, the standard of review applicable to traditional mandamus does not apply to a section 1170, subdivision (e)(2) hearing because under traditional mandamus relief is only available to correct abuses of discretion by an administrative agency, and only when the law clearly establishes the petitioner's right to such action. (*California Society of Anesthesiologists v. Brown* (2012) 204 Cal.App.4th 390.)

not supported by substantial evidence. Furthermore, because section 1170, subdivision (e)(2) states that the “court shall have the discretion to resentence or recall if the court finds that the facts described in subparagraphs (A) and (B) or subparagraphs (B) and (C) exist,” the abuse of discretion standard of review is applicable to any refusal by the trial court to recall or resentence, even if those “facts” set forth in subparagraphs (A) and (B) are proven.

We need not decide whether our own review of the trial court’s determinations under subparagraphs (A) and (B) are de novo, as urged by appellant, or substantial evidence, as argued by the Attorney General. Even if the more deferential substantial evidence standard of review is applied, we conclude that there is a lack of any substantial evidence supporting the trial court’s determinations that the criteria in section 1170, subdivision (e)(2)(A) and (B) do not exist.

C. The Trial Court’s Conclusion that Appellant Did Not Meet the Criteria for Compassionate Release Is Not Supported by Substantial Evidence

Under the substantial evidence standard of review, we determine if there is any substantial evidence, whether contradicted, or uncontradicted, to support the trial court’s findings. (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) We “view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court. [Citations.]” (*Ibid.*) “Substantial evidence” is not synonymous with “any” evidence, but instead is “evidence of ponderable legal significance . . . that is reasonable, credible and of solid value.” (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651. “Substantial” refers to the quality, not the quantity, of evidence. (*Ibid.*) Thus, “[v]ery little solid evidence may be ‘substantial,’ while a lot of extremely weak evidence might be ‘insubstantial.’ [Citation.]” (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871.)

An initial determination that appellant met the criterion that he was a person “terminally ill with an incurable condition caused by an illness or disease that would produce death within six months,” was made by a medical doctor employed by the

CDCR, jointly with the chief medical executive of the California Medical Facility. Their medical conclusions were concurred in by two physician specialists (a pulmonologist and a cardiologist) at Queen of the Valley Medical Center where appellant was receiving care. Together these four physicians concluded that appellant had “severe chronic obstructive pulmonary disease with chronic hypoxia complicated by cor pulmonale.” As a result, appellant required the continuous administration of six liters of oxygen per nostril. Despite this regimen, he still suffered from “severe hypoxia” and “shortness of breath even at rest.”

In addition, the physicians concluded that appellant was also suffering from “severe coronary artery disease with associated ischemic cardiomyopathy and congestive heart failure with chronic angina occurring even at rest,” which classifies him at the most severe stage for such conditions. “[Appellant] is essentially wheelchair bound. He is able to walk several steps to get from his wheelchair to his bed however even this minor exertion causes severe shortness of breath.”

As a result all four of the physicians were of the opinion that appellant’s prognosis was “less than 6 months of survival.” There is no medical opinion stating otherwise. Based on these findings, the physicians asked that appellant “be strongly considered” for compassionate release.

In light of these medical findings, the matter was reviewed first by the warden at the California Medical Facility, secondly by the operations undersecretary of CDCR, and thirdly by the investigations division of the Board. While the investigations division itself did not take a definitive position on the question of whether appellant met the criteria for compassionate release, the warden in his diagnostic study and the undersecretary both did.

The report by the Board’s investigation division, while including much of the information detailed in the reports of appellant’s doctors, the warden’s diagnostic study, and the undersecretary’s report, provided the Board with some important additional information learned through its investigation. For example, a correctional counselor who met with appellant observed that, although their interaction was limited, appellant used a

wheelchair to move around. A licensed clinical social worker spoke to appellant's niece, Wendy Gillespie, who confirmed that arrangements were being made with Enloe Hospice in Chico for services if or when its services were needed. In addition, Ms. Gillespie stated that her mother, Ms. Fiscus, lives in a two-bedroom, one-bath home, and that Fiscus's 46-year-old son also lives in his own home on the property. Appellant would have his own room next to the bathroom. The family planned to install wheelchair ramps so appellant could enter and exit the house, and they had already acquired a wheelchair, cane and shower chair for appellant's use. Gillespie confirmed that there would be someone in the home "at all times," because she and her brother work opposite shifts, and her mother does not work. She ended by noting that she would transport appellant to any needed medical appointments and she had received many offers of support from friends who work in the medical field.

The chief medical executive of the California Medical Facility, Dr. Joseph Bick, was also interviewed. He confirmed that there had been no change in appellant's condition since the last time the doctor saw him in September 2011. He added that if appellant were released "he will likely spend most of his time in bed or chair and would need help getting dressed." He added that appellant "can walk from his wheelchair to the bed or to the bathroom for basic showering or bathing, but will experience shortness of breath. [Appellant] cannot run or push his wheelchair on an incline and will continue to require oxygen around the clock. [Appellant]'s condition has steadily progressed and gotten worse over the years and he has no chance of recovering from his diagnosed illness."

Based on this record, there is overwhelming, uncontroverted evidence establishing the criteria for compassionate release under section 1170, subdivision (e)(2)(A). In fact,

there is not a shred of evidence that appellant is not suffering from a terminal illness that “would”⁷ produce death within six months.

As to the criteria in subparagraph (B) that the circumstances of his proposed release do not represent a threat to public safety, appellant’s level of disability associated with his medical conditions bear on this conclusion as well. The participating physicians concluded that appellant is essentially wheelchair bound. He can “walk several steps to get from his wheelchair to his bed however even this minor exertion causes severe shortness of breath.” Dr. Bick, during his interview with the investigation division, clarified that, if released, appellant “will likely spend most of his time in bed or chair and would need help getting dressed.” He added that appellant “can walk from his wheelchair to the bed or to the bathroom for basic showering or bathing, but will experience shortness of breath.” In addition, he must continuously use bottled oxygen at an inhalation rate of six liters per nostril.

Not only do appellant’s medical disabilities bear on the issue of whether he no longer presents any realistic threat to public safety, but the circumstances of his planned release are relevant to this issue. If released appellant will live in the home of his sister in Chico, where her 46-year-old son also lives. In addition to Ms. Fiscus and her son, appellant’s niece, Wendy Gillespie, will also participate in caring for and supervising appellant. Work schedules are such that someone will be at home 24 hours per day. No evidence was presented that appellant represents a threat to public safety if he is released.

⁷ As we note *infra*, the trial court was puzzled by the fact that the physicians felt that appellant had a terminal condition that “would” be fatal within six months when appellant had been suffering from that condition for years. We note that the trial court overlooked the evidence that while appellant may have had these conditions to some degree for an extended period of time, his conditions were progressive and worsening, and second, that the doctors’ opinions are a “prognosis” or a “prediction of the probable course and outcome of a disease.” (American Heritage Dict. (3d college ed. 1993) p. 1093.) They are not intended to be statements of medical certainty. Understandably then, section 1170, subdivision (e) does not require evidence that the inmate *will* die within six months, only that the condition “*would* produce death within six months.” (Italics added.) The use of the word “would” itself connotes uncertainty. (American Heritage Dict., *supra*, p. 1556.)

The finding under section 1170, subdivision (e)(2)(B), likewise is supported by overwhelming evidence.

It is not at all clear whether ultimately, the trial court refused to find that appellant was “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,” because he found the physicians’ opinions not worthy of belief. The minute order of the November 2 hearing states as much. But, comments made at the hearing, while suggesting an unwillingness to accept the doctors’ opinions, were not definitive on this point:

“To the extent that I have discretion to override the doctor’s opinion, I’m obviously not a doctor, but I’m not persuaded with what’s in front of me that they know that he now has six months or less to live. He has been living with these diseases for years . . . but I don’t find this persuasive at all.

“But it does apparently meet the minimum criteria [*sic*], there is a doctor’s report in here or a summary of a doctor’s report saying he has less than six months to live. I don’t know to what extent I have the authority to impose my medical judgment over theirs, but what’s in front of me does not persuade me that they really have any idea how much longer he has to live having been told the same thing twice now in six months.”

To the extent the court did not find that appellant met the criterion of section 1170, subdivision (e)(2)(A), that conclusion was not based on substantial evidence. The sole basis for challenging the administrative finding was the fact that appellant was still alive, and the doctors did not explain why. As we have noted, the statute does not require that the inmate have an illness that will kill him or her within six months, only that it be of a type that “would” typically result in death within that timeframe. Thus, the court misread the statute, and placed a burden on the treating doctors who made the prognoses that is not reasonable or required by law.

The trial court’s implied determination that appellant may present a threat to public safety if he were to be released is equally without evidentiary support. The trial court virtually ignored the evidence that appellant essentially is wheelchair bound, that he

can only “walk several steps to get from his wheelchair to his bed,” that “even this minor exertion causes severe shortness of breath,” that if released appellant “will likely spend most of his time in bed or chair,” that he requires the continuous use of bottled oxygen, and that he needs help getting dressed. Instead, the judge belittled appellant, by disdainfully concluding “he’s not crippled,” and then by spinning the most fanciful speculative scenario, without any factual basis, that, despite his unassailable limitations, appellant might “wheel himself right out the front door,” and perhaps join “friends” who might “take him to the bar down the street and have a good time” Equally lacking in factual underpinning is the judge’s concern that the family “can’t watch him 24/7.” In fact, the Board’s investigation concluded that a family member would be home “at all times” to look after appellant.

Accordingly, the trial court’s denial of appellant’s motion because either he did not meet either criterion for compassionate release was not supported by substantial evidence, and was erroneous.

D. It Was An Abuse of Discretion For the Trial Court Not to Grant Appellant’s Motion and to Recall His Sentence

Even if section 1170, subdivision (e) gives the trial court discretion to deny a motion to recall a sentence or to resentence where the criteria for compassionate release fixed under the statute have been met, it was abused here.

The only reason stated by the trial court for denying appellant’s motion was the express or implied findings that he did not meet the criteria under subparagraphs (A) and (B), determinations we have concluded were made without substantial evidentiary basis. Indeed, the evidence supporting the existence of subparagraphs (A) and (B) in appellant’s case was overwhelming. A trial court abuses its discretion where its decision exceeds the bounds of reason by contravening the uncontradicted evidence in the record.

(*Conservatorship of Scharles* (1991) 233 Cal.App.3d 1334, 1340.) Thus, a trial court’s exercise of discretion is “ ‘subject to reversal on appeal where no reasonable basis for the action is shown. [Citation.]’ [Citation.]” (*Nalian Truck Lines, Inc. v. Nakano Warehouse & Transportation Corp.* (1992) 6 Cal.App.4th 1256, 1261.)

Rather than stating any other factor justifying its denial of appellant's motion, the trial judge simply stated that "[i]n this Court's view, [appellant] is exactly where he belongs, he's in custody and he should stay there." Where discretion is conferred, " "[t]he discretion of a trial judge is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [Citation.]" ' [Citations.]" (*Cellphone Termination Fee Cases* (2009) 180 Cal.App.4th 1110, 1118; *People v. Jordan* (1986) 42 Cal.3d 308, 316 [an abuse of discretion is found if the court exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice].) Such was the case here.

V.

DISPOSITION

The November 2, 2011 order denying appellant's motion for compassionate release is reversed. We hereby direct the trial court to enter a new order forthwith granting appellant's motion for early compassionate release, and to recall his sentence as provided in section 1170, subdivision (e)(2). Good cause appearing, our decision is hereby ordered to become final as to this court immediately. (Cal. Rules of Court, rules 8.68, 8.264(b)(1), 8.366(b)(1).) The remittitur shall issue within 30 days, unless the

parties stipulate to its immediate issuance. (Cal. Rules of Court, rules 8.272(c)(1), 8.366(a).)

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.