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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

DENNIS LLOYD JEWELL,

Petitioner,

v.

THE SUPERIOR COURT OF  
SAN BERNARDINO COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

E065047

(Super.Ct.No. VCR3309)

OPINION

ORIGINAL PROCEEDINGS; petition for writ of mandate. Dwight W. Moore,  
Judge. Petition is granted, with directions.

Richard D. Pfeiffer, under appointment by the Court of Appeal, for Petitioner.

No appearance for Respondent.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Alana Cohen Butler and Stephanie H. Chow, Deputy Attorneys General, for Real Party in Interest.

In this matter Dennis Jewell seeks compassionate release pursuant to Penal Code section 1170, subdivision (e)(2)(B).<sup>1</sup> It is the third time that the matter has been before this court. We will reverse the trial court's denial and direct petitioner's release.

## I

### STATEMENT OF FACTS

In 1987 Jewell was convicted of five counts of second degree murder (§ 187) arising out of a fatal collision in which five members of a family, including four children under 12 years of age, were killed. Jewell was highly intoxicated at the time. He was sentenced to 77 years to life in prison.

The previous proceedings in this matter can be briefly summarized.<sup>2</sup> In April 2013, the Board of Parole Hearings (Board) approved a request for consideration of sentence recall and compassionate release, concluding that Jewell was terminally ill with

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<sup>1</sup> All subsequent statutory references are to the Penal Code.

<sup>2</sup> Petitioner requests that this court take judicial notice of our two prior opinions in this matter (*People v. Jewell* (June 12, 2014, E059455) [nonpub. opn] (*Jewell I*); *People v. Jewell* (July 24, 2015, E062185) [nonpub. opn] (*Jewell II*)), along with the September 15, 2015 parole hearing transcripts. We hereby grant said request. The previous proceedings mentioned above are taken from our nonpublished opinion in *Jewell II*.

a less-than-six month life expectancy, and that the proposed conditions for his release would not pose a threat to public safety.

The trial court, however, rejected Jewell's request for two reasons. First, it found that it had insufficient data to make a finding that Jewell would in fact die within six months. It also felt that it could not make a finding that petitioner would not pose a risk to public safety, in part because his plans had recently changed<sup>3</sup> and the availability of alcohol to Jewell was unclear.

Jewell appealed, and in *Jewell I*, supra, E059455, we held that the superior court's power with respect to the medical issues was limited to finding whether the Board's determination that the inmate had a life expectancy of less than six months was supported by the reasonable clinical judgment of a Department of Corrections and Rehabilitation physician. We also concluded that this condition was satisfied. However, we agreed with the trial court that Jewell's change of plans supported denial.

Jewell then presented additional evidence concerning his plans to the Board. His friend, a Ms. Hudson, provided a declaration indicating that she was a long-term friend of petitioner's and that she was prepared to care for Jewell until his condition called for admittance to a Veteran's Administration (VA) facility or hospice. She had made

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<sup>3</sup> His original plan had been to reside with his sister, but this fell through just before the court hearing. Jewell presented a new plan which would have him residing with a female friend in Minnesota. However, little information about this placement was before the trial court.

preliminary inquiries at the local VA hospital and was personally experienced in providing end-of-life care; she was also a certified nursing assistant.

Ms. Hudson stated that she had spent the past six and a half years working as a resident assistant at a halfway house for women with substance abuse issues. She does not drink alcohol and does not, and will not, keep alcohol in her home. She does not have a car and plans to assist Jewell in using public transportation.

Corrections officials also noted that Jewell was by then 61 years old with no significant disciplinary history considering the length of time he had spent in prison. He suffered increasing fatigue and shortness of breath and was able to walk only short distances.

Once again the Board determined to recommend compassionate release for Jewell. Once again the trial court denied the request. It noted that it was possible that defendant might be able to drive a vehicle, and while it acknowledged that it could not find a “probability” that Jewell would be dangerous if released, it concluded that “the possibility that he could get out and get behind the wheel of a car, to me, means he is still a threat.” “I am not willing to let this man out if there’s the slightest chance that he [would] get behind the wheel of a car and hurt another living soul.”

Jewell appealed again, and in *Jewell II, supra*, E062185 we held that the trial court applied an incorrect standard. We found that the proper criterion was whether it was *probable* that the inmate’s release would create a risk of danger to the public, or whether there was some probability of danger. In imposing a “reasonableness” element, we

followed *Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 590-592 (*Martinez*) in finding that the twin purposes of section 1170, subdivision (e), were to provide relief to dying prisoners *and* to save the state prisons money by shifting the end-of-life care expenses to other agencies (possibly at lesser expense). We agreed with the concurring and dissenting opinion of Justice Sims in *Martinez* that no one could ever find that there was zero chance that a convicted felon would not commit another crime if released, but that such an interpretation of the statute would mean that no inmate would ever qualify for release, thus frustrating the cost-savings intent of the Legislature. (*Martinez, supra*, at p. 599 (see conc. & dis. opn. of Sims, J.))

Hence, we reversed the trial court's second denial, and remanded, directing the trial court to consider whether it was probable the conditions of defendant's release and treatment would pose a risk to public safety.

In the proceedings now under review, the People presented a copy of a letter written by Jewell to his trial attorney in 1997, in which he raised various complaints about the representation he had received, made some not very thinly veiled threats concerning counsel's professional status, and overall presented himself as a vindictive, self-righteous, unpleasant person. The People also filed a letter from Jewell's brother withdrawing any support and describing Jewell as manipulative and ungrateful. The trial court also reviewed petitioner's regular parole hearing held on September 15, 2015,

during which petitioner, according to one of the commissioners, exhibited “hostility” when disputing a disciplinary report filed by one of his nurses.<sup>4</sup>

Once again the trial court denied the request for compassionate recall. Relying again on the parole hearing, it noted that defendant had described a chaotic and even improbable childhood and upbringing. It also noted that defendant had said that he drank because he was depressed, and reasoned that if released, defendant would no doubt again be depressed due to his medical condition. The court expressed concern that Jewell’s release would not be supervised as would a normal parole release, and that nothing would prevent him from leaving Ms. Hudson’s care. Accordingly, it concluded that Jewell represented an unreasonable risk.

Jewell has both appealed and sought review by petition for writ of mandate on grounds of exigency.

## II

### DISCUSSION

First, we consider the appropriate vehicle for review.

The People argue that extraordinary writ relief is not justified where a party has the available remedy of appeal. Of course this is the usual rule. (*Phelan v. Superior Court* (1950) 35 Cal.2d 363, 366.) It is up to the petitioner seeking extraordinary relief to

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<sup>4</sup> The panel of two commissioners split on whether Jewell was suitable for regular parole; the matter was accordingly referred for an en banc hearing. The result of that hearing has not been communicated to this court.

show that the remedy of appeal is not adequate. (*Interinsurance Exchange of the Automobile Club v. Superior Court* (2007) 148 Cal.App.4th 1218, 1225.)

In this case, although Jewell has obviously repeatedly disproved the dire predictions of his imminent demise, there is no dispute in the record that he is terminally ill with lung and liver cancer and that his health is deteriorating.

Next, the People re-argue the question of whether section 1170, subdivision (e), should be read to include a “reasonableness” or “probability” requirement with respect to the risk of danger. They cite *Martinez, supra*, 183 Cal.App.4th at p. 593, fn. 6, which refused to do so in the context of “medical parole” under section 3550.<sup>5</sup> The simple answer to this argument is that in the second appeal, we determined that section 1170, subdivision (e), *is* subject to a “reasonableness” or “probability” condition. This determination on a question of law is now “law of the case,” and absent any compelling reason, we should not, and do not, depart from it. (*Tally v. Ganahl* (1907) 151 Cal. 418, 421; *Water Replenishment Dist. of Southern California v. City of Cerritos* (2012) 202 Cal.App.4th 1063, 1070-1071.)

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<sup>5</sup> “Medical parole” under section 3550 applies to inmates who are not necessarily terminally ill, but who are permanently incapacitated so as to require 24-hour care. As we commented in our previous opinion, section 3550 now *does* require that a denial of medical parole be based upon a finding that the inmate would not “reasonably” pose a risk to public safety (§ 3550, subd. (a)); this was not the case when *Martinez* was decided.

We now turn to the critical issue—whether the trial court’s finding of “probability” or “reasonable possibility” may be sustained. We hold that it cannot—that the trial court’s decision remains improperly speculative.

It is necessary, however, to consider an issue which we avoided in the previous opinion—under what standard do we review the trial court’s decision?

In *Martinez, supra*, 183 Cal.App.4th 578 the Board had denied an inmate’s request to be recommended for medical parole, and the *Martinez* court held that such a denial should be judicially evaluated under the highly deferential “ ‘some evidence’ ” standard applicable to traditional parole decisions. (*Id.* at p. 593; see *In re Lawrence* (2008) 44 Cal.4th 1181, 1191.) Applied here, that would clearly lead to Jewell’s success, because there is more than “some evidence” that his release would *not* pose a risk. But on the other hand, subdivision (e)(1) of section 1170 does not entrust the final decision to the Board, which can only “recommend” recall; subdivision (e)(2) gives the court “discretion” to recall if the factual requirements are met—although because the Legislature has established clear eligibility criteria, this discretion has been described as “not unfettered.” (*People v. Loper* (2015) 60 Cal.4th 1155, 1161 at fn. 3.)

Accordingly, we believe that we should review for abuse of discretion, but being mindful that an abuse of discretion exists when the necessary factual findings are unsupported by substantial evidence (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 530), we examine the matter in that light.

Jewell clearly was an habitual abuser of alcohol and other substances at the time of the killings. However, he has no record of subsequent substance abuse while incarcerated and has participated in Alcoholics Anonymous for many years.<sup>6</sup> The psychological report prepared for his regular parole hearing found him to be a “low risk” of violence.

In August 2014, a memorandum from the Department of Corrections and Rehabilitation described Jewell as “easily fatigued” and reported that he slept 16 hours a day, continually lost weight and had occasional hemoptysis. His condition is unlikely to have improved.<sup>7</sup>

Although this is not so extreme a case as *In re Martinez* (2012) 210 Cal.App.4th 800, petitioner’s physical limitations similarly make the possibility of criminal or hazardous conduct extremely slim.<sup>8</sup> The inmate in that case had been stabbed in the neck while incarcerated and rendered a quadriplegic with only a limited ability to move his

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<sup>6</sup> Jewell criticizes the trial court for examining the parole hearing transcript. We doubt that there was error in the trial court’s determination to inform itself fully, but as we decide the case in Jewell’s favor, we need not decide the issue.

<sup>7</sup> At the regular parole hearing, it was developed that Jewell had already been looking into funeral and burial benefits available to him as a veteran.

<sup>8</sup> *In re Martinez* was a later proceeding involving the same inmate as *Martinez, supra*, 183 Cal.App.4th 578. By the time *In re Martinez* was decided, section 3550 had been amended to specify that the inmate’s threat of violence must be evaluated under a reasonableness standard. Although the court in *In re Martinez* does briefly distinguish section 1170, subdivision (e), by stating that it does *not* include a “reasonabl[eness]” requirement (*In re Martinez, supra*, at p. 812)—a requirement which we have held must be read in—the point was not at issue, and is thus the weakest kind of dicta.

head. (*Id.* at p. 804.) The appellate court had no difficulty finding that he posed no risk to public safety if released, dismissing as purely speculative the theory that he might persuade accomplices to commit violent acts.<sup>9</sup> (*Id.* at pp. 821-823.) Here, as we noted, Jewell is not so severely impaired. However, it is clear that his mobility is limited. Perhaps acknowledging that petitioner's living arrangements with Ms. Hudson were satisfactory and secure, the trial court theorized that he might just decide to walk away. No reason for such a possible decision was given other than if either Jewell or Ms. Hudson decided that the arrangement "isn't working."<sup>10</sup> This is conjecture unsupported by any evidence that such a thing might happen. And the trial court failed to give any weight to the practical difficulties faced by Jewell. Where would he go if he left Ms. Hudson's residence? It appears that he might be able to be accommodated in a veterans' facility, but that would presumably involve *more* formal supervision than he would

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<sup>9</sup> The inmate had committed his crimes alone and had no record of gang involvement, although he repeatedly threatened to have prison workers harmed. (*In re Martinez, supra*, 210 Cal.App.4th at pp. 805-806.) Although the appellate court described the inmate with terms such as "repulsive" and "odious and malicious," (*id.* at p. 821), these innate qualities were considered distinct from his ability to effectuate any evil intent. Insofar as there is evidence from which it might be concluded that Jewell is not a particularly pleasant person, the analysis is the same.

<sup>10</sup> As the trial court evidently observed, section 1170, subdivision (e), does not impose or establish any method of postrelease supervision on the inmate. This is in contrast to "medical parole" under section 3550, subdivision (h), which authorizes the Board to require periodic medical reports and to return the inmate to custody if his or her condition improves so that he or she no longer qualifies. However, the fact that the Board apparently will not exercise any subsequent control over an inmate granted medical recall cannot be used as a blanket basis for concern over whether or not the inmate will "stick with" the announced plans. Otherwise, a court inclined to deny recall could always say "Well, he/she might just up and leave."

receive with Ms. Hudson. And the only risk that Jewell has ever posed to the public is as a drunk driver. Even if he did resort to alcohol, how would he obtain a vehicle?

For the trial court's ruling to be upheld, the reviewer must accept that there is a "reasonable" possibility either that Ms. Hudson will allow Jewell to obtain both alcohol *and* access to a vehicle (which she does not possess), or that Jewell, weak and emaciated as he is, will elect to leave her home, find alternate and unsupervised lodgings, manage to acquire a vehicle (and insurance, and a driver's license), resume a decades-ago habit of drinking to excess, and drive while intoxicated. Of course this is possible; there are few certainties in life. (Jewell's survival into 2016 demonstrates this.) But as we have previously held, if conjecture, speculation, and "might" were sufficient to support a denial on the basis of risk, the statute would not achieve its intended reach and arbitrary, inconsistent decision-making would be encouraged.

The question of remedy remains. We acknowledge that in the usual parole case where the court finds that a denial is not supported by "some evidence," the matter is remanded to the Board for a new hearing, at which time the Board is free to review new evidence. (*In re Prather* (2010) 50 Cal.4th 238, 244.) This rule is based largely on the separation of powers doctrine and the fact that parole suitability decisions have been entrusted to the executive branch. (*Id.* at pp. 250, 256-257.) Therefore if the court simply reverses the Governor's denial of a Board grant of parole, in reinstating the grant of parole there is no interference with the executive branch and remand is unnecessary. (*In re Ryner* (2011) 196 Cal.App.4th 533, 552-553.) Furthermore, the special and unique

nature of medical parole may justify a final judicial order without remand. (*In re Martinez, supra*, 210 Cal.App.4th at pp. 823-828.) We think the same is true of medical recall decisions. As was the case in *In re Martinez*, the facts are essentially static. Given his condition, it is highly unlikely that Jewell's risk will *increase*. The nature of medical recall, which presumes that the inmate has an extremely limited life expectancy, also makes the concept of a remand for further proceedings problematical. And as was also noted in *In re Martinez*, where the inmate in a medical recall case does not appear before the court, there can be no concern that the inmate's demeanor or tone of voice raised any red flags to which the reviewing court should give deference. Finally, in ordering Jewell's release we are not interfering with the executive branch (which has already recommended his release) but merely reversing a lower court.

### III

#### DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the Superior Court of San Bernardino County to vacate its order denying recall of sentence under section 1170, subdivision (e), and to enter a new order granting recall.

Petitioner is directed to prepare and have the peremptory writ of mandate issued, copies served, and the original filed with the clerk of this court, together with proof of service on all parties. This order shall be final 10 days from the date of filing this opinion.

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McKINSTER  
J.

We concur:

HOLLENHORST  
Acting P. J.

CODRINGTON  
J.