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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Supreme Court Case No. _____

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

JAMES ALDEN LOPER,
Defendant and Appellant.

Court of Appeal
Fourth District
Division One
Case Number
D062693

San Diego County
Superior Court
Case Number
SCD225263

APPEAL FROM THE SAN DIEGO COUNTY SUPERIOR COURT

The Honorable Laura Parsky, Judge

**PETITION FOR REVIEW (Cal. Rules of Court, rule 8.500) AFTER
THE PUBLISHED DECISION OF THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE, DISMISSING
APPELLANT'S APPEAL AS FROM A NONAPPEALABLE ORDER**

Raymond M. DiGuiseppe
State Bar Number 228457
Post Office Box 10790
Southport, North Carolina 28461
Phone: (910) 713-8804

SUPREME COURT
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Frank A. McGuire Clerk

Attorney for James Alden Loper
By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
independent case system

Deputy

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

This petition for review follows the published decision of the Court of Appeal, Fourth Appellate District, Division One, filed on May 29, 2013, dismissing appellant's appeal from the trial court's order denying him compassionate release under Penal Code section 1170, subdivision (e).¹ The opinion is attached as an appendix.² Appellant seeks review

¹ Statutory citations are to the Penal Code unless otherwise indicated.

² Neither party filed a petition for rehearing.

principally to resolve confusion and conflict prevailing in the courts concerning the crucial issue of whether a prisoner may pursue an appeal from a trial court's ruling upon a request for compassionate release, which led to the dismissal of this appeal. He also seeks review on the merits of the appeal for much-needed guidance on matters of significant public interest.

ISSUES PRESENTED

1. Does a prisoner have a right – whether by statute or constitutional principle – to appeal a trial court's ruling upon a request for compassionate release under section 1170, subdivision (e), even though the request is initiated by prison officials instead of the prisoner, or is appellate review limited to those cases in which the prison itself files an appeal?

2. Are the issues underlying the controversy on the merits of such significance to the public interest and proper administration of justice, and are the lower courts in such need of clear guidance on those issues, that this Court should decide them as well, even though those issues are not necessary to the resolution of the procedural question principally at hand?

NECESSITY FOR REVIEW

Over the span of two decades now, the Legislature has made repeated and concerted efforts to ease the crippling financial cost and burden stemming from the critically overcrowded prisons across the state. The compassionate release statutory scheme was a product of these efforts, designed to provide a “streamlined” and fast track” mechanism through which the prisons could release “terminally ill” prisoners who posed no risk to public safety, and thus relieve the state of the burdens of caring for them. Then the Legislature expanded the scope of the statutory scheme to “extend those provisions for early release to prisoners who are permanently medically incapacitated.” A few years later, frustrated with the small

number of releases the courts were actually authorizing for such prisoners, the Legislature created the alterative remedy of granting medical parole as a means to forward the end goal of releasing more of these prisoners.

The compassionate release statutory scheme only provides prison officials with the right to make the initial request in the trial court for compassionate release of a prisoner; it says nothing about who has the right to *appeal* the court's ruling on that request. Clear guidance for courts rendering and reviewing decisions as to whether a prisoner qualifies for compassionate release is itself scant at best. But, with the exception of the opinion at issue here, it is virtually non-existent as to whether a prisoner may appeal the ruling on the initial request. What is clear is that courts must interpret and apply the statutory scheme in light of the Legislature's clear purpose of increasing the number eligible prisoners actually released, and that completely precluding prisoners from appealing adverse rulings would severely undermine this goal by effectively insulating from any appellate review the vast majority of decisions denying release. A close look at analogous situations through the lens of the fundamental principles in play also makes clear that a prisoner does and should have a right to appeal the ruling regardless of whether he or she made the initial request.

Nevertheless, confusion and conflict prevail among the courts over the right of a prisoner to pursue an appeal in these cases, as well as over the proper interpretation and application of the statutory provisions governing a prisoner's eligibility for compassionate release. The problem will continue to fester, leading to decisions like the one at issue, which pose a significant risk of cutting off the process of appellate review crucial to ensuring the statute is being properly interpreted and applied. A decision of this Court is necessary to settle these questions of law that are vitally important to untold numbers of prisoners across the state and significant to the public at large.

STATEMENT OF THE CASE AND FACTS³

Loper, who was born in 1953, pled guilty in 2010 to making a misrepresentation of fact in violation of Insurance Code section 11880, subdivision (a), and he admitted allegations that his crime involved a pattern of felony conduct resulting in a loss of more than \$100,000 (§ 186.11, subd. (a)(3)) and that he had incurred a prior strike (§ 667, subds. (b)-(i)). The trial court sentenced Loper to a six-year prison term.

In May 2012, medical personnel at Richard J. Donovan Correctional Facility issued an internal request to obtain compassionate release for Loper pursuant to the procedure set forth in section 1170, subdivision (e). That provision gives the trial court the discretion — upon application of the Department or the Board of Parole Hearings — to recall the sentence of certain terminally ill or permanently medically incapacitated prisoners who meet the statutory criteria.⁴ The internal request stated that Loper had

³ The factual and procedural background is taken verbatim from the Court of Appeal's decision. (Appendix at 2-4.)

⁴ Section 1170, subdivision (e)(2) provides:

"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. [¶] (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

"uncontrolled hypertension, advanced chronic obstructive pulmonary disease (COPD) and severe coronary artery disease." According to the internal request, Loper was currently able to perform all activities of daily living and was housed in an outpatient setting, but his "life expectancy is short and possibly less than 6 months," and "[h]e is at increased risk for sudden cardiac death[,]" with his "condition . . . likely to worsen." In response to the internal request, the Department issued a diagnostic study on June 21, 2012.

On August 14, 2012, the Department's undersecretary of operations sent a letter to the trial court, enclosing the diagnostic study and recommending that Loper's prison commitment and sentence be recalled under section 1170, subdivision (e).

Pursuant to section 1170, subdivision (e)(3), the trial court held a hearing on August 24, 2012.⁵ At the hearing, the trial court ordered the Department to provide additional information consisting of: "An update on Mr. Loper's condition; An opinion from a doctor of the [Department] as to whether Mr. Loper's illness would produce death within six months; What treatment is available for Mr. Loper; What, if any, treatment Mr. Loper refused while in prison and how that refusal may have affected his current condition; [and] . . . a more extensive release plan"

The chief medical executive at Richard J. Donovan Correctional Facility sent a letter to the trial court on September 12, 2012, in response to the court's request. According to the letter, Loper's condition "remain[ed] stable," his hypertension had improved, he was "not presenting with any symptoms suggestive for acute congestive heart failure,"

muscular or neurological function, and that incapacitation did not exist at the time of the original sentencing."

⁵ Loper waived his right of personal presence, and appointed counsel appeared for Loper at the relevant hearings.

but was "an ill individual with disease processes that will continue to progress, despite treatment, leading to his eventual demise." With respect to Loper's life expectancy, the letter stated that "[h]is current status does not indicate for or against a prognosis of less than six months to live."

The trial court held another hearing on September 14, 2012, at which it denied the request to recall Loper's sentence because the statutory requirements were not met. As the trial court explained, "there is an insufficient showing for the court to make the findings required under . . . section 1170(e)(2)(A), specifically that the prisoner has an incurable condition caused by illness or disease that will produce death within six months as determined by a department physician."

Loper filed a notice of appeal from the trial court's order denying the recall of his sentence. Loper's appellate brief argues that the trial court misunderstood or misapplied the applicable statutory criteria.

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ARGUMENT

I

REVIEW IS NECESSARY TO CLARIFY THAT, CONSISTENT WITH LEGISLATIVE INTENT, AS WELL AS FUNDAMENTAL PRINCIPLES OF FAIRNESS AND CRIMINAL JURISPRUDENCE, A PRISONER MAY APPEAL A TRIAL COURT'S RULING UPON A REQUEST FOR COMPASSIONATE RELEASE INITIATED BY PRISON OFFICIALS

A. The Legislative Purpose of the Compassionate Release Statutory Scheme Is Fully Consistent with, and Indeed Only Advanced By, a Holding that Prisoners Have a Personal Right of Appeal

The Legislature was very clear in its intent when it first enacted the compassionate release statutory scheme in 1997:

'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 [BPH] recommend release via the recall procedure...'

(*Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 591-591, quoting Assem. Com. on Public Safety, Rep. on Assem. Bill No. 29 (1997-1998 Reg. Sess.) Apr. 15, 1997, pp. 1-2, italics added.)

The Legislature reemphasized these important goals when it amended the statute in 2007 to "extend those provisions for early release to

prisoners who are permanently medically incapacitated . . .” (*Martinez v. Board of Parole Hearings*, 183 Cal.App.4th at p. 591, quoting Legis. Counsel’s Dig., Assem. Bill No. 1539 (2007–2008 Reg. Sess.):

‘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.’

‘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.’

(*Martinez*, at pp. 591-592, quoting Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007–2008 Reg. Sess.) Sept. 5, 2007, coms., p. 5.)

In 2010, when the Legislature established “medical parole” as an alternative means for these prisoners to qualify for at least some form of release, it expressed frustration with the results of its efforts to effectuate release under the original scheme: “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.*” (*In re Martinez* (2012) 210 Cal.App.4th 800, 811, quoting Rep. on Sen. Bill No. 1399 (2009-2010 Reg, Sess.) as amended on May 20, 2010, italics added.)

In light of this history, courts must interpret the language of section 1170, subdivision (e), “in a way that effectuates the provision’s primary purpose of saving the state money by authorizing the release from prison custody of those inmates who are terminally ill or permanently medically incapacitated and do not pose a threat to public safety.” (*Martinez v. Board of Parole Hearings*, *supra*, 183 Cal.App.4th at p. 592.) “The intent prevails

over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.” (*People v. Lesdema* (1997) 16 Cal.4th 90, 95.)

The Legislature’s clear directive in creating the remedy of compassionate release for eligible prisoners does not just speak to the proper substantive interpretation and application of the statute in determining whether a prisoner qualifies for release; it is also instructive on the procedural issue that ultimately led to the dismissal of the appeal here – namely, does a prisoner have the right (or “standing”) to *personally* file an appeal from a trial court’s ruling on a request for release even though it is the Board or the Secretary who made the request in the first instance?

The short answer is – and should be – yes. Sure, the statute says it is “the secretary or the board” who “may recommend to the court that the prisoner’s sentence may be recalled” (§1170, subd. (e)(1)) and does not permit the prisoner to personally make such an application to the court. But neither this language nor any other language in the statute places limitations on, or even specifically addresses, who may file *an appeal* to challenge the ruling on the request. Who may file *the initial request* is simply not determinative on this point. It is settled that the right to appeal from a judgment or order is determined by the Constitution or by statute. (*People v. Mazurette* (2001) 24 Cal.4th 789, 792; *People v. Gallardo* (2000) 77 Cal.App.4th 971, 980.) “[S]ection 1237 provides that a defendant may appeal from ‘a final judgment of conviction’ (§ 1237, subd. (a)) or from ‘any order made after judgment, affecting the substantial rights of the party’ (§ 1237, subd. (b)).” (*People v. Totari* (2002) 28 Cal.4th 876, 881.)

The statutory right to appeal an order after judgment affecting the defendant’s substantial rights “is not confined to orders resulting from motions initiated by defendant; rather, by its own terms, the statute applies to ‘any’ order affecting the substantial rights of the party.” (*People v.*

Herrera (1982) 127 Cal.App.3d 590, 596.)⁶ There can be no doubt that a trial court's ruling upon a request for compassionate release affects the prisoner's "substantial rights" within the meaning of this statute, because it directly affects the most fundamental of individual interests: freedom. For the same reason, the prisoner clearly has constitutional "standing" because, unquestionably, he has a "beneficial interest" in the controversy concerning "some particular right to be preserved or protected over and above the interest held in common with the public at large." (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 814, quoting *Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796, italics original.)

And what best advances the Legislature's express intent to effectuate *the ultimate release* of as many eligible prisoners as possible: (1) limiting appeals to those cases in which the prison chooses to exercise its own inherent discretion to pursue the matter further, effectively insulating decisions from review unless an appeal would meet the institutional interests and budgetary constraints of the prison, or (2) also permitting the prisoner – who has a *much* greater interest in seeking review – to personally file an appeal using the prisoner's own available resources or the resources set aside for indigent defendants on appeal? It is clearly the latter approach.

Appellate review of decisions denying a request for compassionate release of a prisoner is an inherently essential part of ensuring that the law is being properly interpreted and applied to effectuate its purpose. Yet precluding appeals from the prisoner stands to drastically curtail such review – contravening the legislative intent to *streamline* and *fast track* this process so that the state *will be able to release* these prisoners. (*Martinez v. Board of Parole Hearings, supra*, 183 Cal.App.4th at pp. 590-591.) Thus, under the well settled canons of statutory constructions, courts

⁶ *Herrera* was disapproved on another ground in *People v. Martin* (1986) 42 Cal.3d 437, 445-446.

must avoid interpreting and applying this law in a manner like the Court of Appeal did here, which would clearly undermine its core purpose. They instead must interpret the law in light of the express aim to effectuate the ultimate release of more eligible prisoners, which would be best advanced by ensuring that prisoners have the personal right to file an appeal from adverse rulings. (*People v. Lesdema, supra*, 16 Cal.4th at p. 95 [courts must interpret statutes “with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.”].)

B. The Most Directly Analogous Case Law, and the Fundamental Principles in Play, Also Compel the Conclusion that a Prisoner May Appeal a Ruling on a Prison-Initiated Request

In essentially concluding that any appellate review of a denial of a request for compassionate release is subject to the discretion of the Board or Secretary who must independently decide to file an appeal, the Court of Appeal evidently felt compelled to follow the line of cases concerning improper resentencing orders under section 1170, subdivision (d).⁷ (Appendix at 7.) The court found a “crucial similarity” between the two

⁷ Section 1170, subdivision (d), provides:

When a defendant subject to this section or subdivision (b) of Section 1168 has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The resentence under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. Credit shall be given for time served.

subdivisions – that neither provides the defendant with the right to make the initial request upon which the trial court’s ultimate order was based. (*Ibid.*) As discussed, who may make the initial request is not determinative of who may *appeal* the ruling on the matter, as that determination is based upon the independent considerations of “substantial rights” and “standing.” Even so, the crux of the problem in those cases was that the trial court had misused the recall process to effectively extend the time in which to file an appeal, rendering them clearly distinguishable from cases like the one at issue here.

Take, for example, the case of *People v. Pritchett* (1993) 20 Cal.App.4th 190, the principal case on which the Court of Appeal relied. (Appendix at 6-8.) The *Pritchett* court summed up in a nutshell the real concern in that case, leading off its analysis as follows: “The People contend -- and we agree -- that defendant may not extend the time for filing a notice of appeal by asking the court to ‘resentence’ him to the same sentence he originally received.” (*Id.* at p. 193.) Basically, the trial court had invoked the recall power under subdivision (d) for the sole purpose of invalidly extending the time period in which the defendant could appeal, only to then reimpose the same sentence. (*Id.* at pp. 193-194.) Thus, the “order” from which the defendant had appealed was a legal nullity that necessarily could not have affected his substantial rights. (*Id.* at pp. 194-195.) This sort of problem was also at the core of the opinions dismissing the appeals in *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1725-1726, and *People v. Gainer* (1982) 133 Cal.App.3d 636, 637-638, 640-642, where the trial courts had lacked any jurisdiction to recall and resentence at the time that they purportedly rendered or were asked to render such an order.

Indeed, in *People v. Gallardo, supra*, 77 Cal.App.4th 971, which the Court of Appeal cites to make its point that the right to appeal an order affecting substantial rights is not as broad as it sounds (Appendix at 5), the concern was to preclude “attacks upon the judgment,” such as a purported

“appeal” from a motion to vacate the judgment, which “would merely bypass or duplicate appeal from the judgment itself.” (*Gallardo*, at pp. 980-981.) This “would virtually give defendant two appeals from the same ruling and, since there is no time limited [*sic*] within which the motion may be made, would in effect extend the time for appeal from the judgment.” (*Ibid.*, quoting *People v. Thomas* (1959) 52 Cal.2d 521, 527; accord *People v. Totari, supra*, 28 Cal.4th at pp. 881-882.) So again, the focus there was in curtailing the abuse of the appellate process to extend the time to appeal.

And in the cases of *People v. Niren* (1978) 76 Cal.App.3d 850 and *Thomas v. Superior Court* (1970) 1 Cal.3d 788, which dismissed a defendant’s challenge to a trial court’s exercise of, or refusal to exercise, its power to recall and resentence, the real problem was that the defendant had *initiated* the request himself, when the statute only permitted the prison officials to initiate the request. (*Niren*, at p. 850 [dismissing the defendant’s appeal from his own request to initiate proceedings under former Penal Code section 1168, which could not be initiated by a defendant]; *Thomas*, at p. 790 [dismissing a writ petition purportedly taken from an order denying the defendant’s request for release on probation under section 1170, subdivision (d), which only permits the Department of Corrections to initiate the request and does not authorize the court to grant probation in any event].) Because the request itself was not properly initiated, any ruling upon it necessarily would be invalid and, of course, so would an “appeal” from any such order -- by the defendant or anyone for that matter -- because the process was a legal nullity from the start. That is obviously not the situation we have here, where the request was *properly* initiated by the Board or Secretary under the terms of the statute, leading to an otherwise appealable order, such that the issue is not *whether* the order may be appealed, as in *Niren* and *Thomas*, but simply *who* may appeal it.

The case of *People v. Herrera, supra*, 127 Cal.App.3d 590, on the other hand, did specifically address this question in the context of an appeal from the denial of the Board of Prison Terms' request for recall and resentencing of Herrera under former section 1170, subdivision (f), which provided a mechanism for the Board to review prison terms and make recommendations to the trial court for recall and resentencing if the Board determined the sentence to be "disparate." (*Id.* at p. 595, fn. 3.) The First Appellate District posited the issue on review as follows: "Assuming that the motion for recall was properly initiated by the Board, does the prisoner have the right to appeal from the denial of that motion *even though he could not have initiated the motion himself?*" (*Id.* at p. 596, italics original.) The court went on to answer this in the affirmative, reasoning as follows: The statutory right to appeal an order after judgment affecting the defendant's substantial rights "is not confined to orders resulting from motions initiated by defendant; rather, by its own terms, the statute applies to 'any' order affecting the substantial rights of the party." (*Id.* at p. 596.) "The 'right' which appellant is asserting is his 'right' to receive a sentence which is not disparate when compared to sentences received by other similarly situated convicts. Underlying this is appellant's right to liberty – and to suffer only that deprivation of liberty which his crimes warrant." (*Ibid.*)

The *Herrera* court further explained: "As a result of the trial court's order, appellant will spend three extra years in a penitentiary over and above the time the Board has determined other similarly situated convicts received for similar crimes." (*People v. Herrera, supra*, 127 Cal.App.3d at p. 597.) "The determinate sentencing law (DSL) in general, and the review provisions of section 1170, subdivision (f) in particular, indicate that the Legislature believed that a prisoner has a 'substantial right' to receive a sentence which is consistent with the sentences received by other similarly situated prisoners. Since the trial court's order denying the motion for recall

clearly ‘affected’ this ‘substantial right,’ the case is appealable by virtue of section 1237, subdivision [b].” (*Herrera*, at p. 597.)

This Court later abrogated the *Herrera* opinion, but only as to its analysis *on the merits* of the issue concerning the manner in which an appellate court is to review the trial court’s ruling on a recommendation. The Court endorsed the general framework of the analysis, but found that the formulation did not “fully and accurately state the obligation of the trial court.” (*People v. Martin, supra*, 42 Cal.3d at pp. 445-446.) The Court did *not* in any way abrogate the *Herrera* court’s holding with respect to the *procedural* issue regarding the defendant’s right to appeal. In fact, the Court essentially endorsed that holding, at one point citing the discussion on this issue in *Herrera* and affirming: “The trial court’s decision to deny a motion to recall under this subdivision is an appealable order.” (*Id.* at p. 450, citing *Herrera*, at pp. 595-597.) Notably, the *Martin* case *itself* arose from an appeal that *Martin* personally filed to challenge as an abuse of discretion the trial court’s ruling upon a recommendation made by *the Board*. (*Martin*, at pp. 444-445.) And yet it was apparently just assumed or understood by all parties involved, and the reviewing courts, that *Martin* had the right to appeal the order, as again, the only mention of this issue arose in the context of this Court’s endorsement of that point in *Herrera*.

Just as in *Herrera*, the fundamental “right” at stake in proceedings initiated under section 1170, subdivision (e), for compassionate release, is the prisoner’s “right to liberty – and to suffer only that deprivation of liberty which his crimes warrant” under the general policy that the purpose of imprisonment is to punish offenders in proportion to the seriousness of their crimes. (*People v. Herrera, supra*, 127 Cal.App.3d at p. 596; see § 1170, subd. (e)(1) [providing that recommendations for compassionate release should be made “consistent with” this general policy].) The denial of a request for compassionate release undoubtedly affects the prisoner’s

substantial rights, particularly since the recommendation necessarily follows a prison determination that the prisoner's liberty should be restored.

A series of additional cases involving analogous circumstances further supports the conclusion that a prisoner may appeal the results of compassionate release proceedings initiated by the Board or Secretary. In *People v. Sword* (1994) 29 Cal.App.4th 614, the Fourth Appellate District treated the appealability of orders denying outpatient status under section 1600 et seq. as settled or understood, footnoting the point that such orders are "appealable under section 1237, subdivision (b)" as "orders after judgment affecting the substantial rights of a party." (*Id.* at p. 619 & fn. 2.) This is the statutory scheme that governs the placement onto outpatient status of those committed to state hospitals or similar treatment facilities. (§ 1600.) Notably, like under the compassionate release statutory scheme, this scheme expressly provides that the director of the hospital or facility is to initiate the process for such placement; there is no provision permitting the patient to personally initiate such a request. (§§ 1602, 1603.)⁸

⁸ Section 1602 provides in pertinent part:

(a) Any person subject to the provisions of subdivision (b) of Section 1601 may be placed on outpatient status, if all of the following conditions are satisfied: [¶] (1) In the case of a person who is an inpatient, the director of the state hospital or other treatment facility to which the person has been committed advises the court that the defendant will not be a danger to the health and safety of others while on outpatient status, and will benefit from such outpatient status.

Similarly, section 1603 provides pertinently:

(a) Any person subject to subdivision (a) of Section 1601 may be placed on outpatient status if all of the following conditions are satisfied: [¶] (1) The director of the state hospital or other treatment facility to which the person has been committed advises the committing court and the

The Second Appellate District followed suit in *People v. Cross* (2005) 127 Cal.App.4th 63, citing the *Sword* decision and also stating as settled or understood that the patient himself could appeal the order denying the outpatient status recommendation of the hospital's *medical director*, because it was "an order after judgment affecting the substantial rights of a party." (*Id.* at p. 66.) The court went on to reverse the order as an abuse of discretion. (*Id.* at pp. 72-74.) Similarly, in *People v. Coleman* (1978) 86 Cal.App.3d 746, the First Appellate District held: "Since an order denying release following restoration [of sanity] proceedings results in continued indefinite commitment to a state hospital or other medical facility, a fortiori it must be construed as an appealable 'order made after judgment, affecting the substantial rights' of the defendant." (*Id.* at p. 750.)

The bottom line is this: the right of appeal is not dependent upon whether the defendant initiated the action that led to the order at issue; so long as his or her substantial rights are in play, the defendant may appeal the order, even if it followed the motion or request of a third party. (See e.g., *In re Daniel K.* (1998) 61 Cal.App.4th 661, 667-670 [trial court's ruling upon the motion of minor's mother for continuing discovery regarding his placements, behavior, and evaluations of those treating and observing him was an appealable order affecting the minor's "substantial rights," even though the motion was denied, because had the motion been granted, the minor's mother would have received unfettered access to personal, privileged, and intimate details of the minor's life]; *People v. Connor* (2004) 115 Cal.App.4th 669, 677-687 [the defendant may appeal an order granting the petition of a third party for release of probation

prosecutor that the defendant would no longer be a danger to the health and safety of others, including himself or herself, while under supervision and treatment in the community, and will benefit from that status.

reports since because they contain personal information about the defendant and thus an order releasing a report involves his or her substantial rights]; contrast *People v. Tuttle* (1966) 242 Cal.App.2d 883, 885 [an order denying a defendant's request for release of trial exhibits involves an "entirely separate" proceeding that "does not affect any substantial right which is the subject of [the criminal] action"] and thus the order is not appealable], & *People v. Beck* (1994) 25 Cal.App.4th 1095, 1103 [same].) Holding that a prisoner may appeal an adverse ruling on a prison-initiated request for compassionate release is fully consistent with this general principle because the prisoner's liberty – the most "substantial" of all rights – is at stake.

C. Review is Essential to Clarify These Matters and Provide Much-Needed Guidance to Courts Interpreting and Applying the Law

The published case law concerning the mechanism of compassionate release under section 1170, subdivision (e), in general is scant, and it is virtually non-existent with respect to the procedural issue at hand with the exception of the Court of Appeal's decision in this case. And that decision is in apparent conflict with the only other existing cases appellant has been able to find that have involved a prisoner's appeal from an order denying release. (See *People v. Wade* (2012, Case No. A133674) [2012 WL 1759369, *People v. McCarty* (2013, Case No. A135608) [2013 WL 1278503], *In re Barnes* (2010, Case No. F061085) [2010 WL 4774696].)⁹ If left undisturbed, the decision would effectively insulate from any appellate review the vast majority of these cases in the several counties

⁹ These cases are not cited in support of any legal proposition. (See Cal. Rules of Court, rule 8.115(a).) They are instead provided simply to illustrate an apparent conflict in the lower appellate courts, as one of the relevant factors in determining the propriety of granting review (see Cal. Rules of Court, rule 8.500(b)(1)), because the courts in those cases appear to have treated the prisoner's right of appeal as assumed or understood.

from which the Court of Appeal hears appeals and would potentially influence other appellate courts to turn away these cases as well.

As detailed above, an in-depth exploration of legislative intent, case law arising in analogous circumstances, and related principles and policies concerning due process and fundamental fairness in criminal cases reveals that the Court of Appeal's published decision on this issue is wrong. The rule is, and should be, that a prisoner has a statutory right and constitutional standing to appeal the ruling on a request for compassionate release even though the request was initiated by the Board or Secretary. However, a pronouncement from this Court is necessary to clarify the landscape for the lower courts, bring uniformity to their decisions on this issue, and ensure those decisions are advancing the legislative design while not undermining the rights of eligible prisoners to pursue appellate review of adverse rulings.

Otherwise, confusion and conflict among the courts will remain, leading to opinions like the one here that erroneously conclude appellate review is only available when the prison itself makes an administrative determination that pursuing an appeal would be in *its* best interests. This case presents a prime opportunity to provide much-needed guidance for both trial and appellate courts by resolving this important issue to clarify that prisoners also have the right to pursue an appeal from these decisions which directly impact their most fundamental of personal interests.

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II

THIS COURT SHOULD ALSO GRANT REVIEW TO DECIDE THE MERITS OF THE CONTROVERSY AND PROVIDE THE MUCH-NEEDED GUIDANCE ON THOSE IMPORTANT ISSUES AS WELL

In addition to providing the opportunity for much-needed guidance on the specific procedural issue at hand regarding the right of appeal, should this Court address the merits of the main controversy as well, a grant of review would also serve as an opportunity to provide the much-needed guidance for trial and appellate courts on the proper interpretation and application of the compassionate release statutory scheme in rendering and reviewing decisions regarding a prisoner's actual eligibility for release.

Even if a matter is not necessary to render a decision, it is well settled that this Court has the discretion to consider the matter on review and it is appropriate to exercise such discretion when the parties have fully briefed the matter, they seek a decision on the merits, and deciding it would promote the public interest and the orderly administration of justice. (*Dix v. Superior Court* (1981) 53 Cal.3d 442, 454 [reaching the merits of the controversy for these reasons, even though the decision could have rested on the dismissal of the underlying action]; see e.g., *DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58 [even though the underlying appeals were subject to dismissal as moot, the Court went on to address the merits because the controversy was "ripe for decision" and deciding it would promote the public interest and orderly administration of justice]; *People v. West Coast Shows, Inc.* (1970) 10 Cal.App.3d 462, 467-468 [while the appeals were technically moot, all parties sought a decision on the merits, which was in the interest of the public]; see also *People v. Gallardo, supra*, 77 Cal.App.4th at p. 981, quoting *In re Banks* (1959) 53 Cal.2d 370, 379-381 [noting that this Court has permitted an appeal even

when the appeal was technically invalid where the case “presented a ‘question as to the constitutionality or interpretation of a statute which is of concern to a number of persons other than the petitioner’ and ‘because the question had not been previously answered by the Supreme Court’”].)

So it is here. The merits of the main controversy – whether the trial court erroneously denied appellant compassionate release – have been fully briefed in anticipation of a decision on the key issue of whether appellant is entitled to such release. And the controversy involves multiple issues of significance to all similarly situated prisoners, as well as the public at large, on which there is currently little or no clear guidance: When is a prisoner “terminally ill” within the meaning of the statute? More specifically, what must be shown to establish that he or she 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) (*italics added*)). What sort of specific showing is required to demonstrate that a prisoner is “permanently medically incapacitated?” (§ 1170, subd. (e)(2)(C)). What is the relationship, if any, between these two subdivisions? Are they completely independent of one another, such that being “permanently medically incapacitated” is alone sufficient to warrant release, or must there be a sufficient showing of a probability of death within six months in every case, as the trial court in the case interpreted the statute? What is the applicable standard of review on appeal from a trial court’s ruling? The parties have assumed the standard is abuse of discretion, but the statute is silent on the matter and the scant body of case law provides little guidance.

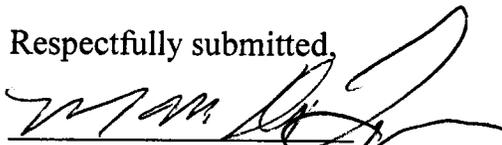
These are just some of the questions “ripe for decision” in this context and, much like the benefit of deciding the procedural issue, deciding the merits of the controversy would advance the interests of the prisoners and the public at large in ensuring that the courts are uniformly interpreting and applying the statutory scheme consistent with its purpose.

CONCLUSION

Loper respectfully requests this Court grant his petition for review.

Dated: July 2, 2013

Respectfully submitted,



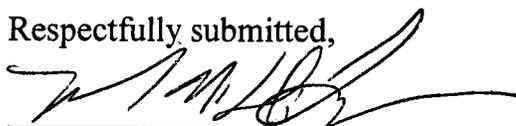
Raymond M. DiGuiseppe,
Attorney for James Alden Loper

CERTIFICATE OF COMPLIANCE

I certify that the attached Petition for Review is prepared with 13 point Times New Roman font and contains 6,503 words.

Dated: July 2, 2013

Respectfully submitted,



Raymond M. DiGuiseppe,
Attorney for James Alden Loper

APPENDIX

Filed 5/29/13

CERTIFIED FOR PUBLICATION
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ALDEN LOPER,

Defendant and Appellant.

D062693

(Super. Ct. No. SCD225263)

APPEAL from an order of the Superior Court of San Diego County, Laura H. Parsky, Judge. Appeal dismissed.

Raymond M. DiGuiseppe, under appointment by the Court of Appeal, for Plaintiff and Respondent.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Steve Oetting and Lise S. Jacobson, Deputy Attorneys General, for Defendant and Appellant.

James Alden Loper appeals from the trial court's order denying a request for recall of his sentence which was initiated by the Department of Corrections and Rehabilitation

(the Department) under the compassionate release provision set forth in Penal Code section 1170, subdivision (e).¹ As we will explain, we conclude that the trial court's order is not appealable by Loper, and we accordingly dismiss the appeal.

I

FACTUAL AND PROCEDURAL BACKGROUND

Loper, who was born in 1953, pled guilty in 2010 to making a misrepresentation of fact in violation of Insurance Code section 11880, subdivision (a), and he admitted allegations that his crime involved a pattern of felony conduct resulting in a loss of more than \$100,000 (§ 186.11, subd. (a)(3)) and that he had incurred a prior strike (§ 667, subds. (b)-(i)). The trial court sentenced Loper to a six-year prison term.

In May 2012, medical personnel at Richard J. Donovan Correctional Facility issued an internal request to obtain compassionate release for Loper pursuant to the procedure set forth in section 1170, subdivision (e). That provision gives the trial court the discretion — upon application of the Department or the Board of Parole Hearings — to recall the sentence of certain terminally ill or permanently medically incapacitated prisoners who meet the statutory criteria.² The internal request stated that Loper had

¹ Unless otherwise specified all further statutory references are to the Penal Code.

² Section 1170, subdivision (e)(2) provides: "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. [¶] (C) The prisoner is permanently medically incapacitated with

"uncontrolled hypertension, advanced chronic obstructive pulmonary disease (COPD) and severe coronary artery disease." According to the internal request, Loper was currently able to perform all activities of daily living and was housed in an outpatient setting, but his "life expectancy is short and possibly less than 6 months," and "[h]e is at increased risk for sudden cardiac death[,] with his "condition . . . likely to worsen." In response to the internal request, the Department issued a diagnostic study on June 21, 2012.

On August 14, 2012, the Department's undersecretary of operations sent a letter to the trial court, enclosing the diagnostic study and recommending that Loper's prison commitment and sentence be recalled under section 1170, subdivision (e).

Pursuant to section 1170, subdivision (e)(3), the trial court held a hearing on August 24, 2012.³ At the hearing, the trial court ordered the Department to provide additional information consisting of: "An update on Mr. Loper's condition; An opinion from a doctor of the [Department] as to whether Mr. Loper's illness would produce death within six months; What treatment is available for Mr. Loper; What, if any, treatment

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."

³ Loper waived his right of personal presence, and appointed counsel appeared for Loper at the relevant hearings.

Mr. Loper refused while in prison and how that refusal may have affected his current condition; [and] . . . a more extensive release plan"

The chief medical executive at Richard J. Donovan Correctional Facility sent a letter to the trial court on September 12, 2012, in response to the court's request. According to the letter, Loper's condition "remain[ed] stable," his hypertension had improved, he was "not presenting with any symptoms suggestive for acute congestive heart failure," but was "an ill individual with disease processes that will continue to progress, despite treatment, leading to his eventual demise." With respect to Loper's life expectancy, the letter stated that "[h]is current status does not indicate for or against a prognosis of less than six months to live."

The trial court held another hearing on September 14, 2012, at which it denied the request to recall Loper's sentence because the statutory requirements were not met. As the trial court explained, "there is an insufficient showing for the court to make the findings required under . . . section 1170(e)(2)(A), specifically that the prisoner has an incurable condition caused by illness or disease that will produce death within six months as determined by a department physician."

Loper filed a notice of appeal from the trial court's order denying the recall of his sentence. Loper's appellate brief argues that the trial court misunderstood or misapplied the applicable statutory criteria.

II

DISCUSSION

The Attorney General argues that the order denying the recall of Loper's sentence is not an order appealable by Loper and advocates that we dismiss the appeal. As we will explain, we agree.

""It is settled that the right of appeal is statutory and that a judgment or order is not appealable unless expressly made so by statute."" (*People v. Totari* (2002) 28 Cal.4th 876, 881.) As relevant here, a defendant may appeal from "any order made after judgment, affecting the substantial rights of the party." (§ 1237, subd. (b).) Therefore, Loper may appeal from the order denying recall of his sentence only if that order affects his substantial rights.

If interpreted broadly, the phrase "affecting the substantial rights of the party" in section 1237, subdivision (b) "would apply to any postjudgment attack upon the conviction or sentence" because "[t]he court's denial of relief in any such situation could affect the defendant's substantial rights. However, decisional authority has limited the scope of the phrase, defining appealability more narrowly." (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 980.) Neither the parties, nor our own research, has revealed any opinion directly addressing whether a party's substantial rights are affected by an order denying a recall of a sentence under the compassionate release provisions set forth in section 1170, subdivision (e). However, case law holds that an order denying a recall of a sentence under a similar provision — section 1170, subdivision (d)(1) — is *not*

appealable.⁴ As we will explain, we find the reasoning of that case law to be persuasive here.

Specifically, section 1170, subdivision (d)(1) states that "[w]hen a defendant . . . has been sentenced to be imprisoned in the state prison and has been committed to the custody of the secretary, the court may, within 120 days of the date of commitment on its own motion, or at any time upon the recommendation of the secretary or the Board of Parole Hearings, recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced" As courts have pointed out when analyzing whether an order denying recall of a sentence under section 1170, subdivision (d) affects a party's substantial rights, the statute does not give *the defendant* the right to initiate a court proceeding for recall of the sentence. Instead, a recall of the sentence is initiated either on the court's own motion or by recommendation of the secretary or the Board of Parole Hearings. (§ 1170, subd. (d)(1).) "Consequently, the courts have uniformly held that an order *denying* a defendant's request to resentence pursuant to section 1170, subdivision (d) is not appealable as an order affecting the substantial rights of the party. This is because the defendant has no right to request such an order in the first instance; consequently, his 'substantial rights' cannot be affected by an order denying that which he had no right to request." (*People v. Pritchett* (1993) 20 Cal.App.4th 190, 194 [citing cases] (*Pritchett*).)

⁴ We note that section 1170, subdivision (d) was amended, effective January 1, 2013, to add an additional subdivision. (Stats. 2012, ch. 828, § 1.) The current text of section 1170, subdivision (d)(1) was formerly referred to as section 1170, subdivision (d).

For the purpose of our analysis, the procedure for recalling a sentence under section 1170, subdivision (e) shares a crucial similarity with the procedure for recalling a sentence under a section 1170, subdivision (d)(1). As under section 1170, subdivision (d)(1), a defendant has no right to apply to the court for an order recalling the sentence on compassionate release grounds pursuant to section 1170, subdivision (e). Instead, such proceedings may only be initiated by the Department or the Board of Parole Hearings. (§ 1170, subd. (e)(1).)⁵ Because Loper's substantial rights are not affected by the trial court's order denying recall of his sentence under section 1170, subdivision (e), Loper may not appeal from the order.

Loper presents two arguments in support of appealability, neither of which are persuasive.

First, Loper suggests that in analyzing whether his substantial rights are affected by the trial court's order denying the sentence recall, we should look to case law discussing whether a party has constitutional standing to bring a lawsuit. Specifically, Loper argues that we should look to whether he has a beneficial interest in the controversy, and "has either suffered or is about to suffer an injury of sufficient magnitude." (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 814, italics omitted.) We reject Loper's argument because it is contrary to the approach

⁵ Specifically, the statute provides that "the secretary [of the Department] or the Board of Parole Hearings . . . may recommend to the court that the prisoner's sentence be recalled." (§ 1170, subd. (e)(1).) The only role that the defendant can play in initiating the compassionate release process is *internally* within the prison by contacting the prison's chief medical officer or the secretary of the Department to try to obtain a recommendation for compassionate release from them. (§ 1170, subd. (e)(6).)

in *Pritchett*, *supra*, 20 Cal.App.4th 190, and the cases it cites, where the inquiry was *not* whether the defendant would suffer injury if the defendant's sentence recall was denied, but rather whether the defendant had a right to *request* the relief that the trial court denied. Here, as in *Pritchett*, the applicable statutory provision simply does not give the defendant the right to request recall of his sentence, and, as in *Pritchett*, that fact is dispositive of whether the defendant's substantial rights are affected.

Next, Loper argues that cases interpreting section 1170, subdivision (d)(1) are not relevant here because of differences between that statute and section 1170, subdivision (e). He argues that (1) the two statutes "serve very different core purposes and functions," in that one focuses on compassionate release and the other focuses on correcting errors in the original sentence; (2) under section 1170, subdivision (d)(1), a trial court has a 120-day deadline to recall a sentence, but that no such deadline exists in the compassionate release provision of section 1170, subdivision (e); and (3) the facts of *Pritchett* are distinguishable because in that case, the trial court granted the defendant's request to recall his sentence for the purpose of avoiding the time limit for filing an appeal. (*Pritchett*, *supra*, 20 Cal.App.4th at pp. 192-193.) We do not find any of Loper's attempted distinctions to be relevant. As we have explained, the fundamental legal principle expressed in *Pritchett* and the cases it cites is that a defendant's substantial rights are not affected by denial of an order for a sentence recall under section 1170, subdivision (d)(1) because the defendant had no legal right to request the order in the first place. That principle is equally applicable here where Loper had no right in the first place to request a recall of his sentence under section 1170, subdivision (e).

When a defendant appeals from a postjudgment order that is not appealable, the proper procedure is to dismiss the appeal. (*People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1726-1727.) Accordingly we dismiss Loper's appeal.

DISPOSITION

The appeal is dismissed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

DECLARATION OF SERVICE

Re: *People v. James Alden Loper*
Supreme Court Case Number _____
Court of Appeal Case Number D062693

I, Raymond M. DiGuseppe, 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.

On July 2, 2013, I served the foregoing **Petition for Review** 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 Postal Service in Southport, North Carolina:

James Alden Loper
CDCR # AG-3529
R.J.D.C.F.
A-4-103L
P.O. Box 799001
San Diego, California 92179

Richard Siref, Esq.
Deputy Alternate Public Defender
8525 Gibbs Drive
Suite 208
San Diego, California 92123

Attorney General's Office
P.O. Box 85266
San Diego, California 92186-5266
(copy also served electronically to:
ADIEService@doj.ca.gov)

Jeanie Cetlinski, Esq.
Deputy District Attorney
330 West Broadway
Suite 700
San Diego, California 92101

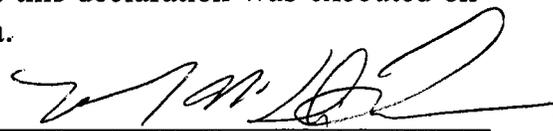
Appellate Defenders, Inc.
555 W. Beech Street, Suite 300
San Diego, California 92101
eservice-criminal@adi-sandiego.com

Clerk of Court
Superior Court of San Diego County
Main Courthouse
220 West Broadway, Third Floor
San Diego, California 92101

Clerk of Court
Court of Appeal
Fourth District, Division One
750 B Street, Suite 300
San Diego, California 92101

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 2, 2013, at Southport, North Carolina.

Raymond M. DiGuseppe
Declarant


Signature