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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD ROBERT MILLARD,

Defendant and Appellant.

D075010

(Super. Ct. No. SCD244053)

APPEAL from an order of the Superior Court of San Diego County, Albert T. Harutunian III, Judge. Affirmed.

Alex Kreit, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Penal Code section 1170, subdivision (d)(1) (section 1170(d)(1))¹ authorizes the Secretary of the California Department of Corrections and Rehabilitation (CDCR) to recommend to the superior court that the court recall a previously imposed sentence and resentence the defendant " 'for any otherwise lawful reason.' " (*People v. Loper* (2015) 60 Cal.4th 1155, 1165 (*Loper*), quoting *Dix v. Superior Court* (1991) 53 Cal.3d 442, 460.) The goal of such resentencing is "to eliminate disparity of sentences and to promote uniformity of sentencing." (§ 1170(d)(1).)

Here, the Secretary of the CDCR (Secretary) recommended that the sentence of prisoner/defendant Donald Millard be recalled and that Defendant be resentenced under section 1170(d)(1) (Secretary's section 1170(d)(1) recommendation); the court rejected the Secretary's section 1170(d)(1) recommendation; Defendant filed a motion for reconsideration, seeking "the opportunity to present information and evidence to the court that might persuade the court to recall and resentence him"; and following a status conference at which the court heard from counsel, the court denied Defendant's request for a hearing on the Secretary's section 1170(d)(1) recommendation. Defendant Donald Millard (Defendant) appeals from an order of the superior court declining to set a hearing on whether to recall Defendant's sentence and resentence him under section 1170(d)(1).

Defendant contends that the superior court abused its discretion by denying Defendant's request for a hearing on the Secretary's section 1170(d)(1) recommendation. The People disagree, but initially argue that, because section 1170(d)(1) does not allow a

¹ Unless stated otherwise, all statutory references are to the Penal Code.

prisoner to seek relief under section 1170(d)(1), *Defendant* may not appeal from the court's order denying his request for a hearing following a rejection of *the Secretary's* section 1170(d)(1) recommendation.

As we explain, where (as here) the section 1170(d)(1) proceeding is properly initiated by the Secretary, the superior court's decision produces an order that may be appealed by the prisoner/defendant under section 1237, subdivision (b), as an "order made after judgment, affecting the substantial rights of the party." The court's later order denying Defendant's request for a hearing on the Secretary's recommendation (by way of a motion for reconsideration) is sufficiently related to the initial order to also affect Defendant's substantial rights for purposes of allowing an appeal under section 1237, subdivision (b). As we further explain in reaching the merits, the court did not err in declining to set a hearing following the court's consideration and rejection of the Secretary's section 1170(d)(1) recommendation. Accordingly, we affirm the court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

In October 2012, Defendant entered a large retail pharmacy on Mission Boulevard in Pacific Beach, walked down the alcohol aisle, and approached the check-out counter where the clerk greeted him. The clerk heard "a click," looked down, and saw Defendant pointing a cocked gun, which appeared to be a black snub-nosed revolver, at the torso area of his body. Defendant said to the clerk: " 'You have one second to give me all of the fuckin' money in the register.' " The clerk opened the cash register, began handing

Defendant money, and ultimately placed the cash drawer on the counter, where Defendant helped himself—all the while pointing the gun at the clerk.

In response to Defendant's demand for more money, the clerk explained that only the manager had keys to the safe and paged the manager using an intercom at the check-out counter. Defendant became impatient and fired his gun. The bullet missed the clerk, passing him approximately two feet to his left. Without waiting for the manager, Defendant grabbed the remaining money on the counter and exited the store.

The clerk called the police and, after ensuring the safety of everyone in the store, closed the store to wait for the police. Less than a half hour later, the police arrested Defendant, and the clerk identified him as the person who had just robbed him in the store.

Defendant entered a guilty plea to burglary (§ 459; count 1), robbery (§ 211; count 2), and assault with a firearm (§ 245, subd. (a)(2); count 3) in June 2013. He admitted the truth of the allegations that he personally used and intentionally discharged a firearm (§§ 12022.5, subd. (a), and 12022.53, subds. (b) & (c)) and that he had one prison prior (§ 667.5, subd. (b)), three serious felony priors (§ 667, subd. (a)(1)), and three strike priors (§ 667, subds. (b)-(i)). Both in his written change of plea and in open court, Defendant acknowledged that his plea was a "plea to the sheet"—i.e., he had "no deals with the People." Accordingly, prior to the plea, the court explained to Defendant that, because the People can ask for "any sentence up to the maximum that is allowed by law for these offenses," he was facing potentially an indeterminate term of 60 years to life imprisonment. Prior to the plea, Defendant acknowledged that the court had no

discretion to strike or dismiss the charged enhancements for the personal use and intentional discharge of a firearm (20 years) and for the three serious felony priors (five years each). In addition, the court explained to Defendant that, based on the facts and circumstances as the court then understood them, *even if* the court had the discretion, the court would *not* strike or dismiss the enhancements.

In July 2013, the trial court sentenced Defendant to a determinate term of 37 years, calculated as follows: the low term of 2 years for the robbery count, 20 years for the firearm enhancement, and five years for each of the three felony prior enhancements.²

Five years later, in a September 2018 letter, the Secretary recommended to the court that, pursuant to section 1170(d)(1), Defendant's sentence be recalled and that Defendant be resentenced (at times, recall and resentencing).³ More specifically, the

² The court also sentenced Defendant, but stayed the punishments, on the burglary and assault counts (§ 654) and on the enhancements related to those counts (§ 12022.53, subd. (f)). The court stayed the one prison prior (*People v. Jones* (1993) 5 Cal.4th 1142) and struck the three serious felony strike priors (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497). Finally, the court imposed various statutory fees, fines, and assessments.

³ As applicable here, section 1170(d)(1) provides in part as follows: "[T]he court may, . . . at any time upon the recommendation of the [S]ecretary . . . , recall the sentence and commitment previously ordered and resentence the defendant in the same manner as if he or she had not previously been sentenced, provided the new sentence, if any, is no greater than the initial sentence. The court resentencing under this subdivision shall apply the sentencing rules of the Judicial Council so as to eliminate disparity of sentences and to promote uniformity of sentencing. The court resentencing under this paragraph may reduce a defendant's term of imprisonment and modify the judgment, including a judgment entered after a plea agreement, if it is in the interest of justice. The court may consider postconviction factors, including, but not limited to, the inmate's disciplinary record and record of rehabilitation while incarcerated, evidence that reflects whether age, time served, and diminished physical condition, if any, have reduced the inmate's risk for

Secretary asked the court to "please consider the amendment to Section 12022.53, subdivision (h), which became effective January 1, 2018."⁴ The Secretary explained that, although the version of section 12022.53 in effect at the time of Defendant's sentencing *required* the court to impose the additional punishment for the use of a firearm, under the amendment (§ 12022.53, subd. (h)), "courts are now empowered with discretion to strike or dismiss a personal use firearm enhancement at . . . resentencing pursuant to Section 1170, subdivision (d), in the interest of justice pursuant to Section 1385."⁵ The Secretary included a copy of a three-page "Diagnostic Study and Evaluation Report" (Report) prepared the month before—which, according to the Report,

future violence, and evidence that reflects that circumstances have changed since the inmate's original sentencing so that the inmate's continued incarceration is no longer in the interest of justice."

4 This amendment to section 12022.53, subdivision (h), provides as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Stats. 2017, ch. 682, § 2.)

This amendment applies to cases not yet final as of January 1, 2018 (*People v. Watts* (2018) 22 Cal.App.5th 102, 119); Defendant was sentenced in July 2013; and neither the record on appeal nor the appellate briefing suggests his case was not final prior to 2018. In instances like this, according to a respected treatise, the CDCR "is utilizing its authority under section 1170(d)(1) . . . to recommend consideration of dismissal of the firearm enhancements for cases final as of January 1, 2018." (Couzens, et al., *Sentencing California Crimes* (The Rutter Group 2019) § 28:8, p. 28-19.)

5 In relevant part, section 1385 authorizes the court to strike or dismiss an enhancement.

"presents case factors that are applicable . . . to the recommendation for Recall of Commitment."⁶

The court responded by letter to the Secretary, first stating that the court "has reviewed the file and statutory amendment" and expressly acknowledging that it "has the discretion to recall and . . . [re]sentence in the interest of justice[.]" The court then denied the Secretary's recommendation, explaining in full:

The court does not believe a modification is justified in this case. Defendant fired his gun in anger toward a robbery victim, and is fortunate no one was injured or killed. At sentencing there was no plea agreement, and as indicated on the change of plea form, [D]efendant had committed these multiple felony offenses with 3 prior strikes including serious felony priors. He was facing up to 60 years to life, with the admitted strikes. The court showed great leniency toward [D]efendant in striking all three strikes. Further leniency was shown by selecting the low term of 2 years on the P[enal] C[ode section] 211 robbery count. The court fully considered what the overall appropriate sentence was in the case based on the facts, and made choices as to discretionary sentencing decisions that ensured the overall sentence was appropriate, taking into consideration the impact of the firearm enhancement. The court was not in any sense forced to sentence defendant to an unjustly punitive sentence because of the 20-year firearm enhancement. Under these circumstances, no purpose would be served by recalling the sentence simply to address a discretionary modification that does not appear warranted.

In early October 2018, Defendant filed a motion "to reconsider recalling and resentencing pursuant to Penal Code section 1170(d)." (Some capitalization omitted.)

⁶ The case factors in the August 2018 Report include: "Current Commitment Offense"; "Prior Juvenile and Adult Criminal History"; "Parole History"; "Active or Potential Holds, Warrants, and Detainers"; "Institutional Adjustment"; "Self[-]Help Activities"; "Medical/Mental Health"; "Support"; "Notification/Registration Requirements"; "Board of Parole Hearings"; and "Confidential." (Some capitalization omitted.)

More specifically, Defendant argued that the court "should carefully consider [Defendant's] post[conviction] conduct as set forth by the Secretary, and the statutory intent of the enabling legislation" and "*use its discretion to provide [Defendant] the opportunity to present information that might persuade the court to recall his sentence and resentence him.*" (Italics added.) Defendant reasoned that, although "this court showed tremendous discretion when imposing the original sentence," the court did not have the authority to strike the gun enhancement at that time; and "it is incumbent on the court to consider the new law and [Defendant's] commitment to rehabilitation when determining whether to strike the gun enhancement."

In response, the court set a status conference in November 2018 to "determin[e] whether the court should set a formal hearing" on Defendant's motion. At the status conference, defense counsel stressed that the information contained in the Report "is only a snippet of information." Without evidence or an offer of proof, he asked the court to let him present "the postconviction work that [Defendant] has done while in custody," suggesting that "it would be inappropriate to deny the ability to at least present the information so that you have a complete and full picture before making that decision." Counsel then explained his understanding of "the very vigorous process" by which the prisoner's postconviction behavior is evaluated before the Secretary decides whether to recommend to the court relief under section 1170(d)(1). The prosecutor emphasized that relief under section 1170(d)(1) is *discretionary*, which includes the right to a hearing, and pointed out the court's leniency at the time of the sentencing. In rebuttal, defense counsel noted that the court's rejection of the Secretary's recommendation "was predominantly

based on the nature of the offense, but did not include or review the postconviction work."

The court was not persuaded, ruling in a November 27, 2018 order that "[n]othing raised [at the status conference] alters the Court's initial view that a discretionary hearing for possible recall should not be set in this case." The court explained:

Defendant was facing a "3-strikes" life sentence with a minimum term of 60 years with limited custody credits. The Court exercised its discretion to strike all the strikes and impose a determinate term of 37 years with full custody credits. There was no plea agreement tying the Court's hands. Under the circumstances, this was an exceedingly generous sentence. [¶] *There is nothing referenced in the . . . Report accompanying the September 4, 2018 recommendation from the Secretary . . . that reflects post[]conviction conduct justifying further lessening of the sentence.* The fact that [D]efendant is seeking to better himself while in custody, and is staying out of trouble, is what he was expected to do. The Court does not feel the Secretary's recommendation takes into consideration the significant "break" already received by [D]efendant at the original time of sentencing. (Italics added.)

Defendant timely appealed from the order.

II. DISCUSSION

The sole issue in Defendant's appeal is whether the trial court erred in denying Defendant's request for a hearing following the court's consideration and rejection of the Secretary's section 1170(d)(1) recommendation. Before we reach that issue, however, we must consider the People's position that, because section 1170(d)(1) does not allow a prisoner to seek relief under section 1170(d)(1), Defendant may not appeal from the court's order rejecting his request for a hearing on the Secretary's section 1170(d)(1) recommendation.

We will affirm the court's order. As we explain, although Defendant may appeal from the postjudgment order, the court did not err in declining to set the hearing he requested.

A. *Defendant May Appeal From the Order Denying His Request for a Hearing on the Secretary's Section 1170(d)(1) Recommendation*

Because the right to appeal is statutory, a defendant may not appeal from a trial court's ruling unless a statute expressly makes the ruling appealable. (*Loper, supra*, 60 Cal.4th at p. 1159; *Teal v. Superior Court* (2014) 60 Cal.4th 595, 598.) Appeals by defendants in criminal cases are governed by section 1237, and Defendant contends that subdivision (b), which provides as follows, authorizes his appeal here: "An appeal may be taken by the defendant from . . . [¶] . . . [¶] . . . any order made after judgment, *affecting the substantial rights of the party.*" (Italics added.)

The parties do not dispute that the court's denial of a hearing following Defendant's motion was a postjudgment order; therefore, the only issue is whether the order affected Defendant's "substantial rights." Section 1237 does not define "substantial rights," and as the Supreme Court observed, "[o]ur cases do not provide a comprehensive interpretation of the term 'substantial rights' as used in section 1237, subdivision (b)" (*Loper, supra*, 60 Cal.4th at p. 1161, fn. 3).

The People contend that, because Defendant never had the right *either* to seek relief under section 1170(d)(1) *or* to request a hearing on the Secretary's section 1170(d)(1) recommendation, Defendant cannot assert that the underlying proceedings affected his substantial rights as required by section 1237, subdivision (b).

In response, Defendant argues that, where (as here) the section 1170(d)(1) proceeding is initiated as required by the statute, the decision of the trial court produces an order that affects his substantial rights; and, since the denial of a request for a hearing in a section 1170(d)(1) proceeding is just one more postjudgment ruling affecting his substantial rights under section 1170(d)(1), he may appeal from the order denying the hearing. Defendant has the better position.

In *Loper, supra*, 60 Cal.4th 1155, our Supreme Court considered a related subdivision of section 1170—i.e., section 1170, subdivision (e) (section 1170(e))—which authorizes the Secretary (and other specified prison authorities) to recommend that the superior court recall a previously imposed sentence on the basis that the prisoner is now terminally ill or medically incapacitated and resentence the prisoner to serve a new sentence outside of prison.⁷ The issue in *Loper* was whether a prisoner who was denied

⁷ Section 1170(e)—"sometimes called 'compassionate release' " (*Loper, supra*, 60 Cal.4th at p. 1158)—provides in part:

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

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

"(A) The prisoner is terminally ill with an incurable condition caused by an illness or disease that would produce death within six months, as determined by a physician employed by the department.

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

"(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

relief under the Secretary's section 1170(e) recommendation, can appeal the court's decision. (*Loper*, at p. 1158.) The court held that, "when the [recall and resentencing] proceeding is properly initiated by prison . . . authorities as required by law, the trial court's decision produces an appealable order that may be appealed *by the prisoner*." (*Ibid.*, italics added.) We are persuaded that the holding in *Loper* under section 1170(e) applies with equal force here under section 1170(d)(1).

The *Loper* court's holding is principally based on section 1237, subdivision (b), which "permits a party to appeal 'any order' . . . made after judgment if it affects that party's 'substantial rights.' " (*Loper, supra*, 60 Cal.4th at p. 1162.) Because section 1170(e) "implicates a prisoner's substantial interest in personal liberty," the court unanimously concluded that a "defendant's substantial rights are at issue in the operation of the compassionate release statute[.]" (*Loper*, at p. 1161, fn. 3.)

We apply the same reasoning here: Because section 1170(d)(1) implicates Defendant's *substantial interest in personal liberty*, we conclude that Defendant's substantial rights are at issue in the operation of this statute that allows for the recall and resentencing for any reason "in the interest of justice." Indeed, the *Loper* court's explanation of the right at issue in resentencing under section 1170(e) applies with equal force to resentencing under section 1170(d)(1). Under section 1170(e), "[t]he "right" which [the prisoner] is asserting is his "right" to receive a sentence *which is not disparate when compared to sentences received by other similarly situated convicts*. Underlying

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

this is [the prisoner's] right to liberty—and to suffer only that deprivation of liberty which his crimes warrant.' " (*Loper, supra*, 60 Cal.4th at p. 1163, italics added.) Under section 1170(d)(1), the same "right" is affected, since section 1170(d)(1) requires the resentencing court to apply the sentencing rules "*to eliminate disparity of sentences and to promote uniformity of sentencing*" (italics added)—so as not to deprive the prisoner, here Defendant, of his right to liberty.

The People's argument on appeal does not convince us otherwise.

The People contend that, because *Defendant* does not have the right to request a recall and resentencing under section 1170(d)(1), his substantial rights were not implicated by the denial of a hearing on *the Secretary's* section 1170(d)(1) recommendation; and, the People's argument continues, section 1237, subdivision (b) allows an appeal from a postjudgment order *only* where the order affects the appellant's substantial rights. The *Loper* court rejected a similar argument in the context of the Secretary's recommendation to recall the prisoner's sentence under section 1170(e): "[A] defendant may appeal an adverse decision on a postjudgment motion or petition if it affects his substantial rights, *even if someone else brought the original motion.*" (*Loper, supra*, 60 Cal.4th at p. 1165, italics added.)

In support of its position that the court's rejection of the Secretary's section 1170(d)(1) recommendation did not affect Defendant's substantial rights, the People rely on the following four opinions in which the prisoner/defendant was not allowed to appeal from an adverse decision under section 1170(d)(1) and its predecessor, former section 1168: *People v. Chlad* (1992) 6 Cal.App.4th 1719 (*Chlad*); *People v.*

Gainer (1982) 133 Cal.App.3d 636 (*Gainer*); *People v. Druschel* (1982) 132 Cal.App.3d 667 (*Druschel*), disapproved by *Loper, supra*, 60 Cal.4th at p. 1167; and *People v. Niren* (1978) 76 Cal.App.3d 850 (*Niren*), disapproved by *Loper, supra*, 60 Cal.4th at p. 1167.

These authorities do not support the People's argument.⁸

Because the People do not further mention, let alone discuss, *Druschel, supra*, 132 Cal.App.3d 667, or *Niren, supra*, 76 Cal.App.3d 850, we shall not either.⁹ (See *Winslett v. 1811 27th Avenue, LLC* (2018) 26 Cal.App.5th 239, 248, fn. 6 [" 'we need not address contentions not properly briefed' "].)

In *Chlad* and *Gainer*, each prisoner/defendant initiated his own section 1170(d)(1) proceeding by requesting the recall and resentencing. (*Loper, supra*, 60 Cal.4th at p. 1165.) Section 1170(d)(1) provides—and its predecessor, former section 1168 provided (*Gainer, supra*, 133 Cal.App.3d at p. 639, fn. 3)—that the court may recall a sentence "within 120 days of the date of commitment *on its own motion*."¹⁰ (*Italics*

⁸ Initially, we note that, because all four intermediate appellate court opinions predate the Supreme Court's opinion in *Loper, supra*, 60 Cal.4th 1155, they necessarily do not take into consideration the guidance that *Loper* provides. We further note that *Loper* discusses and rejects each of the four opinions on which the People rely. (*Id.* at pp. 1165-1167.)

⁹ We nonetheless note that, without any discussion, the People's citation to *Druschel* indicates that *Loper* "distinguished" it, and the People provide no limiting citation for *Niren*. In fact, in *Loper*, our Supreme Court *expressly disapproved of both* *Druschel* and *Niren*, as being inconsistent with the court's later opinion in *People v. Carmony* (2004) 33 Cal.4th 367. (*Loper, supra*, 60 Cal.4th at p. 1167.)

¹⁰ There is no similar time limitation for *the Secretary* (or any other statutorily authorized party) to commence recall and resentencing proceedings under section 1170(d)(1).

added.) On the basis that "section 1170(d) provides that the trial court loses jurisdiction to resentence on its own motion after 120 days has elapsed," the court in each case denied the defendant's requested relief.¹¹ (*Loper*, at p. 1165; see *People v. Fuimaono* (2019) 32 Cal.App.5th 132, 134 [" 'the court loses "own-motion" jurisdiction if it fails to recall a sentence within 120 days of the original commitment' "].) Under these facts, our Supreme Court explained why those defendants lacked standing to appeal the trial courts' orders denying section 1170(d)(1) relief: "Because the trial courts in *Chlad* and *Gainer* had no jurisdiction to resentence on their own motion, their refusal to act on a defective defense motion for resentencing could not have affected any legal rights the defendants in those cases possessed[.]" (*Loper*, at pp. 1165-1166.) Since those defendants' "legal rights" could not have been affected by the rulings due to the trial courts' lack of jurisdiction, the orders denying relief did not "affect[] the substantial rights" of those defendants for purposes of section 1237, subdivision (b); and on that basis, "the appellate courts properly dismissed the appeals" in both *Chlad* and *Gainer* (*Loper*, at p. 1166).

In contrast, in the present appeal, the trial court had—and exercised—jurisdiction under section 1170(d)(1) based on the Secretary's section 1170(d)(1) recommendation. Thus, the court's action in rejecting the Secretary's recommendation necessarily implicated Defendant's interest in his personal liberty and, therefore, Defendant's

¹¹ There was the additional issue that neither section 1170(d)(1) nor former section 1168 authorized the *prisoner/defendant*, as opposed to the court, to initiate recall and resentencing proceedings in the trial court, but the Supreme Court based its lack of jurisdiction ruling on the 120-deadline, not on the identity of the party who initiated the trial court proceedings. (*Loper, supra*, 60 Cal.4th at pp. 1165-1166.)

"substantial rights" for purposes of allowing a postjudgment appeal under section 1237, subdivision (b).¹² (See *Loper, supra*, 60 Cal.4th at p. 1163.) Having determined that, because Defendant's substantial rights—i.e., Defendant's personal liberty interest—are affected by the trial court's denial of the Secretary's section 1170(d)(1) recommendation, we have little difficulty concluding that Defendant's substantial rights are also affected by the trial court's denial of a hearing on the Secretary's section 1170(d)(1) recommendation.

Accordingly, we proceed to reach the merits of Defendant's appeal. (§ 1237, subd. (b).)

B. *The Trial Court Did Not Err in Denying Defendant's Request for a Hearing on the Secretary's Section 1170(d)(1) Recommendation*

Defendant argues that the trial court erred by denying his request for a hearing at which he could present evidence of his postconviction conduct in support of the Secretary's section 1170(d)(1) recommendation. We disagree.

Defendant and the People both suggest that the standard of review is abuse of discretion, although they base their positions on different reasons and authorities. None applies here, however, since the parties rely on cases in which each appellate court

¹² Defendant did not appeal from the court's rejection of the Secretary's section 1170(d)(1) recommendation. In any event, in this appeal, Defendant expressly disavows any error associated with the rejection of the recommendation: "Standing alone, the trial court's assessment of the [Secretary's] recommendation and diagnostic [R]eport may have been within its discretion. The court abused its discretion, however, by denying [Defendant's] request to be given the opportunity to present additional evidence of his postconviction conduct relevant to the factors outlined in . . . section 1170(d)(1)."

reviewed *the merits* of the decision following a proceeding to recall a sentence and resentence a defendant, not whether the court erred in *failing to conduct a hearing*.

We interpret statutory language de novo, which requires us " 'to ascertain and effectuate the intended legislative purpose,' " by considering the applicable language in its " 'broader statutory context' and, where possible, harmoniz[ing] that language with related provisions by interpreting them in a consistent fashion." (*ZB, N.A. v. Superior Court* (2019) 8 Cal.5th 175, 189.) Under this standard, the plain language of section 1170(d)(1) does not support Defendant's assumption of entitlement to a hearing; and Defendant provides no authority for his suggestion that he—or *any* party, for that matter—is entitled to hearing under section 1170(d)(1).

That is in contrast to section 1170, *subdivision (d)(2)*, which allows for the defendant to petition for recall and resentencing if he or she "was under 18 years of age at the time of the commission of the offense for which the defendant was sentenced to imprisonment for life without the possibility of parole has been incarcerated for at least 15 years." (§ 1170, subd. (d)(2)(A)(i).) If the court finds that one or more of certain specified statements in the defendant's petition are true, then section 1170, *subdivision (d)(2) requires* the court to recall the sentence and commitment previously ordered "and *hold a hearing to resentence the defendant[.]*" (§ 1170, subd. (d)(2)(E), italics added.)

In addition, under section 1170(e), which allows for a recall and resentencing based on compassionate release (see, e.g., *Loper, supra*, 60 Cal.4th 1155), if the Secretary or the Board of Parole Hearings submits a recommendation in support of a

compassionate release, then the court is *required* to hold a hearing to consider whether to recall the sentence. (§ 1170(e)(3).)

Thus, we are presented with a statute on determinate sentencing (§ 1170) in which the language at issue (§ 1170(d)(1)) provides for a recall and resentencing *without mentioning the right to a hearing*. In contrast, in the immediately following subpart (§ 1170, subd. (d)(2)) and the immediately following subdivision (§ 1170(e)) both expressly *require a hearing* upon a certain showing before the court may recall (§ 1170(e)) or resentence (§ 1170, subd. (d)(2)) the prisoner/defendant. By this statutory scheme, the Legislature has shown that, when it wants the court to hold a hearing during the recall and resentencing proceedings under section 1170, the Legislature knows how to use language clearly expressing that intent.

In our de novo review, therefore, we conclude that, following the Secretary's recommendation to recall a sentence and resentence a prisoner/defendant under section 1170(d)(1), the statute does not authorize the trial court to hold a hearing at the prisoner/defendant's request.

That said, the statute also does not preclude such a hearing. However, even if we assume without deciding that the court had the authority, and thus the discretion, to set a hearing, based on Defendant's showing, the trial court did not abuse its discretion in denying the motion for a hearing. A trial court abuses its sentencing discretion when its decision is arbitrary or capricious, inconsistent with the letter and spirit of the law, or based on circumstances that constitute an improper basis for decision. (*People v.*

Sandoval (2007) 41 Cal.4th 825, 847 [§ 1170, subd. (b)]; *People v. Gibson* (2016) 2 Cal.App.5th 315, 325 (*Gibson*) [§ 1170, subd. (d)(2)].)

Following the court's rejection of the Secretary's section 1170(d)(1) recommendation, Defendant filed a motion to reconsider the rejection—in major part on the basis that, because "record does not reflect whether the court considered [Defendant's] post[conviction] conduct[,] which is impressive[,] Defendant "should be given the opportunity to present information and evidence to the court that might persuade the court to recall [the sentence] and resentence him."¹³ The court set a status conference to give defense counsel the further opportunity "to directly address" why "the court should set the matter for a formal hearing." At the conference, counsel argued that the Secretary's section 1170(d)(1) recommendation and accompanying three-page Report presented "only a snippet of information." Without adding anything new to the written motion, counsel explained that he wanted to present, and the court to consider, "the postconviction work that [Defendant] has done while in custody" so that the court "ha[s] a complete and full picture before making that decision [to deny a hearing]." Counsel concluded by suggesting that "it would be an abuse of discretion if [the court] didn't look at . . . *all of the postconviction factors*." (Italics added.)

In its written ruling denying Defendant's request to set a hearing on the Secretary's section 1170(d)(1) recommendation, the court responded to defense counsel's concerns

¹³ In the motion, Defendant reminded the court that, at the time of the original sentencing, the court did not have the discretion to strike the gun enhancements; only since January of 2018 has section 12022.53, subdivision (h) given the court discretion to strike or dismiss an enhancement in the interest of justice.

expressed at the status conference regarding the court's consideration of Defendant's postconviction conduct: "There is nothing referenced in the . . . Report accompanying the September 4, 2018 recommendation from the Secretary . . . that reflects post[]conviction conduct justifying further lessening of the sentence." In addition, there is nothing in any of the submissions on Defendant's behalf—i.e., his motion and counsel's argument at the status conference—that suggested there was additional evidence to consider. In support of his motion, Defendant did not present a declaration of what counsel considered Defendant's "postconviction work" that was not included in the Report; and neither in the motion nor at the status conference did counsel make an offer of proof of *any* fact that was not already before the court in the Report. On this record, therefore, even if we assume the trial court had the discretion to set the hearing requested by Defendant, the court did not abuse its discretion in denying Defendant's request for a hearing, since the decision was neither "arbitrary, capricious, or patently absurd manner" nor "a manifest miscarriage of justice." (*Gibson, supra*, 2 Cal.App.5th at p. 325.)

III. DISPOSITION

The November 27, 2018 order denying Defendant's request for a section 1170(d)(1) hearing is affirmed.

IRION, J.

WE CONCUR:

O'ROURKE, Acting P. J.

DATO, J.