In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JAMES ALDEN LOPER,** **Defendant and Appellant.**	Case No. S211840

SUPREME COURT
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Fourth Appellate District, Division One, Case No. D062693
San Diego County Superior Court, Case No. SCD225263
The Honorable Laura H. Parsky, Judge

RESPONDENT'S BRIEF ON THE MERITS

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
LISE S. JACOBSON
Deputy Attorney General
State Bar No. 183862
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-2293
Fax: (619) 645-2271
Email: Lise.Jacobson@doj.ca.gov
Attorneys for Plaintiff and Respondent

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ISSUES PRESENTED

This Court directed the parties to brief the following three issues:

(1) Is a trial court's order denying the recall of a sentence under Penal Code section 1170, subdivision (e) (1170(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 defendant's sentence correct in this case?

INTRODUCTION

The compassionate release provision in section 1170(e) vests a trial court with discretion to recall an inmate's sentence if it finds the inmate is terminally ill with a prognosis of less than six months to live or is permanently medically incapacitated and the inmate's release would not pose a threat to public safety. The provision does not afford an inmate a right to request a recall in the trial court. Instead, the provision authorizes only the Secretary of the Department of Corrections and Rehabilitation (Department) or Board of Parole Hearings or both to recommend a sentence recall.

Because an inmate has no right under section 1170(e) to request a sentence recall in the trial court, the trial court's denial of a recall recommendation cannot affect an inmate's substantial rights within the meaning of section 1237, subdivision (b). Consequently, a denial of a recall recommendation is not an appealable order. This interpretation of the law is consistent with the language of the statute and case law interpreting similar language in another recall provision, section 1170, subdivision (d) (1170(d)).

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[1] All future undesignated code references are to the Penal Code.

While inmates cannot appeal a denial order in a compassionate release case, they may seek review of such orders in a petition for writ of mandate. Because writ review is generally more expeditious than appellate review, this interpretation of section 1170(e) furthers the purposes of the compassionate release provision, which are compassion and saving the state money by fast-tracking the release of qualified prisoners. A contrary interpretation would frustrate this purpose, particularly in cases in which a prognosis of less than six months to live proves to be accurate.

If this Court, however, were to determine that a denial order is appealable, a trial court's underlying factual findings should be reviewed for substantial evidence and its exercise of discretion for an abuse of discretion. This interpretation of the law is consistent with the language of the statute and this Court's jurisprudence.

Finally, the trial court in this case properly denied the recall recommendation because of the absence of a determination by a Department physician that appellant has a terminal illness that would cause death within six months and because of the presence of evidence that appellant was not permanently medically incapacitated as he could perform the activities of basic daily living and does not require 24-hour total care.

STATEMENT OF THE CASE AND FACTS

According to the probation report, appellant and his cohabitant operated a tree trimming business that underpaid the worker's compensation insurance premium to the State Compensation Fund by $282,407.97, and underpaid taxes on their employees to the Employment Development Department by $108,573.59. (CT 7, 10-11.) In exchange for the dismissal of two tax-related charges and a stipulated six-year sentence, appellant pled guilty on November 1, 2010, to misrepresentation of a fact in violation of Insurance Code section 11880, subdivision (a). He also admitted the allegations that his crime involved more than $100,000 (§

186.11, subd. (a)(3)), and that he had sustained a prior strike conviction (§ 667, subds. (b)-(i)). (CT 5-7, 74.) On February 4, 2011, the trial court imposed the stipulated six-year sentence. (CT 75-76.)

The consideration of a sentence recall under § 1170(e) began on May 21, 2012, when Staff Physician Surgeon Ronelle Campbell recommended that appellant be released based on his medical conditions and the lack of effective medical treatment or surgery. (CT 58.) Dr. Campbell reported that appellant has uncontrolled hypertension, advanced chronic obstructive pulmonary disease and severe coronary artery disease. The request stated that appellant's blood pressure remains uncontrolled despite multiple medications and his pulmonary disease requires "BiPAP, multiple medications and continuous 3 1/2 liters of oxygen." (2 CT 58.) Multiple cardiologists had evaluated appellant's coronary artery disease, which "was felt to be maximally controlled with medications." (CT 58.) He is not a surgical candidate because of his other medical conditions and cardiac catheterization is not recommended. (CT 58.) His last catheterization, which was in August 2011, demonstrated "occlusion in his prior cardiac grafts and critical occlusion (90%) in another coronary artery[.]" (CT 58.) Dr. Campbell wrote that appellant is "currently able to perform all ADLSs [activities of daily living] and is housed in [an] outpatient setting." (CT 58.) He cannot work because of daily chest pain and shortness of breath at rest. Appellant uses a wheel chair intermittently. He has been recommended to be admitted to the hospital or Correctional Treatment Center, but had refused on multiple occasions. (CT 58.) Dr. Campbell opined that appellant's "life expectancy is short and *possibly* less than 6 months." (CT 58, italics added.) Appellant has an increased risk of sudden cardiac death, and his condition is likely to worsen. (CT 58.) Dr. Campbell stated that if compassionate release were granted, appellant would be cared for by his

daughter. (CT 58.) The chief medical executive also signed the request for release as did a third physician. (CT 58.)

The Department then conducted a diagnostic study and issued its findings and recommendation on June 21, 2012. The study stated that appellant, who was 58 years old at that time, had a pattern of criminal history that began in his early 20's. (CT 55.) The study repeated Dr. Campbell's medical diagnoses and prognosis and said that appellant is not ambulatory and currently uses a wheelchair with portable oxygen. (CT 56.) Appellant's medical condition is expected to deteriorate and will require placement in an in-patient setting or hospice. Appellant had not been assigned to any work details because of his health problems and was placed on the "Total Disabled list" on November 17, 2011. (CT 56.) The study reported that appellant had family members who were willing to care for him if he were released, including his daughter. (CT 56-57.)

In a letter to the trial court dated August 14, 2012, the Department's Undersecretary for Operations recommended the recall of appellant's prison commitment and sentence. (CT 52-54.) The undersecretary repeated the medical information from the request form and stated that appellant "is currently able to perform all the activities of daily living, and is housed in an outpatient setting." (CT 52.) The undersecretary also stated that "[p]hysicians have determined that [appellant] has less than six months to live." (CR 52.) The undersecretary did not indicate or state that appellant was permanently medically incapacitated. (CT 52-54.) The undersecretary opined that appellant would not pose a threat to public safety if released. (CT 52.) The undersecretary acknowledged appellant's lengthy criminal history, but noted that appellant's institutional adjustment had been satisfactory, that he had not been disciplined while in custody and that his brother and sister-in-law were equipped to care for him. (CT 53.)

The undersecretary enclosed a copy of the Department's diagnostic study with her letter. (CT 52.)

On August 24, 2012, the trial court held a hearing to consider the undersecretary's recommendation. Defense counsel reported that appellant's medical condition was worse, that appellant was refusing medical attention and that there was no medical treatment for appellant's illness. (CT 82.) The prosecutor opposed the release, arguing appellant had had ongoing medical problems for several years and that the release plan was unsuitable. (CT 82.) The court found the Department had provided only minimal information and ordered the Department to provide the court with the following additional information: (1) an update on appellant's condition; (2) an opinion from a Department physician regarding whether appellant's illness would produce death in six months; (3) what medical treatment is available for appellant; (4) what treatments, if any, appellant had refused and how that refusal has affected his current condition; and (5) a more extensive release plan, taking into consideration that appellant's brother also has an extensive criminal history. (RT 48; CT 82.)

On September 13, 2012, the court received a response to its request from Dr. Kyle Seeley, the Chief Medical Executive at Richard J. Donovan Correctional Facility. (CT 60.) Dr. Seeley wrote that appellant had recently been seen by his cardiologist and primary care provider, that "[h]is condition has been and remains stable" and that his hypertension had improved. Appellant had gained weight, but did not present with any symptoms indicative of acute congestive heart failure. Dr. Seeley opined that appellant's "current status does not indicate for or against a prognosis of less than six months to live." (CT 60.) Dr. Seeley described appellant as "an ill individual with disease processes that will continue to progress, despite treatment, leading to his eventual demise." (CT 60.) Appellant was

not a surgical candidate for his cardiac disease but was "on optimal medical management." (CT 60.) Appellant refused placement in the infirmary, but not treatment, and is in good compliance with his medications. Dr. Seeley did not have any updates regarding appellant's post-release care. (CT 60.)

The following day, September 14, 2012, the court resumed the hearing on the release request. (2 CT 84.) The court noted that it had received a copy of Dr. Seeley's letter and that the letter did not answer all the questions it had raised at the last hearing. (RT 2-3.) The prosecutor agreed, arguing the letter did not address whether appellant was compliant with his treatment and how any non-compliance contributed to his problems. (RT 3.) The prosecutor also argued that, because appellant appeared to be more stable than he had been in the past and Dr. Seeley could not state whether appellant had less than six months to live, appellant did not fall within the purview of section 1170(e). (RT 3-4.)

Defense counsel countered that appellant had been compliant with his medications. Defense counsel also advised the court that Dr. Campbell, a Department physician who last treated appellant on June 28, 2012, was present in court and could answer questions. (RT 5.) Defense counsel advised the court that Dr. Campbell said that nobody can say with medical certainty when someone is going to die and that appellant could die tomorrow or possibly live beyond six months. What was clear was that appellant's condition is inoperable and he does not have long to live. (RT 5.) Defense counsel also provided the court with documentation indicating that appellant's brother had been discharged from parole in 2005. (RT 5-6.)

The court ruled that, based on the information provided by the Department, there was an insufficient showing for the court to make the requisite findings under section 1170(e)(2), in particular, "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." (RT

6.) The court noted the most recent information from the Department included a statement that appellant's "current status does not indicate for or against a prognosis of less than six months to live." (RT 6.) The language of the statute, the court pointed out, is quite definitive regarding the determination that a Department physician needs to make. (RT 6.) Consequently, the court denied the request to recall the sentence and release appellant. (RT 6.) In so doing, the court noted "if circumstances change and there's more definitive information, the court will consider the new information at that time." (RT 7.)

Six days later, on September 20, 2012, appellant filed a notice of appeal. (CT 61.) On January 31, 2013, appellant filed his opening brief and motion for expedited processing of the appeal. On February 22, 2013, the Court of Appeal granted appellant's motion. On March 19, 2013, respondent filed a brief, and on April 4, 2013, appellant filed his reply brief. On May 29, 2013, the Court of Appeal filed its opinion, holding that because appellant had no right to apply to the trial court for a sentence recall under section 1170(e), the trial court's denial of the Department's recommendation did not affect his substantial rights, and the denial order was, therefore, not appealable. Accordingly, the Court of Appeal dismissed the appeal.

On September 11, 2013, this Court granted appellant's petition for review.

ARGUMENT

I. A TRIAL COURT'S DENIAL OF A RECOMMENDATION FOR COMPASSIONATE RELEASE FROM PRISON IS NOT AN APPEALABLE ORDER

Appellant contends the trial court's denial of the Department's recommendation for his compassionate release from prison is an appealable order because it affects his "substantial rights" within the meaning of

section 1237, subdivision (b). (ABOM 6-18.) But because appellant did not have a right to request that the trial court recall his sentence and release him, the trial court's denial of the Department's recommendation could not affect his substantial rights. Consequently, the trial court's denial order is not appealable. This construction of the compassionate release statute is consistent with the well-established precedent interpreting a similar recall provision, section 1170(d) and its predecessor, section 1168. Furthermore, this construction of section 1170(e) does not leave inmates without a remedy. Appellant and inmates like him may challenge a trial court's order denying recall and release in a petition for writ of mandate. Because writ review is generally quicker than appellate review, this construction of section 1170(e) effectuates the Legislature's purposes in enacting the statute: compassion and saving the state money by fast-tracking the release of qualified prisoners.

A. The Compassionate Release Provision – section 1170(e)

The compassionate release provision, which was originally enacted in 1997 and amended in 2007, currently provides that "if the secretary [of the Department] 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(e)(1).) The criteria in paragraph (2) are:

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

(§ 1170(e)(2)(A)-(C).)

The board must "make findings pursuant" to paragraph (2) "before making a recommendation for resentence or recall to the court." (§ 1170(e)(2).) "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(e)(7).)

"Within 10 days of receipt of a positive recommendation by the secretary or the board, the court shall hold a hearing to consider whether the prisoner's sentence should be recalled." (§ 1170(e)(3).) "If possible, the matter shall be heard before the same judge of the court who sentenced the prisoner." (§ 1170(e)(8).) "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) [of paragraph (2)] exist." (§ 1170(e)(2).) "If the court grants the recall and resentencing application, the prisoner shall be released by the department within 48 hours of receipt of the court's order, unless a longer time period is agreed to by the inmate." (§ 1170(e)(9).) The compassionate release provision "does not apply to a prisoner sentenced to death or a term of life without the possibility of parole." (§ 1170(e)(2).)

The compassionate release provision also provides that a "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).) "If the secretary

determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled." (*Id.*) The secretary must submit a release recommendation "within 30 days in the case of inmates sentenced to determinate terms and, in the case of inmates sentenced to indeterminate terms, the secretary shall make a recommendation to the Board of Parole Hearings with respect to the inmates who have applied under this section." (*Id.*)

B. Because of Similarities Between section 1170(d) and (e), the Legislature Presumably Intended for section 1170(e) to Be Construed Like section 1170(d) with Respect to the Appealability of Denial Orders

""""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, quoting *People v. Mazurette* (2001) 24 Cal.4th 789, 792.) Thus, whether a trial court's denial of the board or secretary's recommendation for compassionate release is appealable is ultimately a question of statutory construction.

In construing statutes, the "goal is 'to ascertain the intent of the enacting legislative body so that [a court] may adopt the construction that best effectuates the purpose of the law.'" (*People v. Albillar* (2010) 51 Cal.4th 47, 54-55 (citations omitted).) A reviewing court must "'first examine the words of the statute, "giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent."'" (*People v. Albillar, supra,* 51 Cal.4th at pp. 54-55.) If the language of a statute is ambiguous or subject to more than one interpretation, a court may consider legislative history. (*People v. Harrison* (2013) 57 Cal.4th 1211, 1222.) If the language of the statute is silent on a particular procedural situation, "it is appropriate to conform to the legislative purpose evidenced

by the enactment" in drawing a procedural scheme to address the situation. (*People v. Haycock* (1975) 45 Cal.App.3d 90, 93.)

This Court must also harmonize "'the various parts of a statutory enactment . . . by considering the particular clause or section in the context of the statutory framework as a whole.'" (*People v. Murphy* (2001) 25 Cal.4th 136, 142, citations omitted, alterations in original.) Additionally, "'It is an established rule of statutory construction that similar statutes should be construed in light of one another [citations], and that when statutes are in pari materia similar phrases appearing in each should be given like meanings. [Citations.]'" (*People v. Lamas* (2007) 42 Cal.4th 516, 525, citations omitted, alterations in original.) Finally, "the Legislature is presumed to know about existing case law when it enacts or amends a statute . . . ." (*In re W.B., Jr.* (2012) 55 Cal.4th 30, 57.)

As appellant correctly notes (ABOM 8), section 1170(e) is silent on whether an inmate has a right to appeal a trial court's order denying the board's or secretary's recommendation to recall an inmate's sentence. Section 1237, the general provision governing criminal appeals, authorizes a defendant to appeal "[f]rom a final judgment of conviction except as provided in Section 1237.1 and Section 1237.5" (§ 1237, subd. (a)) and "[f]rom any order made after judgment, affecting the substantial rights of the party" (§ 1237, subd. (b)). Because the trial court's order in this case was not a "final judgment" within the meaning of section 1237, subdivision (a), any entitlement to appeal turns on whether the order affected appellant's "substantial rights."

"If interpreted broadly, the phrase" "'order made after judgment, affecting the substantial rights' of the defendant" "would apply to any postjudgment attack upon the conviction or sentence." (*People v. Gallardo* (2000) 77 Cal.App.4th 971, 980, quoting § 1237, subd. (b).) But

"decisional authority has limited the scope of the phrase, defining appealability more narrowly." (*Ibid.*)

Although compassionate release proceedings do not involve an attack upon a conviction or sentence, the reasoning of one line of authority that does concern such an attack, namely cases addressing the appealability of orders denying recall requests under section 1170(d), is persuasive.

In 1997, when the Legislature enacted section 1170(e) (*Martinez v. Board of Parole Hearings* (2010) 183 Cal.App.4th 578, 590), section 1170(d) authorized a trial court "within 120 days of the date of commitment *on its own motion, or at any time upon the recommendation of the Director of Corrections or the Board of Prison Terms*" to recall the sentence and commitment previously ordered for a defendant sentenced under section 1170 or section 1168, subdivision (b), "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." (Stats. 1995, ch. 49, § 1, italics added.)

Subdivision (e)(1), as originally enacted, similarly provided, "Notwithstanding any other law and consistent with paragraph (1) of subdivision (a) of section 1170, if the Director of Corrections or the Board of Prison Terms or both determine that a prisoner satisfies the criteria set forth in paragraph (2), *the director or the board may recommend to the court that the prisoner's sentence be recalled.*" (Stats. 1997, ch. 751, § 1, italics added.)

Since 1997, the Legislature has made only nonsubstantive changes to the above quoted portions of section 1170(d) and (e)(1): both provisions now refer to the "secretary or the Board of Parole Hearings" (Stats. 2007, ch. 740, § 2), and in 2013 subdivision (d) was renumbered subdivision (d)(1) (Stats. 2102, ch. 828, § 1).

Thus, as the as the Court of Appeal below observed, the recall procedures in section 1170(d)(1) and (e) share "a crucial similarity": neither section affords a defendant a "right to apply to the court for an order recalling the sentence . . . ." (Slip. Opn. at 7.) This similarity is crucial because the lower appellate courts have uniformly held that a denial of a defendant's request for a sentence recall under section 1170(d) is not an appealable order. (*People v. Chlad* (1992) 6 Cal.App.4th 1719, 1726 (*Chlad*); *People v. Gainer* (1982) 133 Cal.App.3d 636, 641 (*Gainer*); *People v. Druschel* (1982) 132 Cal.App.3d 667, 668-669 (*Druschel*); see also *People v. Niren* (1978) 76 Cal.App.3d 850, 851 (*Niren*) [section 1168].) The rationale for these cases is "because the defendant has no right to request such an order in the first instance . . . 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 (*Pritchett*), citing *Chlad, supra,* at p. 1726; *Gainer, supra,* at p. 641; *Druschel, supra,* at pp. 668-669; *Niren,* at p. 851.) In *Pritchett*, the court applied the same reasoning in concluding that section 1237, subdivision (b), did not authorize an appeal from a trial court's order granting a defense recall motion and reimposing the same sentence under section 1170(d). (*Pritchett, supra,* at p. 194.)

In light of the well-established, uniform case law construing the language in subdivision (d) when the Legislature enacted section 1170(e), the Legislature presumably intended for subdivision (e) to be construed like subdivision (d); i.e., because an inmate has no right to request a recall under subdivision (e), an order denying recall under this provision does not affect an inmate's substantial rights within the meaning of section 1237, subdivision (b), and is, therefore, not appealable. Indeed, if the Legislature had intended to confer a right to inmates to bring a recall request under section 1170(e), it could have done so as it has in other statutory provisions,

including section 1170(d)(2), which authorizes defendants who were sentenced to prison for life without the possibility of parole when they were under the age of 18 years to submit to the sentencing court a petition for recall and resentencing. (§ 1170(d)(2); see also § 1016.5, subd. (c) [authorizing defendants to file a motion to vacate a guilty plea where court allegedly failed to advise of the immigration consequences of plea]; *People v. Totari, supra,* 28 Cal.4th at pp. 887-888 [denial of a motion to vacate guilty plea under § 1016.5 affects defendants' substantial rights and is appealable].) That the Legislature instead chose to structure section 1170 (e) like section 1170(d)(1) shows the opposite intent.

That the Legislature did not intend to confer to inmates a right to request a sentence recall in the trial court is underscored by section 1170(e)(6), the provision which authorizes inmates or their family members or designess to "independently request consideration for recall and resentencing by contacting the chief medical officer at the prison or the secretary." (§ 1170(e)(6).) By expressly providing inmates with what the Court of Appeal below correctly characterized as an internal role within the prison (Slip Opn. 7, fn. 5), the Legislature removed any doubt about whether it intended to confer a right to inmates to recommend recall in the trial court. As with section 1170(d)(1), inmates under section 1170(e) have no such right.

Appellant, however, contends that the cases holding that a defendant cannot appeal a court's ruling on defense-initiated recall requests under section 1170(d)(1) and its predecessor are inapposite or distinguishable. (ABOM 15-17.) Specifically, appellant argues the core concern in *Pritchett, Chlad* and *Gainer* was to curtail "the abuse of the appellate

process to extend the time to appeal." (ABOM 16.)[2] This was a concern in *Pritchett.* The court there agreed with the State that a "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, supra,* 20 Cal.App.4th at p. 193.) The court also ruled that the trial court's order granting the request was a legal nullity because the trial court granted the request for this reason alone, and not for any reason rationally related to lawful sentencing. (*Id.* at pp. 194-195.) Consequently, the trial court's recall order was not a "'final judgment of conviction'" within the meaning of section 1237, subdivision (a). (*Ibid.*) But the court further ruled that Pritchett did not have a right to appeal the order under section 1237, subdivision (b), because "[i]t would be anomalous to hold that a defendant's substantial rights are affected by an order *granting* this request, but not by an order denying the request." (*Ibid.*) Similarly, although the defense recall motions in *Chlad* and *Gainer* were both filed after the 120-day time period in which the court could recall a sentence on its own motion, and although *Chlad* cited the lack of jurisdiction as one reason why the denial order did not affect the defendant's substantial rights, *Chlad* also cited defendant's lack of a right to bring the motion in the trial court as an additional reason why the order did not affect the defendant's substantial rights. (*Chlad, supra,* 6 Cal.App.4th at pp. 1725-1726.) The lack of a right

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[2] Appellant argues the court had the same concerns in *People v. Gallardo, supra,* 77 Cal.App.4th at p. 971. (ABOM 15). *People v. Gallardo,* did not address the appealability of a denial order under section 1170(d)(1). *Gallardo* observed that, a ruling denying a motion to vacate judgment "ordinarily is not appealable when the appeal would merely bypass or duplicate appeal from the judgment itself." (*People v. Gallardo, supra,* 77 Cal.App.4th at p. 981, citation omitted.) While this is not a concern with section 1170(e), such an order is not appealable because, as discussed earlier, an inmate has no right to recommend recall to the trial court in the first instance.

to bring the recall motion was the sole basis for the holding in *Gainer* that the denial order was not appealable. (*Gainer, supra,* 133 Cal.App.3d at p. 641.)

Appellant also contends *Niren* and this Court's decision in *Thomas v. Superior Court* (1970) 1 Cal.3d 788, are distinguishable because the recall requests there were improper because they were initiated by the defendants. (ABOM 17.) Appellant reasons, "[b]ecause 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." (ABOM 17.) In *Niren,* the court held that the denial of the defendant's recall request was not appealable because the defendant did not have standing to bring the recall motion under former section 1168. (*People v. Niren, supra,* 76 Cal.App.3d at p. 851.) In *Thomas v. Superior Court*, this Court denied the petitioner's petition to compel the trial court to hear his recall request on the merits for the same reason. (*Thomas v. Superior Court, supra,* at p. 790; see *Alanis v. Superior Court* (1970) 1 Cal.3d 784, 786-787 [same].) But neither *Niren* nor *Thomas* held that a trial court's ruling on a recall motion initiated by a defendant is a legal nullity because a defendant lacks standing to request a recall. (*People v. Niren, supra,* at p. 851; *Thomas v. Super Court, supra,* at p. 790.) Nor did *Pritchett, Chlad, Gainer,* or *Druschel* so hold with respect to section 1170(d). (*Pritchett, supra,* 20 Cal.App.4th at pp. 193-195; *Chlad, supra,* 6 Cal.App.4th at pp. 1725-1726; *Gainer, supra,* 133 Cal.App.3d at pp. 641-642; *Druschel, supra,* 132 Cal.App.3d at pp. 668-669.) In fact, this Court has recognized that a recall under section 1170(d) "does not exceed the court's 'own-motion' jurisdiction simply because the court was approached with an informal request to act" by a defendant and a prosecutor. (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 465.) Furthermore, appellant's position would seem to be a harmful one for

defendants in general because if appellant were correct, any order reducing a sentence at the defendant's behest would also be invalid. Thus, the case law interpreting section 1170(d) and its predecessor is persuasive.

Appellant additionally argues that a comparison of the texts of section 1170, subdivisions (d)(1) and (e) further illustrates that the provisions are not analogous. (AOB 16.) As appellant points out (ABOM 16-17), and as set forth earlier, section 1170(e)(6) provides "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. . . . If the secretary determines that the prisoner satisfies the criteria set forth in paragraph (2), the secretary or board may recommend to the court that the prisoner's sentence be recalled." Section 1170(d) does not contain a like provision. But it does not follow that in including section 1170(e)(6) the Legislature intended to confer a substantial right to defendants. Indeed, as discussed earlier, this provision supports exactly the opposite conclusion: the Legislature considered what roles and rights to confer to inmates under the compassionate release program and determined that inmates would have an internal role within the prison system but no right to request a recall provision in the trial court.

Furthermore, case law recognizes that, although a defendant has no statutory right to initiate recall proceedings under section 1170(d)(1), defendants may request the trial court do so. (*People v. Laue* (1982) 130 Cal.App.3d 1055, 1060 [because a defendant "has no standing to make a motion to recall under section 1170(d), he should ask the judge to request that the Department of Corrections prepare a diagnostic study recommending a recall"].) And the case law reflects that defendants have long requested sentence recalls in the trial court. (E.g, *Pritchett, supra,* 20 Cal.App.4th at pp. 192-193; *Chlad, supra,* 6 Cal.App.4th at 1726; *Gainer, supra,* 133 Cal.App.3d at p. 638; *Druschel, supra,* 132 Cal.App.3d at pp.

668-669; *Niren, supra,* 76 Cal.App.3d at p. 851; *Thomas v. Superior Court, supra,* 1 Cal.3d at p. 789.) Thus, contrary to appellant's position (ABOM 17), section 1170(e)(6) does not evidence a legislative intent to confer a more substantial interest and stake to inmates than what it conferred in section 1170(d)(1), let alone a substantial right.

In short, because of the similarities between section 1170(d)(1) and (e), the Legislature presumably intended for section 1170(e) to be construed like section 1170(d)(1) with respect to denial orders, i.e., because an inmate has no right to petition the court for a recall under section 1170(e), a denial of a recall request could not affect an inmate's substantial rights within the meaning of section 1237, subdivision (b).

C. Inmates Like Appellant May Seek Review of a Denial of a section 1170(e) Recall Recommendation Via a Petition for Writ of Mandate

Construing a denial of a recommendation for compassionate release under section 1170(e) as a nonappealable order would not leave inmates like appellant without a remedy. To the contrary, this construction would pave the way for such inmates to pursue a far more expeditious remedy – a writ of mandate.

A "writ of mandate lies generally to compel performance of a legal duty when no plain, speedy, and adequate remedy at law is available." (*People v. Mena* (2012) 54 Cal.4th 146, 153, citing Code Civ. Proc., §§ 1085 & 1086.) A petitioner must also have a beneficial interest in the case to obtain a writ. (Code Civ. Proc., § 1086.) "The requirement that a petitioner be 'beneficially interested' has been generally interpreted to mean that one may obtain the writ only if the person has 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."

(*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796 (*Carsten*).)

"'Although mandamus does not generally lie to control the exercise of judicial discretion, the writ will issue "where, under the facts, that discretion can be exercised in only one way." [Citations.]'" (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047, quoting *Robbins v. Superior Court* (1985) 38 Cal.3d 199, 205, alterations in original.) Thus, mandate is available to correct an abuse of discretion. (*Id.* at pp. 1047-1048; *Owens v. Superior Court* (1980) 28 Cal.3d 238, 253; *Maine v. Superior Court of Mendocino County* (1968) 68 Cal.2d 375, 381.)

As previously discussed, section 1170(e)(3) requires a court to hold a hearing on a positive recommendation from the secretary or board within 10 days of receipt of the recommendation. Section 1170(e)(2) vests a trial court with "discretion to resentence or recall if the court finds" the criteria for release exists. Thus, the law requires the trial court to act on a recall recommendation from the secretary or board. (§ 1170(e)(2), (3); compare *Portillo v. Superior Court* (1992) 10 Cal.App.4th 1829, 1833 [mandamus relief not available for denial of petitioner's recall request under section 1170(d) because trial court had no duty to act since petitioner lacked standing to bring recall motion].) If a trial court's denial of a recall recommendation were deemed a nonappealable order, an inmate would certainly have no plain, speedy or adequate remedy in the ordinary course of law to challenge a trial court's denial order. And, as appellant correctly notes (ABOM 9-10), an inmate has a beneficial interest in the outcome of a recall proceeding. Thus, appellant and inmates like him could obtain judicial review of a denial order by filing a petition for writ of mandate.

As set forth earlier, the medical criteria for compassionate release require either a prognosis by a Department physician that a terminally ill inmate has less than six months to live or that the inmate be permanently

medically incapacitated. (§ 1170(e)(2)(A), (C).) Terminally ill inmates with a prognosis of death within six months would likely be able to obtain mandate review even if a denial order were appealable because, as this case illustrates, even an expedited appeal does not constitute a plain, speedy and adequate remedy as more than eight months elapsed between appellant's filing of his notice of appeal and the issuance of a decision by the Court of Appeal. (Cf. *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 900 ["Dismissal of a petition for involuntary civil commitment is an appealable final judgment [citations], but the People may alternatively seek writ review, and a stay, when the appellate remedy is inadequate [citation] because the dismissal will result in the release of one potentially dangerous to the public."].) But the same would not necessarily be true for medically incapacitated inmates. If a denial order were appealable and a medically incapacitated inmate had a prognosis of longer than six months to live, an appeal would be an adequate remedy. Having a choice between writ and appellate review in some cases but only appellate review in others would generate confusion for inmates and the courts. No such confusion exists if denial orders were not appealable; both terminally ill and permanently medically incapacitated inmates would only be able to seek writ review of a trial court's exercise of discretion as there would be no adequate remedy at law for either group. Furthermore, construing section 1170(e) as permitting appellate review for all inmates and a choice between writ and appellate review for terminally ill inmates would frustrate one of the Legislature's purpose in enacting the statute, which, as discussed *post,* is saving the State money by fast-tracking the release of prisoners who meet the criteria in section 1170(e)(2). Conversely, construing a denial of a recall recommendation under section 1170(e) as nonappeable order would more fully effectuate this purpose.

Thus, contrary to appellant's position (ABOM 18), construing a denial of a recommendation for relief under section 1170(e) as a nonappealable order does not leave an "inmate without a remedy" or a means of review to ensure "that trial courts are properly interpreting and applying the law so as to effectuate its purpose." Instead, construing a denial as a nonappealable order ensures inmates like appellant will have an opportunity to pursue a far more efficient remedy – a writ of mandate.

D. Construing a Denial of a Recommendation for Compassionate Release As a Nonappealable Order Furthers the Legislature's Purposes in Enacting section 1170(e)

The compassionate release provision must be interpreted in a manner that effectuates the Legislature's primary purpose in enacting it. (*Martinez v. Board of Parole Hearings, supra,* 183 Cal.App.4th at p. 582.) The language of section 1170(e) indicates the Legislature intended to bestow compassion to terminally ill and medically incapacitated inmates whose release pose no risk to public safety. (§ 1170(e).) The language of the provision also indicates that the Legislature intended to expedite the processing of compassionate release cases. This intent is apparent from the fact that the statute applies to terminally ill inmates with a prognosis of less than six months to live and from the timelines in the provision, e.g., a trial court is required hold a hearing within ten days of receipt of a positive recommendation from the secretary or board and an inmate must be released within 48 hours of a court's grant of a recall recommendation unless the inmate agrees to a longer time period. (§ 1170(e)(2), (3), (9).)

To the extent appellant can point to any ambiguity in the statute, the legislative history does not support his claim that denial orders are appealable. While the legislative history does not address the appealability issue, it does establish the purpose of the original provision "was not just compassion; it was to save the state money." (*Martinez v. Board of Parole*

Hearings, supra, 183 Cal.App.4th at p. 590.) An analysis from the Assembly Committee on Public Safety quotes the bill's author as stating, ""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."" (*Martinez v. Board of Parole Hearings, supra,* at pp. 590-591, quoting Assem. Com. on Public Safety, Rep. on Assem. Bill No. 29 (1997-1998 Reg. Sess.) Apr. 15, 1997, at pp. 1-2, italics added.) The Assembly Committee on Public Safety's analysis also states, ""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 [BPH] recommend release via the recall procedure."" (*Id.* at p. 591, italics added, alterations in original.)

As with the original bill, the legislative history of the 2007 amendment "reflects that the purpose of the provision is not just compassion; it is to save the state money." (*Martinez v. Board of Parole Hearings, supra,* 183 Cal.App.4th at p. 591.) The Assembly Committee on Public Safety analysis states that, according to the bill's author ""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 v. Board of Parole Hearings, supra,* 183 Cal.App.4th at p. 591, quoting Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007-2008 Reg. Sess.) Sept. 5, 2007, coms., p. 5.)

Thus, the legislative history confirms the Legislature's purpose in enacting and amending section 1170(e) was to bestow compassion and save

the state money by fast-tracking the release of qualified prisoners. (*Martinez v. Board of Parole Hearings, supra*, 183 Cal.App.4th at p. 592.) Because of the general availability of writ review, construing denials of recommendations for recall under § 1170(e) as nonappealable orders effectuates the Legislature's purposes in enacting the provision. Appellant's contrary interpretation, that such orders are appealable, would only exacerbate the Legislature's frustration with the few number of prisoners released under the provision, a frustration that led to the enactment of the medical parole provision in section 3550. (See *In re Martinez* (2012) 210 Cal.App.4th 800, 811.) This is because some terminally ill inmates could die during the additional time it takes for appellate rather than writ review. Accordingly, both the language and purposes of section 1170(e) establish that the Legislature did not intend to confer a substantial right to defendants and a corollary right to appeal when it enacted and amended the compassionate release provision.

E. The Purported Constitutional Principles and Case Law Appellant Cites to Support His Right to Appeal Argument Are Not Persuasive

Appellant argues that the right to appeal is determined by the Constitution or statute. (ABOM 9, citing *People v. Mazurette, supra,* 24 Cal.4th 789, 792; *People v. Gallardo, supra,* 77 Cal.App.4th at p. 980.) He asserts that "[u]nder 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*.'"" (ABOM 9, quoting *County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 814, quoting *Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315, quoting *Carsten, supra,* 27 Cal.3d at p. 796.) Appellant contends

there is no question that an inmate who is the subject of a compassionate release request "has constitutional 'standing' with respect to the outcome of those proceedings because" an inmate has a special interest and right to be preserved that is more significant than a member of the general public, namely, "his freedom from continued imprisonment is at stake." (ABOM 10.) Appellant then contends that his fundamental interest in securing freedom, which he suggests is a personal liberty interest, drives the analysis of whether a denial order affects an inmates "substantial rights" within the meaning of section 1237, subdivision (b). (ABOM 10.)

Appellant's reasoning is flawed. There is no constitutional right to appeal a post-judgment order in a criminal case in California. Moreover, the California Constitution does not contain a counterpart to the Article III standing requirement of the Federal Constitution. And appellant's reliance on Article III standing only confuses the issue. Simply stated, a beneficial or special interest in an outcome of a proceeding is not coextensive with a "substantial right."

The California Constitution does not include a right to appeal a post-judgment order in a criminal case; that right is governed exclusively by statute. (*People v. Mazurette, supra*, 24 Cal.4th at p. 792; accord *Gallardo, supra,* 77 Cal.App.4th at p. 980.) Thus, in California, a criminal defendant does not have "constitutional 'standing'" to appeal a post-judgment order simply because the defendant has a personal stake or beneficial interest in the outcome.

As discussed, an inmate's special interest in the outcome of a compassionate release proceeding does satisfy the beneficial interest requirement for standing for mandate under section 1086 of the Code of Civil Procedure. (*Carsten, supra*, 27 Cal.3d at p. 796.) But the cases involving the recall provision in section 1170(d) and its predecessor

establish "beneficially interested" (Code Civ. Proc., § 1086) and "substantial rights" (§ 1237, subd. (b)) are not interchangeable.

Defendants in section 1170(d) cases, like inmates in compassionate release cases, have a beneficial or special interest in the outcome of the proceedings as a positive ruling on a request for a sentence recall could result in a shorter prison term. Yet the courts in section 1170(d) cases have uniformly ruled that a trial court's order denying a defendant's recall request does not affect a defendant's substantial rights because a defendant had no right or standing under section 1170(d) to bring the motion in the trial court in the first instance. (*Chlad, supra,* 6 Cal.App.4th at pp. 1725-1726; *Gainer, supra,* 133 Cal.App.3d at p. 641; *Druschel, supra,* 132 Cal.App.3d at p. 669; *Niren,* 76 Cal.App.3d at p. 851.) Thus, a "beneficial interest" in the outcome of a proceeding is not coextensive with a "substantial right" within the meaning of section 1237, subdivision (b).

Further, the California Constitution does not include a requirement similar to the case or controversy limitation in Article III of the Federal Constitution, which requires a party requesting standing to show a personal stake in the outcome. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117, fn. 13.) Appellant's attempt to link Article III standing to the state right to appeal under section 1237 only serves to muddy the waters.

Appellant also argues that case law involving analogous situations establishes that in determining whether an order affects a defendant's substantial rights, the focus should be on the interest at stake, not whether a defendant has a right to initiate the proceedings. (AOB 10-14, citing *People v. Sword* (1994) 29 Cal.App.4th 614 (*Sword*); *People v. Cross* (2005) 127 Cal.App.4th 63 (*Cross*); *People v. Coleman* (1978) 86 Cal.App.3d 746 (*Coleman*); *People v. Herrera* (1982) 127 Cal.App.3d 590 (*Herrera*), disapproved on another ground in *People v. Martin* (1986) 42 Cal.3d 437 (*Martin*); *In re Daniel K.* (1998) 61 Cal.App.4th 661; *People v.*

Connor (2004) 115 Cal.App.4th 669 (*Connor*).) Contrary to appellant's position, these cases do not establish a right to appeal exists in the context of section 1170(e) as these cases involve different code sections, and a repealed code section, and disparate circumstances.

With the exception of *Herrera* and *Martin,* the cases cited by appellant dealt with other sections of the Penal Code or the Welfare and Institutions Code and circumstances that are not analogous to a sentence recall request under the compassionate release provision. Specifically, *Sword* and *Cross* involved outpatient placements under section 1603. (*Sword, supra,* 29 Cal.App.4th at p. 614; *Cross, supra,* 127 Cal.App.4th 63.) *Coleman* involved a restoration of sanity proceeding under former section 1026a. (*Coleman, supra,* 86 Cal.App.3d at p. 749.) *In re Daniel K.* concerned a denial of a continuing discovery request in a juvenile dependency case under Welfare and Institutions Code section 300. (*In re Daniel K., supra,* 61 Cal.App.4th at p. 666.) And *Coleman* addressed the grant of a third party's request for a defendant's probation report outside the public access period under section 1203.05. (*Connor, supra,* 115 Cal.App.4th at p. 687) Appellant's suggestion that these cases are more persuasive than those interpreting the recall provision in section 1170(d) overlooks the settled principle that a statute should be construed "in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts." (*People v. Shirokow* (1980) 26 Cal.3d 301, 307.) Appellant reliance on these cases is also misplaced for additional reasons.

Unlike the situation with the compassionate release provision, in *Coleman* the defendant had a statutory right to initiate the proceeding from which he was appealing. (*Coleman, supra,* 86 Cal.App.3d at 749, fn. 2.) While, as appellant points out (AOB 11), outpatient placement orders under sections 1602 and 1603 are initiated on the advice of the director of the

state hospital or other treatment facility (see §§ 1602, subd. (a), 1603, subd. (a)), the issue of the appealability of the denial orders was not contested in either *Sword* or *Cross*. *Sword* simply cited *Coleman* in a footnote as support for the proposition that "[o]rders denying outpatient status are appealable under section 1237, subdivision (b) (orders after judgment affecting the substantial rights of a party)." (*Sword, supra*, 29 Cal.App.4th at p. 619, fn. 2.) And *Cross* cited *Sword* and section 1237, subdivision (b) for this same point. (*Cross, supra,* 127 Cal.App.4th at p. 66.) Thus, the courts in *Cross* and *Sword* had no occasion to address arguments that *Coleman* is distinguishable because Coleman had a right to apply for a hearing on the restoration of sanity. (See § 1026.2.)

In re Daniel K.'s discussion of the minor's substantial rights in the discovery order was dicta as the statute governing the right to appeal post-judgment orders in juvenile dependency cases, Welfare and Institutions Code section 395, does not include a "substantial rights" requirement. (*In re Daniel, K., supra,* 61 Cal.App.4th at p. 670 & fn. 6.) Further, the mother was the appealing party. (*Id.* at p. 663.) Finally, in *Connor,* the court determined that, in enacting section 1203.05, the Legislature intended to confer a conditional right of confidentially to defendants in at least the personal information in their probation reports after the 60-day period of public access has expired. Consequently, the court concluded an order granting a third party's request for a defendant's probation report affects a defendant's statutory right to confidentiality and is appealable under section 1237, subdivision (b). In contrast, the similarities between section 1170(d) and (e) and the legislative history of section 1170(e) establish that the Legislature did not intend to confer a substantial statutory right to inmates when it enacted and amended section 1170(e).

As noted, only two of the cases cited by appellant involved former section 1170, subdivision (f), which was repealed by the Legislature in

1992 (Stats. 1992, ch. 695, § 10), namely, *Herrera* and *Martin.* (AOB 12-13.) These cases do not advance appellant's argument.

In *Herrera,* the trial court denied the board's motion to resentence the defendant under former section 1170(f). At that time, section 1170(f), provided in pertinent part, "'In all cases the Board of Prison Terms shall not later than one year after the commencement of the term of imprisonment, review the sentence and shall by motion recommend that the court recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he had not been previously sentenced if the board determines the sentence is disparate.'" (*Herrera, supra,* 127 Cal.App.3d at p. 594, fn. 3.)

On appeal, the State relied on *Niren* in arguing that the court's order denying the recall motion was not appealable because the defendant did not have a right to bring the motion. (*Herrera, supra,* 127 Cal.App.3d at pp. 595-596.) The court distinguished *Niren,* where the defendant moved for a sentence recall under former section 1168, on the ground that the motion at issue in *Herrera* was properly initiated by the board. (*Id.* at 596.) Thus, the court framed the question before it as: "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*?" (*Ibid.*) The court answered the question in the affirmative. (*Id.* at pp. 596-597.)

The court noted section 1237 authorizes a defendant to appeal from "any" post-judgment order that affects the substantial rights of the party, not just an order initiated by the defendant. The court further observed that the "right" Herrera was asserting was "his 'right' to receive a sentence which is not disparate when compared to sentences received by other similarly situated convicts. Underlying this is [Herrera's] right to liberty-and to suffer only that deprivation of liberty which his crimes warrant."

(*Ibid.*) With respect to the latter point, the court noted the board had determined that Herrera's sentence was "disparate" and that his sentence was three years longer than similarly situated defendants. (*Id.* at p. 597) The *Herrera* court concluded that in enacting the determinate sentencing law, including section 1170, subdivision (f), "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." (*Ibid.*) Accordingly, the court concluded the denial order "affected Herrera's "substantial right" and was appealable under then section 1237, subdivision (2).

As appellant correctly notes (AOB 13), although this Court disapproved of *Herrera* on another ground in *Martin,* this Court cited *Herrera* as support for the proposition that a "trial court's decision to deny a motion to recall under subdivision [(f) of section 1170] is an appealable order." (*Martin, supra*, 42 Cal.3d at p. 450, citing *Herrera, supra,* 127 Cal.App.3d at pp. 595-597.)

Appellant's reliance on *Herrera* and *Martin* is misplaced for several reasons. As mentioned earlier, the recall provision at issue in *Herrera* and *Martin,* former section 1170, subdivision (f), was repealed in 1992, five years before the enactment of the compassionate release provision. (Stats. 1992, ch. 695, § 10.) Thus, it is unlikely that, in adopting the language that it did, the Legislature intended for subdivision (e) to be construed like former subdivision (f) rather than subdivision (d), which, as noted, was in existence at the time the Legislature enacted subdivision (e).

Appellant's reliance on this Court's decision in *Martin* is misplaced for the additional reason that the People did not challenge the appealability of the order in *Martin*. (*Martin, supra*, 42 Cal.3d at p. 450.) Consequently, this Court did not have the benefit of adverse arguments on the issue. Furthermore, unlike former subdivision (f), the compassionate release

provision does not relate to the validity or constitutionality of an inmate's original sentence. Instead, at issue with the compassionate release provision is whether an inmate is entitled to the benefit of early release from his lawful conviction and sentence.

Finally, construing a denial of a recommendation under subdivision (e) as a nonappeable order effectuates one of the Legislature's purpose in enacting and amending subdivision (e), which is expediting the release of inmates who meet the criteria for compassionate release, because those inmates can seek writ review. Time is not of the essence in cases involving disparate sentences discovered within one year of the imposition of sentence.

In sum, the text of section 1170(e) and cannons of statutory construction establish that, because an inmate does not have a right to request a recall in the trial court, a denial order does not affect the inmate's "substantial rights" within the meaning of section 1237, subdivision (b), and the order, therefore, is not appealable. Inmates can, however, seek review of a denial order by a far more expeditious means, a petition for writ of mandate. Consequently, construing a denial of a recall recommendation as a nonappeable order effectuates the Legislature's purposes in enacting and amending section 1170(e), which are compassion and saving the state money by fast-tracking the release of qualified inmates.

II. IF A DENIAL ORDER IS APPEALABLE, THE TRIAL COURT'S FACTUAL FINDINGS SHOULD BE REVIEWED FOR SUBSTANTIAL EVIDENCE AND ITS DECISION FOR AN ABUSE OF DISCRETION

Appellant contends that the trial court's denial order should be reviewed de novo because the Legislature contemplated that the majority, if not all, of the evidence before the trial court in most compassionate release cases would be documentary in nature and because a trial court's application of the law to the facts in such cases is predominately a question

of law. (ABOM 19-24.) The language of section 1170(e)(2), which expressly requires a trial court to make factual findings and vests a trial court with discretion to recall and resentence, and the relevant case law establish that the trial court's factual findings are reviewed for substantial evidence and its application of the law to the facts for an abuse of discretion.

Section 1170(e)(2) states: "The court shall have the *discretion* to resentence or recall *if the court finds that the facts* described in subparagraphs (A) [terminal illness] and (B) [release would not threaten public safety] or subparagraphs (B) and (C) [medically incapacitated] exist[.]" (Italics added.) As appellant conceded below (AOB 20-21), where "'a discretionary power is statutorily vested in the trial court, its exercise of that discretion'" will not be reversed on appeal absent a showing that the trial court abused its discretion. (*People v. Williams* (2013) 58 Cal.4th 197, 270-271, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; accord *Baggett v. Gates* (1982) 32 Cal.3d 128, 142 - 143.) "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." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) A "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*, *supra*, 43 Cal.4th at pp. 711-712, footnotes omitted.)

A. A Trial Court's Factual Findings Should Be Reviewed for Substantial Evidence

"Deference is given to the factual findings of trial courts because those courts generally are in a better position to evaluate and weigh the evidence." (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 385.) Application of the deference standard also conserves appellate resources

because it relieves an appellate court of """the burden of a full-scale independent review and evaluation of the evidence."""" (*People v. Louis* (1986) 42 Cal.3d 969, 986, quoting *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1195, disapproved on another ground in *People v. Mickey* (1991) 54 Cal.3d 612, 672, fn. 9.)

As set forth above, the compassionate release statute expressly requires the trial court to make factual findings. It also clearly contemplates that the trial judge who presided over the criminal proceedings will have superior knowledge of the risk to public safety. Indeed, if that were not the case, there would be little reason to have the matter handled by the original sentencing judge if possible. (See § 1170(e)(8).) The original sentencing judge may also have garnered additional insight into an inmate's medical condition during the course of the criminal proceedings. In this case, for example, the same trial judge who sentenced appellant also heard the recall recommendation. (CT 45, 84-85.) During the criminal proceedings, appellant moved to continue the sentencing hearing for at least 60 days because of his health problems. Appellant attached records and letters from physicians in support of his motion. (CT 31-44.) And he addressed the court about his medical conditions at the hearing on his continuance motion. (CT 75.) At the hearing on the recall recommendation, the prosecutor argued that whether appellant had refused treatment while in prison was important in light of appellant's history of manipulation "given his prior request made so that he could receive treatment for . . . various ailments." (RT 3.)

Furthermore, as appellant reluctantly recognizes (ABOM 22), recall hearings can entail live witness statements or testimony, as appellant's counsel recognized by informing the court of Dr. Campbell's presence and as appellant's counsel and the court recognized by eliciting from Dr. Campbell the date of her last examination of appellant and last day of work

for the Department. (RT 4-6.) Thus, that witnesses might testify or offer statements at a recall hearing is more than just what appellant characterizes as a "*theoretical*[]" possibility. (ABOM 22.)

Moreover, even if a trial court's findings under section 1170(e) were based solely on documentary evidence, such findings would still be entitled to deference. (*See Haraguchi v. Superior Court, supra,* 43 Cal.4th at p. 711, fn. 3 ["that the trial court's findings [in denying motion to recuse prosecutor] were based on declarations and other written evidence does not lessen the deference due those findings"].) Therefore, as is traditional, a trial court's factual findings under section 1170(e) should be reviewed under "deferential standard of substantial evidence." (*People v. Holmes* (2004) 32 Cal.4th 432, 442 [adequacy of factual basis for plea]; see *People v. Jones* (2013) 57 Cal.4th 899, 922 [speedy trial motion]; *People v. Linton* (2013) 56 Cal.4th 1146, 1192 [juror misconduct]; *People v. Tully* (2012) 54 Cal.4th 952, 979 [suppression motion].)

B. A Trial Court's Application of the Law to the Facts in Ruling on a Recommendation Request Should Be Reviewed for an Abuse of Discretion

Because section 1170(e)(2) vests a trial court with discretion to resentence or recall, its application of the law to the facts should be reviewed for an abuse of discretion. (*People v. Williams, supra*, 58 Cal.4th at pp. 270-271; *Haraguchi v. Superior Court, supra*, 43 Cal.4th at p. 711.) This interpretation of section 1170(e) is consistent with this Court's application of the abuse of discretion standard in reviewing other cases involving discretionary sentencing decisions by trial courts. (E.g., *People v. Carmony* (2004) 33 Cal.4th 367, 373-374 [refusal to dismiss strike prior]; *People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 972-973, 977-998 (*Alvarez*) [reduction of a felony to a misdemeanor]; *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 531 [dismissal of strike prior];

People v. Giminez (1975) 14 Cal.3d 68, 72 [imposition of consecutive sentences].)

Application of the abuse of discretion standard in compassionate release cases is also consistent with the general principle that where a """"trial court makes an individual-specific decision,"" such as for juror bias or competency to stand trial, then a reviewing court will be more inclined to utilize abuse of discretion review." (*People v. Holmes*, *supra,* 32 Cal.4th at p. 442, quoting *People v. Cromer* (2001) 24 Cal.4th 889, 895.) In compassionate release cases, trial courts make individual-specific decisions – e.g., does this inmate have a terminal illness that would produce death in six months or is this inmate permanently medically incapacitated, and would the release of this inmate pose a threat to public safety? (§ 1170(e)(2).)

For all of these reasons, a trial court's application of the law to the facts in a compassionate release case should be reviewed for an abuse of discretion. Thus, appellant is not entitled to a reversal on appeal absent a showing that the trial "'court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Williams, supra*, 58 Cal.4th at pp. 270-271, quoting *People v. Rodrigues, supra*, 8 Cal.4th at p. 1124.) As discussed *post,* the trial court properly exercised its discretion in this case.

C. The De Novo Review Standard is Inapplicable

Appellant contends that de novo review is appropriate because "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[,]" as was the situation in his case. (ABOM 22.) Appellant's contention should be rejected for multiple reasons. First, as noted earlier, the compassionate release provision states: "If possible, the matter shall be

heard before the same judge of the court who sentenced the prisoner." (§ 1170(e)(8).) Thus, the Legislature expressly recognized that a trial judge who handles the sentencing may have obtained information that is not in the documentary evidence provided by the Department that is relevant to a compassionate release hearing. In other words, the Legislature recognized that a trial judge who handled the original sentencing would be in a better position to evaluate future dangerousness and possibly other issues "than the appellate courts that may subsequently encounter the case in the context of a few briefs, a few minutes of oral argument, and a cold and often limited record." (*Haraguchi v. Superior Court, supra*, 43 Cal.4th at p. 713.) Second, as appellant's counsel and the trial court clearly recognized, the statute permits a court to consider live witness statements at a recall hearing. (RT 4-6.) Thus, de novo review would not increase the accuracy of recall determinations under § 1170(e). (*Haraguchi v. Superior Court, supra*, 43 Cal.4th at p. 713.)

Third, there was a conflict in the evidence in this case: Dr. Campbell opined on May 21, 2012, that appellant's "life expectancy is short and possibly less than six months" (CT 58); Dr. Campbell last treated appellant on June 28, 2012, and last worked for the Department on June 29, 2012 (RT 5-6); the undersecretary wrote in her August 14, 2012 letter that "Physicians have determined that [appellant] has less than six months to live" (CT 52); and Dr. Seely wrote in his September 12, 2012 letter that appellant's "current status does not indicate for or against a prognosis of less than six months to live" (CT 60). This factual conflict weighs in favor of deference to the trial judge who received the evidence.

Fourth, even when a case involves only documentary evidence, other factors, like judicial economy and whether a decision is individual-specific, come into play. (*People v. Louis, supra*, 42 Cal.3d at p. 986; *People v. Holmes, supra,* 32 Cal.4th at p. 442.) Individual-specific decisions like

those that are made in a compassionate release case are unlikely to have precedential value. (*People v. Cromer, supra,* 24 Cal.4th at p. 895.) Thus, concerns of judicial administration, i.e., "efficiency, accuracy, and precedential weight," militate against de novo review in compassionate release cases. (*Haworth v. Superior Court, supra*, 50 Cal.4th at p. 386.)

Finally, and most fundamentally, even if the only evidence before the trial court were conflict-free documentary evidence, as discussed, where a statute vests a trial court with discretion, the trial court's ruling is reviewed for an abuse of discretion (*People v. Williams, supra*, 58 Cal.4th at pp. 270-271), and, under this standard, "its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court, supra*, 43 Cal.4th at p. 711.) Thus, the parole cases appellant cites, in which this Court and other intermediate appellate courts applied de novo review because the evidence before the trial court was entirely documentary, do not advance appellant's argument as the trial court decisions in those cases were not discretionary. (See ABOM 20, citing *In re Rosenkrantz* (2002) 29 Cal.4th 616, 677; *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; *In re Hare* (2010) 189 Cal.App.4th 1278, 1291.)

Implicitly recognizing the weakness of his argument that denial orders should be reviewed de novo, appellant attempts to reframe the issue as a "question of law" that "concerns the operation of a statutory scheme that implicates significant legal and policy matters that, . . . the trial court fundamentally misinterpreted and misapplied." (ABOM 24.) But the question presented is, assuming a denial of a recommendation for a sentence recall under section 1170(e) is an appealable order, what is the proper standard of review on appeal? The answer to that question is a trial court's denial order, which involves an application of the law to the facts, is

reviewed for an abuse of discretion and its underlying factual findings for substantial evidence. This interpretation of section 1170(e) is consistent with the language of the statute and the relevant case law.

III. THE TRIAL COURT CORRECTLY DENIED THE RECOMMENDATION FOR RECALL OF APPELLANT'S SENTENCE

Appellant contends the trial court erred in denying the recommendation for recall because the evidence showed he had a terminal illness that "could" possibly produce death within six months and that he was permanently medically incapacitated. He further argues he is entitled to relief even under the more deferential abuse of discretion standard because the trial court abused its discretion by applying the wrong standard for terminal illness and by failing to consider whether he was permanently medically incapacitated. (ABOM 24-41.) The compassionate release provision requires more than a medical determination that a terminal illness may or could possibly cause death within six months. It requires a prognosis from a Department physician that an inmate has a terminal illness that would produce death within six months. Given the absence of such a prognosis from a Department physician in this case and the presence of evidence that appellant was not permanently medically incapacitated as he was being treated as an outpatient and was able to perform activities of daily living, the trial court correctly denied the recommendation for recall and release under section 1170(e). Accordingly, the trial court's ruling should be affirmed under any standard of review.

A. The Trial Court's Ruling

As set forth earlier, section 1170(e)(2) vests a trial court with discretion to release an inmate if it finds the release would not pose a threat to public safety and finds one of two medical conditions 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" or "(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."

On the first day of the hearing on the release recommendation, August 24, 2012, appellant's counsel advised the court that appellant's medical condition was worse and that appellant was refusing medication. The prosecutor opposed the recall, arguing appellant had ongoing medical conditions for several years and that the release plan was inadequate. (CT 82.) The court found the information provided by the Department was minimal. (CT 82.) The court ordered the Department to provide, among other things, an opinion from a Department physician regarding whether appellant's illness would produce death in six months. (CT 83.)

On the second day of the hearing, September 14, 2012, the trial court stated at the outset that the minute order reflected it had requested from the Department, "An opinion from a doctor of the Department of Corrections and Rehabilitation as to whether [appellant's] illness *would* produce death within six months." (RT 2, italics added.) The court noted it had received a one-page letter from Dr. Seeley. (RT 2.) After listening to the arguments of counsel and Dr. Campbell's statements about when she last treated appellant and last worked for the Department, the court stated, "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(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." (RT 6, italics added.) The court continued, "The most recent information received from the Department of Corrections and Rehabilitation 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." (RT 6.) The court noted, "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 Department of Corrections and Rehabilitation." (RT 6.) The court added, "[o]bviously, if circumstances changes and there's *more definitive* information, the court will consider the new information at that time." (RT 6-7, italics added.)

B. The Trial Court Properly Denied the Recommendation for Release

The record amply supports the trial court's finding that section 1170(e)(2)(A) was not satisfied. Dr. Campbell stated in her May, 21, 2012 Request for Compassionate Release that appellant's "life expectancy is short and possibly less than 6 months." (CT 58.) While the undersecretary stated in her recommendation letter that "[p]hysicians have determined that [appellant] has less than six months to live," (CT 52), there was no accompanying determination by a Department physician that appellant would be dead within six months as a result of his terminal illness or disease. Recognizing the inadequacy of the evidence, and rather than simply denying the recommendation, the trial court asked for an opinion from a Department physician as to whether appellant's illness would produce death in six months. (CT 82; RT 2.) Dr. Seeley responded to this request in his September 12, 2012 letter: "His current status does not indicate for or against a prognosis of less than six months to live." (CT 60.)

While the trial court did not expressly consider section 1170(e)(2)(A), Dr. Campbell also stated in her request that appellant "is currently able to perform all ADLSs [activities of daily living]." (CT 58.) While appellant argues he cannot perform two of the activities of basic daily living without assistance – breathing and ambulating, as he requires BiPAP, oxygen and a wheelchair (ABOM 29, 35-36, citing Cal. Code Regs., tit. 15, § 3076, subd. (b)), Dr. Campbell, an experienced physician who personally evaluated appellant and noted these requirements, determined otherwise. (CT 58.)

Furthermore, the provision also requires that the medical condition "results in the prisoner requiring 24-hour total care. . . ." (§ 1170(e)(2)(C).) Drs. Campbell and Seeley both indicated that appellant was receiving outpatient care and had refused placement in a hospital or prison infirmary. (CT 58, 60.) Finally, although appellant has uncontrolled hypertension, advanced chronic obstructive pulmonary disease and severe coronary artery disease, his condition is not akin to a "coma, persistent vegetative state, brain death, ventilator-dependency, [or] loss of control of muscular or neurological function. . . ." (§ 1170(e)(2)(C).) Thus, while the diagnostic study included in the list of criteria for consideration "inmate 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), the trial court and parties understood that only section 1170(e)(2)(A) was at issue as section 1170(e)(2)(C) was not mentioned by anyone at the hearing.

In light of the evidence before the trial court, the trial court correctly denied the recommendation for compassionate release. Accordingly, the trial court's decision should be upheld, whether reviewed de novo or for an abuse of discretion.

C. Appellant's Interpretation of the Medical Criteria Is Inconsistent with the Principles of Statutory Construction and Undermines the Legislature's Intent to Balance Competing Interests

Appellant's argument that he is entitled to relief on de novo review is dependent on this Court accepting his strained interpretation of the meaning of the medical criteria in section 1170(e)(2)(A) and (C). Specifically, appellant asserts the phrase "*would* produce death within six months" in section 1170(e)(2)(A) requires a court to consider an inmate's terminal illness or disease in the abstract and decide whether that illness or disease "*presents the possibility* of leading to an inmate's death within six months" or "*could* cause the prisoner to die within as short of a period of six months." (ABOM 26-28, 34-35.) But if the language of a statute "is unambiguous, the plain meaning controls." (*People v. Leiva* (2013) 56 Cal.4th 498, 506.) That is the situation with section 1170(e)(2)(A). It requires a prognosis by a Department physician that an inmate has a terminal illness that "would produce death within six months," not certain death within six months or the abstract possibility of death in that time-frame. (§ 1170(e)(2)(A); see also § 1170(e)(4) ["Any physician employed by the department who determines that a prisoner has six months or less to live shall notify the chief medical officer of the prognosis. If the chief medical officer concurs with the prognosis, he or she shall notify the warden."].) Such prognoses are commonly made by medical professionals. (E.g., *Laswell v. AG Seal Beach, LLC* (2010) 189 Cal.App.4th 1399, 1403 [plaintiff twice certified by a physician for hospice care as terminally ill with a life expectancy of less than six months]; *Tillery v. Richland* (1984) 158 Cal.App.3d 957, 966 [doctor opined patient had 3 to 6 months to live].)

Additionally, appellant's interpretation of section 1170(e)(2)(A) would lead to the absurd result that the mere diagnosis with a terminal medical condition would be sufficient. This would render the "within six

months" language of the provision surplusage. "Interpretations that lead to absurd results or render words surplusage are to be avoided." (*People v. Loeun* (1997) 17 Cal.4th 1, 9, citation omitted.)

Furthermore, while appellant correctly notes the Legislature has expressed frustration with the few number of prisoners who have been released under section 1170(e), if the Legislature believed the problem were attributable to "an overly stringent interpretation of the eligibility criteria in the trial courts" (ABOM 28), the Legislature certainly could have amended this provision to read as appellant thinks it should, i.e., "a terminal illness that *presents the possibility* of leading to the inmates death within six months. . . ." (ABOM 27.) That the Legislature did not do so in the 2007 amendment indicates that it was satisfied with the language of section 1170(e)(2)(A) and the trial courts' application of it. (See *People v. Escobar* (1992) 3 Cal.4th 740, 750-751.) Indeed, the statements of the 2007 bill's author, which are quoted in the analysis of the Assembly Committee on Public Safety, do not reflect concern about misapplication of section 1170 (e)(2)(A) by the trial courts, but instead a desire to educate Department staff and the families of inmates about the compassionate release program and a desire to expand the scope of the provision to include permanently medically incapacitated inmates. (See *Martinez v. Board of Parole Hearings, supra,* 183 Cal.App.4th at p. 591, quoting Assem. Com. on Public Safety, Rep. on Assem. Bill No. 1539 (2007-2008 Reg. Sess.) Sept. 5, 2007, coms., p. 5.)

As for section 1170(e)(2)(C), appellant argues the "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." (ABOM 29.) The language of section 1170(e)(2)(C) is unambiguous: "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."

Contrary to appellant's argument (ABOM 29), it is clear from the context of section 1170(e)(2)(C) that the phrase "24-hour total care" means around the clock care by medical professionals, and the requirement would not be satisfied if an inmate merely needed medicinal assistance or a combination of medicinal assistance and physical care. Also contrary to appellant's suggestion (ABOM 29), the inclusion in the list of conditions "loss of control of muscular or neurological functions" without limitation about the degree of the loss does not indicate that conditions less serious than the others in the list, i.e., "coma, persistent vegetative state, brain death, ventilator-dependency" (1170(e)(2)(C)), would suffice. This is because"'[w]hen a statute contains a list or catalogue of items, a court should determine the meaning of each by reference to the others, giving preference to an interpretation that uniformly treats items similar in nature and scope.'" (*Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 169, citation omitted.) Because the language of section 1170(e)(2)(C) is unambiguous, the plain language of the statute, which is markedly different from appellant's interpretation of it, controls. (*People v. Leiva, supra,* 56 Cal.4th at p. 506.)

Appellant is correct, however, that a liberal construction of the medical criteria would promote the Legislature's purpose of saving money by expediting the release of prisoners and might help address problems with the prison healthcare system identified in federal litigation unrelated to this case and section 1170(e). (ABOM 24, 28-30.) So, too, would

releasing all prisoners. But in enacting section 1170(e), the Legislature sought to balance the interest in saving money on medical treatment for terminally ill and permanently medically incapacitated prisoners who pose no threat to public safety with the interest in punishing and deterring criminals. That this is so is apparent in section 1170(e)(1) which states, "Notwithstanding any other law and *consistent with paragraph (1) of subdivision (a)*. . . ." (Italics added.) Section 1170(a)(1) states, "The Legislature finds and declares that the purpose of imprisonment for crime is punishment." Thus, appellant's broad construction of the medical criteria should be rejected for the additional reason that it upsets the balance of the competing interests involved in the compassionate release provision.

D. The Trial Court Understood and Correctly Applied the Law

Appellant argues he is entitled to relief even under the deferential abuse of discretion standard for two reasons. First, appellant argues the trial court's statement at the hearing "'*will* produce death within six months as determined by a department physician" instead of "would" (§ 1170(e)(2)(A)), indicates "the trial court artificially raised the bar required to satisfy this prong by essentially requiring evidence of *certain* death within six months." (ABOM 39, quoting RT 6.) As the earlier summary of the trial court's comments show, the trial court was well aware of the applicable standard and that certainty was not required as the trial court used the word "would" at the beginning of the hearing and advised counsel at the end of the hearing that it would reconsider a recommendation if there were a more definitive determination, not a definitive one. (RT 2, 6-7.) Thus, the trial court simply misspoke when it said "will" instead of "would." (RT 6.)

Second, appellant claims the trial court abused its discretion by focusing exclusively on section 1170(e)(2)(A) and not mentioning section

1170(e)(2)(C). But given the evidence before the court about the nature of appellant's condition, that appellant could perform the activities of daily living and that he did not require 24-hour total care, the trial court's focus on subdivision (e)(2)(A) and failure to mention subdivision (e)(2)(C), indicates the trial court recognized the obvious inapplicability of subdivision (e)(2)(C), not that the trial court did not understand that evidence of either subdivision (e)(2)(A) or (e)(2)(C) would suffice. That this is so is underscored by the fact that neither party mentioned subdivision (e)(2)(C) at the hearing on the recall recommendation. Appellant's argument is also undercut by the presumption that the trial court knows and applies the relevant statutory law. (Evid. Code, § 664; *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046.) Finally, the diagnostic study received by the court referred to the criteria in both section 1170(e)(2)(A) & (e)(2)(C). (CT 56.) Thus, there was no abuse of discretion and no error.

CONCLUSION

The Court of Appeal's decision should be affirmed because a denial of a request for recall under section 1170(e) is not an appealable order. Assuming such an order were appealable, a trial court's denial order should be reviewed on appeal for an abuse of discretion and its underlying factual findings for substantial evidence. But regardless of what standard of review applies on appeal, the trial court's denial order should be affirmed.

Dated: February 5, 2014

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General

LISE S. JACOBSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF ON THE MERITS** uses a 13 point Times New Roman font and contains 13,997 words.

Dated: February 5, 2014

KAMALA D. HARRIS
Attorney General of California

LISE S. JACOBSON
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. James Alden Loper** No.: **S211840**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 6, 2014, I served the attached **RESPONDENT'S BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Mr. Kevin J. Lane, Clerk/Administrator California Court of Appeal Fourth Appellate District, Division One 750 B Street, Ste. 300 San Diego, CA 92101	Mike Roddy, Executive Officer San Diego County Superior Court Deliver to: Hon. Laura H. Parsky, Judge 220 West Broadway San Diego, CA 92101-3409
The Honorable Bonnie M. Dumanis District Attorney San Diego County District Attorney's Office 330 West Broadway, Suite 1320 San Diego, CA 92101	

and, furthermore I declare, in compliance with California Rules of Court, rules 2.25(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document from Office of the Attorney General's electronic service address ADIEService@doj.ca.gov on February 6, 2014 to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com and to Appellant's attorney Raymond M. DiGuiseppe's electronic service address by 5:00 p.m. on the close of business day at *diguiseppe228457@gmail.com.*

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 February 6, 2014, at San Diego, California.

C. Pasquali
Declarant

C. Pasquali
Signature

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