FIRST DISTRICT APPELLATE PROJECT

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The Impact of the California Supreme Court's Recent Decision in *People v. Loper* (2015) 60 Cal.4th 1155 on the Appealability of the Denial of Penal Code Section 1170(d) Recall Motions

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The Courts of Appeal have long held that the denial of a Penal Code section 1170(d) recall motion brought within 120 days of sentencing is not an appealable order. There has been no meaningful disagreement in this area among the published authorities for decades. (See e.g. *People v. Pritchett* (1993) 20 Cal.App.4th 190; *People v. Chlad* (1992) 6 Cal.App.4th 1719; *People v. Gainer* (1982) 133 Cal.App.3d 636; *People v. Druschel* (1982) 132 Cal.App.3d 667; *People v. Niren* (1978) 76 Cal.App.3d 850.)

However, the California Supreme Court's recent decision in *People v. Loper* (2015) 60 Cal.4th 1155 appears to have upset the established order when it comes to the appealability of Penal Code section 1170(d) recall motions. *Loper* held that the denial of a Penal Code section 1170(e) compassionate release recall petition is an appealable order. While the outcome of *Loper* is no doubt a very welcome development in the emerging area of compassionate release law, the decision's importance may be more far reaching in terms of the appealability of post-judgment orders in general and the denial of Penal Code section 1170(d) recall motions in particular.

In arguing against the appealability of Penal Code section 1170(e) compassionate release recall petitions, the Attorney General urged the Supreme Court to follow the reasoning of the above-cited Penal Code section 1170(d) cases. *Loper* - surprisingly, given how settled this area of law seemed to be - concluded that a key line of the above cases had been wrongly decided. Specifically, *Loper* disapproved of the cases holding that because a defendant does not have the right to move for relief under Penal Code section 1170(d) - but only the right to invite the trial court to exercise its discretion to recall a sentence on its own motion within 120 days - the denial of such relief is a non-appealable order. This rationale, *Loper* held, is inconsistent with the Supreme Court's earlier holding in *People*

v. Carmony (2004) 33 Cal.4th 367 that a defendant may challenge the denial of a *Romero*[1] motion on appeal notwithstanding the fact that the defendant only has the right under Penal Code section 1385 to invite the trial court to exercise its discretion to dismiss a prior strike conviction on its own motion. *Loper* expressly stated: "There being no apparent reason why this analysis would not apply to motions for resentencing under section 1170(d), we hereby disapprove *People v. Druschel*, *supra*, 132 Cal.App.3d 667, 183 Cal.Rptr. 348, and *People v. Niren*, *supra*, 76 Cal.App.3d 850, 143 Cal.Rptr. 130, to the extent they are inconsistent with *Carmony*, *supra*, at page 376, 14 Cal.Rptr.3d 880, 92 P.3d 369."[2]

Accordingly, where the defendant has filed a timely notice of appeal from the denial of a Penal Code section 1170(d) recall motion brought within 120 days of the original sentencing hearing, the trial court's ruling on the recall motion should now be considered an appealable order. At the very least, *Loper* has opened the door for trial attorneys to file notices of appeal from the denial of Penal Code section 1170(d) recall motions and for appellate attorneys to assert, with supporting authority, that the denial of such a motion constitutes an appealable order.

Broadly speaking, *Loper* can be interpreted to mean that if a trial court has the statutory authority or jurisdiction to act on its own motion or at the invitation of the defendant on a post-judgment matter affecting the defendant's substantial rights, the ensuing order denying relief should be considered appealable under Penal Code section 1237(b). This reading of *Loper* is consistent with other recent cases out of the Supreme Court such as *Teal v. Superior Court* (2014) 60 Cal.4th 595 [holding that the denial of a Proposition 36 resentencing petition on eligibility grounds is an appealable order under Penal Code section 1237(b)] and *People v. Totari* (2002) 28 Cal.4th 876 [holding that the denial of a Penal Code section 1016.5 post-judgment motion to vacate is an appealable order under Penal Code section 1237(b)]. On the other hand, where a trial court lacks the statutory authority or jurisdiction to consider a post-judgment matter (or where the matter does not affect the substantial rights of the defendant), the ensuing order denying relief is likely not appealable. (See e.g. *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208 ["Since

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[1] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

[2] *Loper* left intact the cases holding (1) that the denial of an 1170(d) recall motion filed more than 120 days after sentencing is not an appealable order (see *Chlad* and *Gainer*, *supra*) and (2) that an appeal may not be taken from the granting of a Penal Code section 1170(d) motion where the trial court recalled the sentence for the sole purpose of permitting defendant to file a notice of appeal after the defendant had failed to do so within the 60-day period provided by law (see *Pritchett*, *supra*).

the trial court lacked jurisdiction to modify the restitution fines, its order denying defendant's motion requesting the same did not affect his substantial rights and is not an appealable postjudgment order"].)

A question arises as to whether all Penal Code section 1170(d) motions necessarily involve the substantial rights of the defendant such that a trial court's denial will invariably produce an appealable order. *Loper* observed that prior Supreme Court cases "do not provide a comprehensive interpretation of the term 'substantial rights' as used in [Penal Code] section 1237, subdivision (b)," and the Supreme Court declined to use *Loper* as a vehicle to "offer a generally applicable definition of that phrase." (*Loper*, *supra*, at fn. 3.) Nor did *Teal* address the scope of the phrase "substantial rights," as the Attorney General did not "contest the point that an erroneous denial of a petition for recall of sentence under [Penal Code] section 1170.126 affects a petitioner's substantial rights." (*Teal*, *supra*, fn. 3.)

It is noteworthy, however, that the denial of the inmate's Proposition 36 recall petition in *Teal* was deemed an appealable order pursuant to Penal Code section 1237(b) even though it was undisputed the petitioner was ultimately ineligible for resentencing under Penal Code section 1170.126. (*Teal*, *supra*, fn. 4.) *Teal* unequivocally held that "[t]he test of appealability under [Penal Code] section 1237, subdivision (b), does not depend on the resolution of 'an issue to be determined on the merits.'" (Quoting *Totari*, *supra*.) Similarly, in *Totari*, the Supreme Court held that the appealability of the denial of a Penal Code section 1016.5 motion to vacate premised on a claim of insufficient advisements concerning the immigration consequences of a guilty or no contest plea is not dependent on the merits of the underlying claim. To the contrary, *Totari* held that adopting such an approach would result in a "judicial inefficiency." The procedural question of appealability is a threshold determination that is distinct from the ensuing assessment of the appeal's merits.

In sum, should trial attorneys begin filing notices of appeal from the denial of Penal Code section 1170(d) recall motions, appellate counsel can now cite to *Loper* for the proposition that the order appealed from is in fact an appealable one.