

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent

v.

JAMES ALDEN LOPER,
Defendant and Appellant.

Case No. S211840

Court of Appeal
No. D062693

San Diego County
Superior Court
No. SCD225263

SUPREME COURT
FILED

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

Frank A. McGuire Clerk

Deputy

APPELLANT'S OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Is a trial court's order denying the recall of a sentence under Penal Code section 1170, subdivision (e), appealable?¹
2. Assuming such an order is appealable, what is the proper standard of review on appeal?
3. Was the trial court's order denying the recall of appellant's sentence correct in this case?

INTRODUCTION

“For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs. Needless suffering and death have been the well-documented result.” (*Brown v. Plata* (2010) 131 S.Ct. 1910, 1923.) And for years the Legislature has been acutely aware of the inherent limitations on the state’s ability to provide adequate healthcare, particularly for the aged and chronically ill inmates who “consume a disproportionate amount” of the resources – a problem that it sought to address back in 1997 by enacting the compassionate release act under section 1170(e), because “[p]risons were never intended to act as

¹ Statutory citations are to the Penal Code unless otherwise indicated. Section 1170, subdivision (e), shall hereafter be cited as “section 1170(e).”

long term health care providers for chronically ill prisoners.” (Sen. Com. on Appropriations, Rep. on Assem. Bill 29 (1997-1998 Reg. Sess.) July 14, 1997, p. 1.) The Legislature’s 2007 amendment to section 1170(e) aimed to further this objective “by increasing the awareness of CDCR staff and families of terminally ill prisoners regarding the compassionate release process” and “extend[ing] 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, Rep. on Assem. Bill No. 1539 (2007–2008 Reg. Sess.) Sept. 5, 2007, coms., p. 5.)

But the Legislature has remained stymied in its goals. Enacting the “medical parole” alternative in 2010, it said, “last year only two such releases were approved and we continue to incarcerate inmates who could, by any rational standard, be released without posing a threat to the public.” (Rep. on Sen. Bill No. 1399 (2009-2010 Reg. Sess.), p. 4.) “Because of their medical condition . . . they are no longer a threat to society and the ones being punished are the taxpayers.” (*Ibid.*) Appellant is one of these prison inmates who has been left to languish in the critically overburdened, undeniably inadequate prison healthcare system. The fate of him and countless other similarly situated inmates ultimately rests in the hands of the trial courts, who act as the gatekeepers in deciding whether an inmate will actually be released under section 1170(e). So when these gatekeepers deny a request for compassionate release, it is crucial that their decisions be subject to meaningful appellate review, which can only exist if the inmate has a personal right to appeal the denial. It is also vital that the provisions of section 1170(e) defining the class of inmates eligible for compassionate release be given a broad construction so as to best effectuate the end goal of relieving the prisons and the state of burdens they cannot and will not carry. Otherwise, inmates like appellant will simply add to the “needless suffering and death” and just become another tragic statistic in this broken system.

STATEMENT OF THE CASE AND FACTS

On November 1, 2010, appellant pleaded guilty to one count of insurance fraud (Ins. Code, § 11880, subd. (a)) involving losses over \$200,000 (§§ 186.11, subd. (a)(3), 12022.6, subd. (a)(2)). Medical records produced while he was in local custody pending sentence reflect that he had a history of severe and worsening health problems, leading one physician to opine on January 26, 2011 that: “If this patient was to be incarcerated, he would not be able to receive the medical attention that he needs and this would have dire consequences to his health.” (CT 44.) On February 4, 2011, appellant was sentenced to a stipulated prison term of six years and was eventually housed at the Robert J. Donovan Correctional Facility (RJDCF). (CT 30, 76). Appellant’s conditions worsened over the next year until on May 21, 2012, a physician for the CDCR (the California Department of Corrections and Rehabilitation) issued a “Request for Compassionate Release,” reporting that “[appellant’s] life expectancy is short and possibly less than 6 months,” he “is at increased risk of sudden cardiac death,” and “[his] condition is likely to worsen.” (CT 58.)

The CDCR conducted a diagnostic study of appellant, which led to findings in a June 21, 2012 report that: he “is considered terminally ill with a life expectancy of less than six months to live or is permanently medically incapacitated and requires 24-hour total care;” he does not pose a threat to public safety; and “[t]here are verifiable community resources appropriate, sufficient, and immediately available to provide support and sustenance and to meet the inmate’s medical and/or psychological needs upon release.” (CT 55-57.) On August 14, 2012, the CDCR Undersecretary of Operations issued a letter to the trial court concurring in the study’s findings and recommending a recall of appellant’s sentence and his release. (CT 52-53.)

At the initial hearing on August 24, 2012, the court noted it had received the CDCR’s recommendation for a recall of appellant’s sentence,

it heard arguments from counsel on the matter, and ultimately issued a request for further information from the CDCR with the following order:

The Court ORDERS the Department of Corrections and Rehabilitation to provide the court with the following information: An update on [appellant's] condition; An opinion from a doctor of the Department of [C]orrections and Rehabilitation as to whether [appellant's] illness would produce death within six months; What treatment is available for [appellant]; What, if any, treatment [appellant] refused while in prison and how that refusal may have affected his current condition; Provide a more extensive release plan taking into consideration that [appellant's] brother Robin Prest[o]n also has an extensive criminal history.

(CT 82-83.)²

On September 12, 2012, Dr. Seeley, one of the CDCR's Chief Medical Executives, issued a letter in response stating as follows:

The patient [appellant] has been seen recently by both his Cardiologist and his Primary Care Provider in RJDCF. His condition has been and remains stable. His hypertension has improved. There is noted weight gain but this is not concerning as he is not presenting with any symptoms suggestive for acute congestive heart failure. He has a follow up with the cardiologist in approximately one month's time. His current status does not indicate for or against a prognosis of less than six months to live. He is an ill individual with disease processes that will continue to progress, despite treatment, leading to his eventual demise. [Appellant] is not a surgical candidate for his cardiac disease but is on optimal medical management. He has refused placement in our Infirmary but has not refused treatment and is noted to be in good compliance with his medications. I do not have any updates relative to post release care; no additional information has been brought forward in this regard.

(CT 60.) At the subsequent hearing on September 14, 2012, the trial court noted it had received this letter from Dr. Seeley. (RT 2-3.) After hearing

² This information is contained in the court minutes (CT 82-83); the record does not include a Reporter's Transcript of the proceedings.

further argument on the matter, the court denied the request for release, finding insufficient evidence that appellant had “an incurable condition caused by illness or disease that will produce death within six months”:

It appears to the court that based on the information that’s been presented by the Department of Corrections and Rehabilitation, there is an insufficient showing for the court to make the findings required under Penal Code section 1170, subdivision (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. [¶] The most recent information received from the [CDCR] from their Chief Medical Executive includes the sentence that his current status does not indicate for or against a prognosis of less than six months to live. And the language of the statute is quite definitive in terms of the determination that the department physician needs to make, and that is a letter that’s dated September 12, 2012. So based on that, the court is denying the request from the [CDCR]. [¶] Obviously, if circumstances change and there’s more definitive information, the court will consider the new information at that time.

(RT 6-7.)

On September 20, 2012, appellant filed a notice of appeal from the denial of the request for compassionate release. (CT 61.) On appeal, he challenged the order denying relief on the basis that he satisfied the eligibility criteria under section 1170(e), his release would directly advance the primary goals the Legislature sought to achieve in creating the remedy of compassionate release, and the trial court’s contrary decision was based on a misinterpretation and misapplication of the law. The Court of Appeal never reached this question. It held that, because appellant had no right to initiate the request for release under section 1170(e), he had no right to appeal an order denying such a request, and therefore the order could not have affected his “substantial rights” or have otherwise vested him with standing to personally file an appeal. So it dismissed the case. (Opn. 5-9.)

ARGUMENT

I

THE ONLY INTERPRETATION OF SECTION 1170(E) CONSISTENT WITH BOTH THE TEXT AND LEGISLATIVE INTENT OF THE COMPASSIONATE RELEASE LAW IS THAT AN INMATE HAS THE RIGHT TO PERSONALLY APPEAL AN ORDER DENYING A REQUEST FOR SUCH RELEASE

The basic provisions of section 1170(e) establishing the “compassionate release” mechanism are as follows: “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.” (§ 1170, subd. (e).)³ The criteria listed in paragraph (2) are as follows:

(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.

³ Subdivision (a)(1) of section 1170 provides:

The Legislature finds and declares that the purpose of imprisonment for crime is punishment. This purpose is best served by terms proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances. The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by determinate sentences fixed by statute in proportion to the seriousness of the offense as determined by the Legislature to be imposed by the court with specified discretion.

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

(§ 1170, subd. (e)(2)(A)-(C).)⁴

“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).” (§ 1170, subd. (e)(7).) When the secretary or the board makes such a recommendation to the court based upon these criteria, the court shall hold a hearing within 10 days of receipt of the recommendation to “consider whether the prisoner’s sentence should be recalled.” (§ 1170, subds. (e)(2)(C), (e)(3).) “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[.]” (§ 1170, subds. (e)(2).)

“The interpretation of section 1170, subdivision (e) is a question of law that we review de novo.” (*Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 588.) “In construing statutes, we determine and effectuate legislative intent.” (*In re Martinez* (2012) 210 Cal.App.4th 800, 809, citing *People v. Woodhead* (1987) 43 Cal.3d 1002, 1007.) “To ascertain intent, we look first to the words of the statutes.” (*In re Martinez*,

⁴ This remedy is not available to inmates sentenced to death or to life in prison without the possibility of parole. (§ 1170, subd. (e)(2)(C).)

at p. 809, citing *Dyna-Med, Inc., v. Fair Employment & Housing Comm.* (1987) 43 Cal.3d 1379, 1386-1387.) “However, the ‘plain meaning’ rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute.” (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) “Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible.” (*In re Martinez*, at pp. 809-810, quoting *California Mfrs. Assn. v. Public Utilities Comm.* (1979) 24 Cal.3d 836, 844.) “If . . . the language is susceptible to more than one reasonable interpretation, then we look to ‘extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part.’” (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519, quoting *Woodhead*, at p. 1008.) “We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.” (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) The same is true when a statute is silent on a matter: “In drawing from the statute a procedural scheme to provide for situations as to which the statute is silent, it is appropriate to conform to the legislative purpose evidenced by the enactment.” (*People v. Haycock* (1975) 45 Cal.App.3d 90, 93, citing *Morse v. Municipal Court* (1974) 13 Cal.3d 149, 156.)

The text of section 1170(e) is silent as to whether an inmate may personally file an appeal from an order denying compassionate release. So we must answer this question in light of the Legislature’s express intent to “streamline[]” and “fast track” the release of “terminally ill” prisoners in enacting the compassionate release statutory scheme (Assem. Com. on

Public Safety, Rep. on Assem. Bill No. 29 (1997–1998 Reg. Sess.) Apr. 15, 1997, pp. 1-2) and its intent to “significantly increas[e] fiscal savings” of the early release mechanism by later making it available to “permanently medically incapacitated” inmates (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007-2008 Reg. Sess.) Sept. 5, 2007, coms., p. 5). The subsequent enactment of the “medical parole” alternative (§ 3550) is also informative because that was born out of the frustration with the actual results under section 1170(e): in enacting section 3550, “the Legislature wanted to create a mechanism that increases the number of inmates being released from prison as compared to *the few* released under section 1170” (*In re Martinez, supra*, 210 Cal.App.4th at p. 811, italics added) and thus “address some of the shortcomings of the medical recall statute” (*id.* at p. 812). Thus, we must construe the provisions of section 1170(e) “in a way that effectuates [section 1170(e)’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; *id.* at pp. 591, 592 [the purpose of section 1170(e) “was not just compassion; it was to save the state money”].)

Serving as the backdrop in this context are the general principles that determine when a party has a right to appeal a judicial order. That right 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.) Under traditional constitutional principles, a party has “standing” to invoke the judicial process when he or she has a “beneficial interest” in the controversy – that is, ““some special interest to be served or some particular right to be preserved or protected *over and above the interest held in common with the public at large.*”” (*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.) The statutory right of appeal is found in section 1237, which “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.)

There can be no question that an inmate like appellant who is the subject of a request for compassionate release has constitutional “standing” with respect to the outcome of those proceedings because he certainly has a “special interest” or a “particular right to be preserved or protected” of more significance than a member of the general public: his freedom from continued imprisonment is at stake. “The interest in securing that freedom, the freedom ‘from bodily restraint,’ lies ‘at the core of the liberty protected by the Due Process Clause.’” (*Turner v. Rogers* (2011) 131 S.Ct. 2507, 2518, quoting *Foucha v. Louisiana* (1992) 504 U.S. 71, 80; see also *People v. Wilkinson* (2004) 33 Cal.4th 821, 837, quoting *People v. Olivas* (1976) 17 Cal.3d 236, 250-251 [““We conclude that personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and United States Constitutions.””].)

The quintessentially fundamental interest at stake in the context of a request for compassionate release necessarily drives the analysis of whether a denial of the request and the resulting continued deprivation of the inmate’s freedom is a post-judgment order “affecting the substantial rights” of the inmate so as to create a statutory right of appeal. (§ 1237, subd. (b)). The published case authority concerning the interpretation of the compassionate release provisions in general is scant at best, and it is virtually non-existent concerning the appealability of orders denying such release with the exception of the Court of Appeal’s opinion in this case. But the case law addressing appealability issues in analogous situations compellingly demonstrates the Court of Appeal was wrong in concluding

that an inmate has no right to *appeal* an order denying a request for such release simply because he or she cannot *initiate* the request. The only conclusion that advances the clear legislative intent of section 1170(e), is consistent with the principles governing a party's right to appeal, and sets sound policy is that the inmate has a personal right to appeal the order.

To illustrate, courts have taken as simply settled or understood that the denial of a recommendation of outpatient status for a defendant institutionalized in a state hospital or treatment facility (see § 1600 et seq.) is an order the defendant may personally appeal as a post-judgment order affecting his or her "substantial rights" under section 1237, subdivision (b). (*People v. Sword* (1994) 29 Cal.App.4th 614, 619 & fn. 2; *People v. Cross* (2005) 127 Cal.App.4th 63, 66, 72-74; see also *People v. Coleman* (1978) 86 Cal.App.3d 746, 750 ["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."].) Notably, like the compassionate release provisions, the director of the hospital or facility is to initiate the process for outpatient placement; there is no particular provision permitting the patient to personally initiate such a request. (§§ 1602, 1603.)⁵

⁵ An institutionalized person is eligible for placement on outpatient status where: "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" (§ 1602, subd. (a)); or "[t]he director of the state hospital or other treatment facility to which the person has been committed advises the committing court and the 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" (§ 1603, subd. (a)).

Indeed, in *People v. Herrera* (1982) 127 Cal.App.3d 590, the court considered the appealability of an order denying the Board of Prison Terms' request for recall and resentencing under former section 1170, subdivision (f), on the basis of "disparate" sentencing. (*Id.* at p. 595, fn. 3.) The specific issue was: "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.) Answering this question in the affirmative, the court explained that "[a]pplication of [section 1237, subdivision (b)] 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.*) "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." (*Id.* at p. 597.) Thus, the order was appealable as affecting his substantial rights. (*Ibid.*)

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* (1986) 42 Cal.3d 437, 445-446.) The Court did *not* 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* to support its own point that “[t]he 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.)⁶ 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*.

Still other cases illustrate that a party’s right to appeal an order turns upon the nature of the party’s interest at stake, and not simply upon whether the party was the one who initiated the process leading to the order. (*In re Daniel K.*, *supra*, 61 Cal.App.4th at pp. 667-670 [the trial court’s ruling upon the motion of the 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 reports because such reports contain personal information about the defendant and thus an order releasing a report involves his or her substantial rights]; see also *People v. Wortham* (Oct. 24, 2013, A138769) 220 Cal.App.4th 1018, 2013 WL 5755193, *2 [a defendant may appeal the denial of a petition for recall

⁶ See also *In Daniel K.* (1998) 61 Cal.App.4th 661, 670, where, in relying upon *Herrera* to find an order appealable as affecting a party’s “substantial rights” under section 1237, subdivision (b), the court noted that the opinion had been “disapproved on another point” in the *Martin* case.

of sentence under the Three Strikes Reform Act because a mistaken determination “would unquestionably affect a petitioner’s substantial rights” since it “would foreclose the possibility of a reduced sentence”]⁷; 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], and *People v. Beck* (1994) 25 Cal.App.4th 1095, 1103 [same].)

This review highlights the problems with the Court of Appeal’s conclusion that the denial of a request for compassionate release and the resulting continued deprivation of the inmate’s fundamental liberty interest is not appealable as an order affecting the inmate’s substantial rights. The “crucial similarity” that the court found between this case and the line of cases concluding that the defendant had no right to *appeal* a resentencing order under section 1170, subdivision (d),⁸ is that neither provides the

⁷ A defendant does have the right to initiate the process of petitioning for recall of a sentence under the Three Strikes Reform Act. (§ 1170.126, subds. (a)-(b).) However, the *Wortham* court did not reply upon this as a factor in support of its holding that the defendant may appeal an order denying such a petition. (*People v. Wortham, supra*, 2013 WL 5755193, *1-3.) The issue of whether such an order is appealable is currently under review in this Court. (See *Teal v. Superior Court* (2013) 217 Cal.App.4th 308, review granted July 31, 2013, S211708, and *People v. Hurtado* (2013) 216 Cal.App.4th 941, review granted July 31, 2013, S212017.)

⁸ 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

defendant with the right to *initiate* the proceedings that led to the order. (Opn. at 7.) Not only is this not determinative of the appealability issue, but those cases are also clearly inapposite and therefore do not control here.

The main point in *People v. Pritchett* (1993) 20 Cal.App.4th 190 – the principal case on which the Court of Appeal relied (Opn. at 6-8) – was that “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” (*Pritchett*, at p. 193). 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.) The same concern was at the core of the other opinions the Court of Appeal cited in the context of purported appeals from invalid orders under section 1170, subdivision (d) (Opn. at 5-9): the trial courts necessarily lacked any jurisdiction to recall and resentence at the time that they purportedly rendered or were asked to render such an order because the 120-day time limitation had already expired (see *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). Similarly, in *People v. Gallardo*, *supra*, 77 Cal.App.4th 971, 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

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.

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 limit[ation] 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 there too the focus was in curtailing the abuse of the appellate process to extend the time to appeal.

Again, whether and the extent to which a defendant has the right to initiate the process leading to the post-judgment order does not answer the question of whether he or she may appeal the order. But a comparison of the text in subdivision (d) with that of subdivision (e) on this point further illustrates why the two subdivisions do not make for a good analogy. While section 1170(e) does not permit the inmate to apply directly to the trial court for compassionate release, it does empower the inmate (or a family member or designee) to apply for such relief at the prison level by requesting that the chief medical officer or the secretary initiate the process: “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.” (§ 1170(e)(6).) “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)” (*ibid.*, italics added) – that is, “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” (§ 1170(e)(4)). And then, “[i]f the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2) [the eligibility for release criteria], the secretary or board may recommend

to the court that the prisoner's sentence be recalled." (§ 1170(e)(6).) Section 1170, subdivision (d), contains no provision at all enabling the defendant to initiate or even be involved any part of the recall proceedings. Thus, the defendant's interest and stake in the compassionate release process under subdivision (e) is more "substantial" than in the context of recall proceedings under subdivision (d) by the very terms of the statute.

The dismissal of the appeals in *People v. Niren* (1978) 76 Cal.App.3d 850 and *Thomas v. Superior Court* (1970) 1 Cal.3d 788 are also distinguishable from our case. Those cases dismissed a defendant's challenge to a trial court's exercise of, or refusal to exercise, its power to recall and resentence, but that was because 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 section 1168, which could not be initiated by a defendant]; *Thomas*, at p. 790 [dismissing a 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].) 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 because the process was a legal nullity from the start. But here, the request *was* properly initiated by the appropriate prison officials, 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.

And it is clear that the inmate has -- and should have -- the right to personally appeal an order denying a request for compassionate release, particularly in light of the express legislative intent behind section 1170(e). Were it otherwise, the inmate -- whose life and liberty hang in the balance -- would be denied any meaningful opportunity for appellate review, because the

trial court's ruling would be insulated from any review except in the unlikely case that prison officials decide an appeal would be in the best interests of the *prison* based on its own administrative and budgetary concerns. So the vast majority of such denials would go unchecked, leaving the inmate without any effective remedy and subverting the entire process of appellate review which is essential to ensuring that trial courts are properly interpreting and applying the law so as to effectuate its purpose. (See *People v. Wortham, supra*, 220 Cal.App.4th 1018, 2013 WL 5755193, *2 ["even on straightforward determinations, trial courts can make mistakes"].) This sort of result would severely undermine the Legislature's years of concerted and repeated efforts to *streamline* and *fast track* this process so that the state *will be able to release* these prisoners under section 1170(e). (*Martinez v. Board of Parole Hearings, supra*, 183 Cal.App.4th at pp. 590-591.) Such an interpretation of section 1170(e) is thus untenable as it would "defeat the general purpose of the statute." (*People v. Jenkins, supra*, 10 Cal.4th at p. 246.) Rather, the well settled canons of statutory construction, fundamental principles of justice, and sound policy dictate that an inmate must be found to have a constitutional and statutory right to appeal a trial court's denial of a request for compassionate release, regardless of the mere fact that it is not the inmate who initiates the request. This is "the construction that comports most closely with the apparent intent of the Legislature." (*Jenkins*, at p. 246.)

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II

THE PROPER STANDARD OF REVIEW ON APPEAL FROM THE ORDER DENYING COMPASSIONATE RELEASE UNDER SECTION 1170(E) IS DE NOVO

Below, the parties assumed that a trial court's denial of a request for compassionate release under section 1170(e) would generally be reviewed under the abuse of discretion standard on appeal. However, the statute itself is silent on the matter of the appropriate standard of review, no published case has directly addressed it, and the resolution of the issue did not materially affect the analysis of appellant's claims below because, as he argued, he is entitled to relief even under this deferential standard. Now that the issue is squarely before this Court on review, an analysis of the general principles governing the appropriate standard of review in light of the specific circumstances of this case demonstrates that the trial court's denial of the compassionate release request should be reviewed de novo.

While general principles exist regarding the appropriate standard of review on appeal from an order at the superior court level in various contexts, the applicable standard must ultimately be based on the circumstances of the particular case. (See *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 859-860 ["any determination underlying any order is scrutinized under the test appropriate to such determination"].) Deference to the trial court under the abuse of discretion standard of review is appropriate for orders based on resolutions of conflicting evidence. "The power to judge the credibility of witnesses and to resolve conflicts in the testimony is vested in the trial court . . ." (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1463, quoting *In re Carpenter* (1995) 9 Cal.4th 634, 646.) "Where there is conflicting testimony, reviewing courts recognize that the trier of the facts has the better opportunity to judge the credibility of witnesses. In such a case the trial court's findings of fact, to the extent

that they rest upon an evaluation of credibility, should be regarded as *conclusive* on appeal.” (*Hamlin*, at p. 1463, internal quotations omitted, italics original.) Similarly, rulings based on ““first-hand observations made in open court”” – like those resolving claims of juror misconduct in which “the trial court has taken evidence, including the testimony of the jurors themselves – are entitled to such deference because the trial court is ““best positioned”” to make the relevant findings. (*People v. Ault* (2004) 33 Cal.4th 1250, 1267, quoting *People v. Cromer* (2001) 24 Cal.4th 889, 901.)

On the other hand, when the ruling did not involve the credibility determinations and resolution of conflicts inherent in taking live testimony, *de novo* is the appropriate standard of review on appeal: “We shall review the trial court’s decision and the contentions of the parties in light of the materials that properly were before that court. Because the trial court’s findings were based solely upon documentary evidence, we independently review the record.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 677; accord *In re Lowe* (2005) 130 Cal.App.4th 1405, 1420; see also *In re Ryner* (2011) 196 Cal.App.4th 533, 543, *In re Lazor* (2009) 172 Cal.App.4th 1185, 1192, and *In re Hare* (2010) 189 Cal.App.4th 1278, 1291 [all finding that the appropriate standard of review from a denial of parole was *de novo* because the trial court relied solely upon documentary evidence].) When “the trial court’s task is simply to evaluate . . . the documentary record summarizing the facts accepted by the parties . . . the usual deference that would apply to the review of a trial court’s ruling based on its superior ability to resolve *factual* questions (e.g., the credibility of witnesses appearing before it) is unwarranted.” (*In re Zepeda* (2006) 141 Cal.App.4th 1493, 1497, italics original.) In such contexts, the facts are considered essentially undisputed. (*Ibid.*) “Where there is no conflict in the evidence, there is no requirement that the reviewing court view it in the light most favorable to upholding the trial court’s determination” (*People v. Duren* (1973) 9 Cal.3d 218, 238) and

“the ultimate conclusion to be drawn from the evidence is a question of law” (*Miller v. Ellis* (2002) 103 Cal.App.4th 373, 378). So it is well settled that the *de novo* standard applies in such contexts. (*Miller*, at p. 378; see also *Swift v. Superior Court* (2009) 172 Cal.App.4th 878, 882 [“Because the court’s order in this matter turns on the application of the statute to undisputed facts, we find the *de novo* standard of review appropriate.”], and *Upland Police Officers Ass’n v. City of Upland* (2003) 111 Cal.App.4th 1294, 1301 [“a *de novo* standard of review is appropriate” when “the trial court interpreted the statute in light of the undisputed facts”].)

“Similarly, when the resolution of an issue on appeal requires the court to consider abstract legal doctrines, to weigh underlying policy considerations, and to balance competing legal interests, *de novo* review is appropriate.” (*In re Lowe*, *supra*, 130 Cal.App.4th at p. 1421.) “The California Supreme Court has held that if ‘the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.’” (*Ibid.*, quoting *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) “And to make an application of decisional law . . . entails the resolution of a mixed question of law and fact that is predominantly one of law, inasmuch as it ‘requires a critical consideration, in a factual context, of legal principles and their underlying values’ rather than merely “experience with human affairs.” (*Aguilar v. Atl. Richfield Co.*, *supra*, 25 Cal.4th at p. 860, quoting *Crocker*, at p. 888.) “The former is scrutinized *de novo*.” (*Aguilar*, at p. 860.) Likewise, *de novo* review is appropriate when the trial court’s decision “is in contravention of controlling legal authority” concerning issues that involve significant legal and public policy matters. (*Lowe*, at pp. 1421-1422 [applying the *de novo* standard to decide an issue involving the Governor’s constitutional authority to reverse grants of parole because the

trial court's decision contravened controlling authority and implicated the serious public policy matter of "balanc[ing] petitioners' interest in release on parole against the Governor's interest in protecting the public".)

The provisions of section 1170(e) establishing the procedure by which the recall process is initiated indicate that the majority, if not all, of the evidence presented and considered by the trial court will be of merely a documentary nature in most cases, as it was in this case. This begins with basic eligibility for release criteria: whether an inmate is "terminally ill" or "permanently medically incapacitated" (§ 1170(e)(2)(A), (e)(2)(C)) will almost invariably be established through written medical information and reports of the inmate's treating medical personnel. The same is true of the criterion that the inmate "does not pose a threat to public safety" (§ 1170(e)(2)(B) – that determination will largely be based on records and reports of the inmate's criminal history, such as probation reports and other CDCR records. Indeed, in describing what specifically must be presented to the trial court for its consideration, the statute says that the recommendation for recall "shall include one or more medical evaluations, a postrelease plan, and findings pursuant to paragraph (2)." (§ 1170(e)(7).) Thus, while the trial court holds a live hearing on the matter (§ 1170(e)(3)), at which it could *theoretically* take testimony from witnesses, the statute reflects that the Legislature envisioned the information before the court would consist entirely of records, reports, and other documentary evidence and that the hearing would simply serve as an opportunity for argument.

That is precisely how the process played out in this case. All of the evidence that the trial court considered was documentary in nature. That evidence consists of the written materials in the record on appeal: the CDCR's initial May 21, 2012 request for compassionate release, detailing the severity of appellant's conditions, and explaining that his "life expectancy is short and possibly less than 6 months" and that he "is at

increased risk of sudden cardiac death” (CT 58); the CDCR’s June 12, 2012 diagnostic study, which included medical details, analyses, and opinions concerning appellant’s eligibility as a “terminally ill” or “permanently medically incapacitated” inmate, as well as his criminal history, assessments of the degree of risk he would pose to the public upon release, and details of his post-release plan (CT 55-57); the Undersecretary’s August 14, 2012 written evaluation reiterating many of the same details and concurring in the conclusions of the study (CT 52-53); the September 12, 2012 letter that Dr. Seeley prepared concerning appellant’s condition in response to the court’s request for additional information (CT 60); and other various documents detailing appellant’s medical history (CT 31-48).

At the first hearing on the matter, it is apparent that no witnesses testified and no other evidence was presented at that time. (CT 82-83.) No witnesses testified at the second hearing either; the only additional evidence presented was another document from defense counsel, which demonstrated that appellant’s brother (with whom he had planned to reside upon release) was discharged from parole in 2005. (RT 2-7.) Essentially, the hearings simply served as an opportunity for argument from the parties about the existing documentary evidence before the court. Such arguments of course do not constitute evidence themselves. (See *People v. Kiney* (2007) 151 Cal.App.4th 807, 815 [“Unsworn statements of counsel are not evidence because unsworn testimony in general does not constitute ‘evidence’ within the meaning of the Evidence Code.”].) Without any conflicting witness testimony or even any disputes about the content of the evidence in the documents presented, the trial court did not make any of the sort of credibility determinations or resolutions of conflicting evidence in connection with ruling upon the request for compassionate release. So the deferential abuse of discretion standard is neither appropriate nor warranted here. (*In re Zepeda, supra*, 141 Cal.App.4th at p. 1497.) “In the absence of

any controverted factual evidence on this appeal, therefore, we are presented with a pure question of law for which the appropriate review is de novo.” (*Miller v. Ellis, supra*, 103 Cal.App.4th at p. 378.) And that question of law concerns the operation of a statutory scheme that implicates significant legal and policy matters and that, appellant contends, the trial court fundamentally misinterpreted and misapplied – factors further supporting the conclusion that de novo is the appropriate standard of review. (See *Aguilar v. Atl. Richfield Co., supra*, 25 Cal.4th at p. 860.)

III

APPELLANT’S RELEASE WOULD DIRECTLY ADVANCE THE LETTER AND SPIRIT OF SECTION 1170(E), BOTH BY RELIEVING THE STATE OF THE TREMENDOUS BURDENS ASSOCIATED WITH PROVIDING THE CONSTANT CARE AND TREATMENT HE REQUIRES AND BY EXTENDING COMPASSION TO A CHRONICALLY ILL PERSON WHO POSES NO THREAT TO PUBLIC SAFETY

A. The Proper Interpretation of the Eligibility Criteria

Interpreting the eligibility for release criteria under section 1170(e) must be done in light of the Legislature’s stated purposes in wrestling with the deep and persistent crisis of the state’s inability to finance and provide even the most minimally adequate level of healthcare to the chronically ill. Foremost here are the Legislature’s recognition that “prisons should not act as long term health care providers for terminally ill prisoners” and its aim to “significantly increas[e] fiscal savings from their release” by “increasing the awareness of CDCR staff and families of terminally ill prisoners regarding the compassionate release process” and “extend[ing] the reach of the law to include prisoners who are permanently medically incapacitated . . .” (*Martinez v. Board of Parole Hearings, supra*, 183 Cal.App.4th 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; see *People v. Jenkins*, *supra*, 10 Cal.4th at p. 246 [“We must select the construction that comports most closely with the apparent intent of the Legislature. . . .”].) As lawmakers have noted, “[t]he level of overcrowding, and the impact of the population crisis on the day-to-day prison operations, is staggering . . .” (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007–2008 Reg. Sess.), June 26, 2007, coms., p. 5.)

Indeed, the woefully inadequate prison healthcare system is at the heart of the ongoing litigation against the state in the federal courts. (See Opinion and Order Requiring Defendants to Implement Amended Plan in *Coleman v. Brown*, No. 2:90-cv-0520 LKK JFM P (E.D.Cal.), and *Plata v. Brown*, No. C01-1351 THE (N.D.Cal.), June 20, 2013 (“Combined Order”).)⁹ “The State’s failure has created a vacuum of leadership, and utter disarray in the management, supervision, and delivery of care in the Department of Corrections’ medical system.” (Combined Order at 5.) “[T]he constitutional violations resulted in the imposition of a drastic remedy: placing the prison medical care system in a receivership.” (*Ibid.*) As recently as May 23, 2013, the receiver reported: “Simply put, we do not have appropriate and adequate healthcare space at the current population levels.” (*Id.* at pp. 22-23.) The state is (and has been) under repeated orders to significantly reduce the prison population for over four years. (*Id.* at pp. 5-6, 15-26, 31-32.) To implement this reduction, the state has specifically been ordered “to develop a system to identify prisoners who are

⁹ The CDCR has posted a listing of all the proceedings in this litigation on its website, with links to the orders issued in both underlying cases. (See http://www.cdcr.ca.gov/News/3_judge_panel_decision.html.) The particular order referenced above is also posted on the website, under the following link: <http://www.cdcr.ca.gov/News/docs/3JP-June-2013/federal-judges-order-gov-brown-to-release-some.pdf>.

unlikely to reoffend or who might otherwise be candidates for early release, to the extent that they have not already done so.” (*Id.* at pp. 26, 41-42, 51.)

Turning to section 1170(e)’s eligibility criteria with this background in mind, the statute provides that an inmate is eligible for compassionate release so long as he or she: (1) is either “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” (the “terminally ill” prong) or “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” (the “permanently medically incapacitated” prong); and (2) “[t]he conditions under which the prisoner would be released or receive treatment do not pose a threat to public safety.” (§ 1170(e)(2)(A)-(C).)

Regarding the terminally ill prong, the potential difficulty resides in determining what the Legislature meant by “an illness or disease *that would produce death* within six months.” (§ 1170(e)(2)(A), italics added.) Even respondent acknowledges that this does not mean eligibility is limited to those inmates who are *certain* to die within six months of a specific date. (Respondent’s Brief in the Court of Appeal at 10 [stating that “the statute does not require a determination of certain death within six months”].) Indeed, the word “would” is “[u]sed in the main clause of a conditional statement to express simply a *possibility or likelihood*”; it is also “[u]sed to indicate *uncertainty*.” (American Heritage Dict. (4th ed. 2000), p. 1984, cols. 1-2, emphasis added; see also <http://www.merriam-webster.com/dictionary/would>, italics added [“would” is “used in auxiliary function in the conclusion of a conditional sentence to express a *contingency or possibility*” and “in auxiliary function to express *doubt or uncertainty*”].) Thus, the use of the word “would” in defining the sort of illness or disease of concern shows the statute does not require a prognosis

of certain death within six months from a fixed point in time. Instead, the most reasonable interpretation of the phrase “*would produce death within six months*” is that the inmate is suffering from an illness or disease so severe and debilitating that it *presents the possibility* of leading to the inmate’s death within six months from the time of a given prognosis. That is, the focus is upon the illness or disease itself as being characteristic of one that *could* cause the inmate to die within as short a period of time as six months, even though it cannot be said with certainty that death will occur.

In fact, a “prognosis” of any sort inherently involves uncertainty. Rendering a “prognosis” is understood to mean: “[t]he forecast of the *probable* outcome or course of a disease; the patient’s *chance* of recovery” (<http://www.medterms.com/script/main/art.asp?articlekey=5061>, italics added); “the act or *art* of *foretelling* the course of a disease;” or “the *prospect* of survival and recovery from a disease as *anticipated* from the usual course of that disease or indicated by special features of the case” (<http://www.merriam-webster.com/medlineplus/prognosis>, italics added). So the text of the statute itself indicates that the terminally ill prong concerns an illness or disease which merely presents the possibility or likelihood of death within six months from a given prognosis date. This is consistent with the legislative history which generally described the class of inmates of concern as simply those who are “terminally” or “chronically” ill without reference to precisely how much time they have left to live. (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 29 (1997–1998 Reg. Sess.) Apr. 15, 1997, pp. 1–2; Sen. Com. on Appropriations, Rep. on Assem. Bill 29 (1997-1998 Reg. Sess.) July 14, 1997, p. 1.) In fact, the lawmakers placed particular emphasis on those inmates with AIDS. (Rep. on Assem. Bill No. 29, *supra*, at pp. 1-2 [where the bill’s author noted: “The bill is frankly an attempt to fast track the release of prisoners with AIDS and other terminal illnesses . . .;” “[o]ver 350 male prisoners are

known to have died from AIDS alone at the California Medical Facility at Vacaville between June 1985 and January 1995;” and “[s]tudies have shown that prisoners with AIDS and other terminal illnesses generally live half as long as people with the same conditions on the outside”].) It is now commonly understood that persons with AIDS can and often do live for many years beyond contracting HIV. Nevertheless, as an inherently life-threatening, incurable condition, it is also commonly understood that the carrier perpetually faces a premature demise, and the possibility of a rapid decline in health toward that demise, as the disease runs its course. So by the very nature of the disease, there is always the *possibility* that it “*would* produce death within six months” from any given point in time.

Such a broad construction of the statutory language is preferable because it directly advances the statute’s primary purpose. Conversely, interpreting the statute narrowly to mean that relief is only available when prisoner is *certain* to die within six months from a fixed point in time would frustrate the ultimate goal of alleviating the state of the burden of housing terminally and chronically ill individuals who pose no threat to public safety, because few cases would ever satisfy such a standard. We must bear in mind that the apparent problem the Legislature has faced to date is an overly stringent interpretation of the eligibility criteria in the trial courts because so few compassionate releases have been approved, such that, in the Legislature’s opinion, “we continue to incarcerate inmates who could, by any rational standard, be released without posing a threat to the public.” (Rep. on Sen. Bill No. 1399 (2009-2010 Reg. Sess.), p. 4.)

A broad interpretation of the permanently medically incapacitated prong is also appropriate and necessary to effectuate the legislative intent. Beginning again with the text, this criterion applies to an inmate who is “permanently medically incapacitated with a medical condition” that did not exist at the time of the original sentencing and 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.” (§ 1170(e)(2)(C).) While the illustrations include vegetative or comatose conditions, the list also includes a condition that involves a mere “loss” of muscular control or neurological function with no limitation on the extent of such loss except that it must ultimately render the inmate “permanently unable to perform activities of basic daily living” resulting the need for “24-hour total care.”

The Code of Regulations broadly defines “activities of basic living” as “breathing, eating, bathing, dressing, transferring, elimination, arm use, or physical ambulation.” (Cal. Code Regs., tit. 15, § 3076, subd. (b)(2), italics added.) And the statute does not define or limit the nature of the “care” that the inmate must be receiving in connection with these activities – some may require constant physical assistance, others may simply need medicinal treatments, while still others may require a combination of both. Coupled with the statute’s use of the qualifying phrase “including, but not limited to” in its preface the list of illustrative conditions, it is evident that this provision is intended to cover *any* medical condition, whatever the particular nature, that renders the inmate unable to breathe, eat, bathe, dress, transfer, eliminate, use his or her arms, or to physically ambulate without *some* form of continuous physical assistance or medical care.

Notably, those who argued against the bill expanding the compassionate release law to “permanently medically incapacitated” inmates did so primarily based upon the potential breadth of its application:

This bill dispenses . . . vastly expands the program without unambiguous direction as to who else might qualify. For example, the term ‘24-hour total care’ is unclear. Would that require a caretaker to be at the person’s side for literally 24 hours per day or could that be interpreted to mean that the

person lives in his parents' house where someone is on the premises at all times? Additionally, while a coma or brain death should be easily identified, the same cannot be said for 'loss of muscular control or neurological function.'

(Sen. Rules Com., Sen. Public Safety Com., Report on Assem. Bill No. 1539 (2007–2008 Reg. Sess.), Third Reading, July 5, 2007, coms., p. 7 [comments of the California District Attorneys Association].)

Of course, the opponents lost their bid to defeat this legislation, and it is now law in the same form that they challenged as too broad. So the courts must accept and apply the law consistent with the Legislature's judgment that extending compassionate release to inmates whose conditions satisfy the terms of section 1170(e)(2)(C) "is both humane and cost-effective," will ensure the procedure for medical release is "effective," and "will result in significant fiscal savings in the state's General Fund without reducing public safety." (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007–2008 Reg. Sess.) Sept. 5, 2007, coms., p. 5.) This construction of the statute, which is fully consistent with the language of the provision itself and the related regulations, directly advances the express purposes of the Legislature and should therefore be adopted over a more narrow construction that attempts to limit the scope of its application in contravention of the legislative intent. (See *People v. Jenkins*, *supra*, 10 Cal.4th at p. 246 ["We must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences."].)

These interpretations of the eligibility criteria would also be consistent, and assist the state in complying, with the currently looming mandate of the federal courts that the prisons identify and release inmates

who are “unlikely to reoffend or who might otherwise be candidates for early release.” (Combined Order, *supra*, at pp. 26, 41-42, 51.)

B. Appellant is Entitled to Compassionate Release Under a Proper Interpretation of the Eligibility Criteria

At the outset, there is no real dispute that “the conditions under which [appellant] would be released” would “not pose a threat to public safety.” (§ 1170(e)(2)(B).) His current guilty plea conviction arose out of insurance and tax fraud allegations. (CT 1-2, 5-7, 10-11, 72-74.) The diagnostic study noted that “[t]here is not a documented victim or next of kin of the commitment offense in the community who would suffer fear from the release of the inmate back into the community.” (CT 56.) While appellant’s prior record involved some convictions and allegations of violent conduct, most of those are remote and the bulk of the past criminal conduct involved non-violent offenses. (CT 12-23.) Indeed, the Undersecretary specifically concluded that, despite this history, appellant “would not pose a threat to public safety, if he were released.” (CT 52.) Moreover, appellant has displayed no problematic behavior during his time in prison. (CT 53, 55, 57.) While appellant planned to live with his brother, Robin Preston, who apparently had a criminal history, Preston was discharged from parole and has evidently remained free of any other criminal convictions since 2005. (CT 83; RT 5-6.) And to the extent appellant’s history may indicate a propensity to engage in criminal behavior individually or collectively with others, his significantly compromised state of health as reflected in the record clearly removes any realistic concern that he could or would pursue any individual or joint criminal endeavors, as it shows that his time on the outside would be entirely consumed with maintaining the basic sustenance necessary to simply stay alive.

The record shows appellant's long history of serious and debilitating health problems has caused significant damage to his health, requiring constant medical attention and treatment for the last several years, and setting him on irreversible downward spiral toward a premature death, which renders him eligible for release under section 1170(e) as either a "terminally ill" or a "permanently medically incapacitated" inmate.

Appellant has suffered from major heart problems since at least 2003: he had two myocardial infarctions (heart attacks) that year, as well as two open heart surgeries, including a quadruple bypass; (CT 33, 44); in 2006, he underwent seven angioplasty procedures and "stent surgeries" (CT 33); and his heart disease has continued to worsen over time such that now he has "severe coronary artery disease" or "ASHD"¹⁰ (CT 35, 58). He also suffers from long term and pervasive respiratory problems: "advanced chronic obstructive pulmonary disease (COPD)"¹¹ (CT 52); "severe esophagitis" (CT 38)¹²; and asthma (CT 33, 35, 37). In addition, he suffers from a litany of other debilitating, largely irreversible health problems: "uncontrollable diabetes" (CT 36, 44); "uncontrolled" blood pressure (CT

¹⁰ "ASHD" is Arteriosclerotic Heart Disease, which is characterized by "the narrowing of the blood vessels that result in blocking the blood flow to the heart." (<http://arteriosclerotic.org/arteriosclerotic-heart-disease/>.) It is also referred to as Coronary Artery Disease or "CAD." (<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0004449/>.)

¹¹ "COPD" refers to Chronic Obstructive Pulmonary Disease, a lung disease that most commonly results in a combination of "long-term cough with mucus" and "destruction of the lungs over time." (<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001153/> [The United States National Library of Medicine's website].)

¹² "Esophagitis is a general term for any inflammation, irritation, or swelling of the esophagus, the tube that leads from the back of the mouth to the stomach." (<http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002138/>.)

52); hyperlipidemia¹³ (CT 35); “severe degenerative joint disease” and arthritis (CT 35, 44); severe digestive and gastrointestinal problems, including stomach ulcers, frequent nausea, chronic acid reflux and vomiting, chest pain, diarrhea, and rectal bleeding (CT 37, 38); “uncontrolled” hypertension (CT 35, 52, 56); “bad eyesight” (CT 35); and chronic neck pain (CT 35). Appellant has also suffered a stroke (CT 44), a fractured neck disk (CT 33), a severe hernia requiring surgical repair (CT 43, 44), and has had to undergo surgery on both knees (CT 33).

As a result of these conditions, appellant was placed on the “Total Disabled” list and became a “participant of the Disability Placement Program as an Intermittent Wheelchair user (DPO).” (CT 56.) It was also determined that due to the severity and pervasiveness of appellant’s various medical problems, his state of health is too poor for him to undergo any of the procedures necessary to reverse or stop the progression of the coronary heart disease – that is, the condition was deemed incurable. (CT 52, 58.) In the May 2012 request for compassionate release, in addition to opining that appellant’s “life expectancy is short and possibly less than 6 months,” the authoring physician (Dr. Campbell) noted that appellant “is at increased risk of sudden cardiac death,” and “[his] condition is likely to worsen.” (CT 58.) Dr. Campbell believed release was necessary based on “the lack of effective medical treatment or surgery” available for appellant. (CT 58.)

As of the time of the diagnostic study in June 2012, appellant was still listed as “not ambulatory and . . . currently using a wheelchair with portable oxygen.” (CT 56.) The study reported that appellant “is considered terminally ill with a life expectancy of less than six months to live or is permanently medically incapacitated and requires 24-hour total care.” (CT 56.) As of the time of the recommendation for release from the

¹³ “Hyperlipidemia” means high blood cholesterol levels. ([http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001440/.](http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001440/))

Undersecretary in August 2012, it was noted that appellant's COPD "requires a BiPAP [a bi-level positive airway pressure mechanical ventilator], multiple medications and continuous 3 ½ liters of oxygen," "[h]is blood pressure remains uncontrolled despite medications," he was still intermittently wheelchair dependent, and remained "at risk of sudden cardiac death." (CT 52.) The Undersecretary also noted that "[p]hysicians have determined that he has less than six months to live." (CT 52.)

While Dr. Seeley noted that appellant's condition was "stable," his hypertension had improved, and he was not showing symptoms of "acute congestive heart failure" at the time of the evaluation in September 2012, Dr. Seeley reaffirmed that appellant's cardiac disease was irreversible and was only being "manage[d]" with medical treatments, and that appellant "is an ill individual with disease processes that will continue to progress, despite treatment, leading to his eventual demise." (CT 60.) Dr. Seeley's report was very brief and simply did not address or in any way dispel the existence of the long and well documented history of appellant's numerous other significantly debilitating medical conditions or the multitude of specific ongoing treatments required to manage those conditions. This includes the findings in the more in-depth reports that appellant remained "at risk of *sudden* cardiac death" (CT 52, italics added), continuously required a ventilator to manage his COPD (CT 56), and regularly required medicinal treatments to manage his inherently life threatening conditions of "uncontrollable" diabetes and high blood pressure (CT 36, 44, 52).

On this record, appellant can properly be deemed eligible for compassionate release under either of the two main bases for such release. Although Dr. Seeley believed the September 2012 evaluation did not "indicate for or against a prognosis of less than six months to live" (CT 60), again, the proper and most appropriate construction of the terminally ill prong requires only that the inmate be suffering with a condition severe

enough that it *could* cause the inmate to die within as little as six months, even though it cannot be said with certainty that death will occur. Like an inmate suffering with AIDS whose actual lifespan is unknown but who perpetually faces the prospect of a rapid decline toward death at any time, appellant is undeniably on an irreversible downward spiral toward inevitable death and perpetually faces the risk that his health could take a sharp turn for the worse at any time, leading to rapid or even sudden death. At the end of the day, appellant is the very sort of “chronically ill” inmate the Legislature had in mind when it created the remedy of compassionate release for an inmate whose release poses no risk to public safety and would relieve the state of the significant costs associated with attempting to provide him the continuous care and treatment he requires just to stay alive. (See Assem. Com. on Public Safety, Rep. on Assem. Bill No. 29 (1997–1998 Reg. Sess.) Apr. 15, 1997, pp. 1–2; Sen. Com. on Appropriations, Rep. on Assem. Bill 29 (1997-1998 Reg. Sess.) July 14, 1997, p. 1.)

Even if the record does not sufficiently show appellant’s conditions “would produce death within six months” as determined by a department physician under the terminally ill prong, he is nevertheless eligible for release on the independent basis that he falls squarely within the purview of the permanently medically incapacitated prong. Again, the proper construction, most consistent with the relevant text and intent, is that this prong applies to *any* condition that renders the inmate unable to breathe, eat, bathe, dress, transfer, eliminate, use his or her arms, or ambulate without *some* form of continuous physical or medicinal assistance. Appellant has a multitude of such conditions – from his severe and irreversible coronary artery disease and uncontrollable diabetes and high blood pressure, to his advanced COPD and severe esophagitis, to his severe degenerative joint disease and severe gastrointestinal problems, appellant is and has been significantly and continuously debilitated in numerous ways.

While some of the records reflect that appellant has been able to perform activities of basic living (CT 58), it is obvious that he has been able to perform the most basic of such activities only with some significant form of constant care or assistance: he needs a mechanical ventilator to properly breathe, a wheelchair to properly ambulate, and a litany of regular medicinal treatments to manage his incurable heart disease, diabetes, high blood pressure, chronic pain, and other debilitating diseases and conditions.

Simply put, if appellant does not fall into the class of “terminally ill” inmates for whom the Legislature initially created compassionate release, his numerous highly debilitating conditions requiring constant treatment through the already crippled prison healthcare system certainly place him within the class of “permanently medically incapacitated” inmates to whom the Legislature expanded the reach of section 1170(e) because their release would “result in significant fiscal savings in the state’s General Fund without reducing public safety.” (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007–2008 Reg. Sess.) Sept. 5, 2007, coms., p. 5.)

For these reasons, a *de novo* review shows that appellant is entitled to compassionate release under either prong of section 1170(e). Therefore, the Court of Appeal’s judgment dismissing the appeal should be reversed and the trial court’s order denying the request for compassionate release should be reversed with directions to grant the request for such release.

C. The Result is the Same Even If the Court Applies the Deferential Abuse of Discretion Standard in Reviewing the Order

Should this Court find that the proper standard of review on appeal is abuse of discretion, the result is the same because the order denying the request for compassionate release was a clear abuse of discretion.

“The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court’s ruling

under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712.) Generally then, "[t]he question is whether the trial court's actions are consistent with the substantive law and, if so, whether the application of law to the facts of the case is within the range of discretion conferred upon the trial court." (*Bd. of Admin. v. Wilson* (1997) 57 Cal.App.4th 967, 973.) However, "when the trial court's order involves the interpretation and application of a constitutional provision, statute, or case law, questions of law are raised and those questions of law are subject to de novo (i.e., independent) review on appeal." (*Prigmore v. City of Redding* (2012) 211 Cal.App.4th 1322, 1333-1334; see also *San Francisco Unified Sch. Dist. ex. rel. Contreras v. First Student, Inc.* (2013) 213 Cal.App.4th 1212, 1228 ["the trial court's conclusions of law are not binding on us and are reviewed de novo"], and *In re Charlisse C.* (2008) 45 Cal.4th 145, 159 [same].)

It is settled that "a disposition that rests on an error of law constitutes an abuse of discretion." (*In re Charlisse C.*, *supra*, 45 Cal.4th at p. 159.) "The scope of discretion always resides in the particular law being applied." (*First Student, Inc.*, *supra*, 213 Cal.App.4th at p. 1228.) "There is no discretion to adopt a reading, or make an application, of decisional law that is inconsistent with the law itself." (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 860; accord *Cont'l Ins. Co. v. Superior Court* (1995) 32 Cal.App.4th 94, 108.) "Any such reading or application must necessarily be deemed an abuse." (*Aguilar*, at p. 860.) "[R]eversal is appropriate where there is no reasonable basis for the ruling or the trial court has applied 'the wrong test' or standard in reaching its result." (*Donahue v. Donahue* (2010) 182 Cal.App.4th 259, 269, quoting *Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239.) Simply put, "[i]t is an

abuse of discretion for a trial court to misinterpret or misapply the law.” (*Prigmore v. City of Redding, supra*, 211 Cal.App.4th at p. 1334.)

That is precisely what led to the trial court’s ruling in this case. First, even though the diagnostic study report specifically stated that appellant was eligible for compassionate release under *either* of section 1170(e)’s two main prongs – the study stated that appellant “is considered terminally ill with a life expectancy of less than six months to live *or* is permanently medically incapacitated and requires 24-hour total care” (CT 56, italics added) – the trial court never considered or even mentioned appellant’s eligibility under the permanently medically incapacitated prong. Instead, it focused exclusively upon appellant’s eligibility under the terminally ill prong, and specifically the aspect of the prong requiring that the inmate has “an illness or disease that would produce death within six months.” (§ 1170(e)(2)(A).) That was the main reason the court put off ruling on the matter at the initial hearing, as it wanted “[a]n opinion from a doctor of the Department of [C]orrections and Rehabilitation as to whether [appellant’s] illness would produce death within six months.” (CT 83.) And this was the sole reason why the court ultimately denied the request at the subsequent hearing based on Dr. Seeley’s evaluation, as it found there had been an insufficient showing that appellant “has an incurable condition caused by illness or disease that will produce death within six months as determined by a department physician.” (RT 6.) The court remarked that “the language of the statute is quite definitive” that such a finding is required, with no mention or apparent recognition of the independent basis for release as a “permanently medically incapacitated” inmate. (RT 6.) Thus, the ruling was necessarily an abuse of discretion, and a prejudicial one at that because, as explained, the record shows appellant is entitled to release on this basis regardless of whether his conditions “would produce death within six months” for purposes of the terminally ill prong.

The specific wording of the trial court's reasoning reveals the second reason why its ruling constitutes an abuse of discretion. It was not only under the misimpression that the terminally ill prong had to be satisfied before *any* release is authorized under section 1170(e), it interpreted this prong to require that the inmate's condition "*will* produce death within six months as determined by a department physician." (RT 6, italics added.) Unlike the word "will," which connotes certainty in the matter, the statute requires only a determination that the inmate has "an incurable condition caused by an illness or disease that *would* produce death within six months." (§ 1170, subd. (e)(2)(A), emphasis added.) Again, the word "would" connotes simply a *possibility or likelihood*, and thus inherently expresses some level of doubt or uncertainty about the matter. Thus, the trial court artificially raised the bar required to satisfy this prong by essentially requiring evidence of *certain* death within six months. As discussed, under a proper construction of the terminally ill prong, appellant's severe and pervasive conditions, the worst of which are now incurable, indeed warrant his release under this prong of the statute. This was clear based on the record before the court at the time of the initial hearing, such that no further evaluation or report was required. So the trial court both misinterpreted and misapplied the law in denying release under this prong. (See *Aguilar v. Atl. Richfield Co.*, *supra*, 25 Cal.4th at p. 860.) A correct understanding and application of this prong would have led to a grant of compassionate release at the time of the initial hearing. And the same is true regarding the other prong: had the court appreciated that appellant was eligible for release for the independent reason that he was "permanently medically incapacitated," there would have been no need to request further information about the likelihood of death within six months.

The only other basis the trial court cited in the context of the proceedings that led up to the denial of release was the adequacy of the

post-release plan, as it noted at the initial hearing that it wanted “a more extensive release plan taking into consideration that [appellant’s] brother Robin Prest[o]n also has an extensive criminal history.” (CT 83.) But both the diagnostic study and the Undersecretary’s evaluation detailed a clear post-release plan. The study specifically stated that “[t]here are verifiable community resources appropriate, sufficient, and immediately available to provide support and sustenance and to meet the inmate’s medical and/or psychological needs upon release.” (CT 56-57.) The Undersecretary further noted that appellant would reside with his brother, Robin Preston, who would provide the necessary accommodations. (CT 53.) The Undersecretary also explained that CDCR staff had spoken with Preston, “who confirmed these post-release plans and stated he will provide a room for his brother, transportation to and from the doctor’s office when needed, and his wife will be home during the day to care for [appellant].” (CT 53.) Preston also confirmed that the home was wheelchair accessible. (CT 53.) Regarding Preston’s criminal history, he had been released from parole in 2005 (RT 5-6) and, in any event, as the prison officials found, there is no realistic concern that *appellant* would engage in further criminal conduct.

So there was no basis for finding the post-release plan inadequate. More importantly, though, this was not the basis for the ultimate ruling. At the final hearing on the matter, the court made no mention of the post-release plans in denying the request, citing as the sole basis for its ruling the perceived inadequacy of the evidence to support the court’s erroneous reading of the statute – that compassionate requires a showing that appellant’s conditions *will* produce his death within six months. And, again, this was a prejudicial abuse of discretion because appellant’s conditions not only render him “terminally ill” under a proper reading of the statute, but they also qualify him for compassionate release on the independent basis that he is “permanently medically incapacitated.”

For these reasons, the trial court's order cannot withstand scrutiny even under the deferential abuse of discretion standard of review because, but for its error in the interpretation and application of the law, there is surely a reasonable probability that appellant would have been granted compassionate release under section 1170(e). (See *In re J.S.* (2011) 196 Cal.App.4th 1069, 1078, quoting *People v. Watson* (1956) 46 Cal.2d 818, 836 [in cases of ordinary error, reversal is required where the reviewing court, “after an examination of the entire cause, including the evidence,’ is of the ‘opinion’ that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error”].)

CONCLUSION

The preservation of the most important of personal interests, the proper administration of criminal justice, and the fundamental judicial task of interpreting statutory schemes so as to best advance the legislative intent all compel the conclusion that appellant and inmates like him have the right to personally appeal the denial of a request for compassionate release. As a 60 year old inmate who poses no threat to public safety upon release and who suffers from “multiple complex medical problems” (CT 38) that will continue to require constant treatment and care at taxpayer expense through an already crippled healthcare system until he meets his inevitable demise, appellant is entitled to compassionate release under any standard of review. He is precisely the sort of inmate for whom this release remedy exists. The judgment of the Court of Appeal should be reversed, and the trial court should be directed to grant appellant compassionate release.

Dated: December 4, 2013

Respectfully submitted,



Raymond M. DiGuiseppe,
Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

I certify that the attached Appellant's Opening Brief on the Merits is prepared with 13 point Times New Roman font and contains 13,321 words.

Dated: December 4, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Raymond M. DiGuiseppe", written in a cursive style.

Raymond M. DiGuiseppe

DECLARATION OF SERVICE

Re: *People v. James Alden Loper*
Supreme Court Case Number S211840
Court of Appeal Case Number D062693

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

On December 5, 2013, I served the foregoing **Appellant's Opening Brief on the Merits** on each of the parties listed below, by placing a true copy of it in a sealed addressed envelope with postage fully paid and depositing it with the Postal Service in Southport, North Carolina, with the exception of ADI which I served electronically:

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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 December 5, 2013, at Southport, North Carolina.

Raymond M. DiGuiseppe
Declarant


Signature