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TRAINING BULLETIN

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States' Civil Liability For Negligent, Reckless Or Indifferent Decision To Parole A Violent Criminal

By
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Recently, we were asked to look into the circumstances surrounding the shooting of a Los Angeles Police Officer during a gunbattle initiated by a parolee named Javier Joseph Rueda, who was negligently, mistakenly or recklessly released by State parole authorities, after serving only two (2) years of a ten (10) year prison sentence.

The officer sustained a gunshot wound to his forearm, while a second officer suffered a fractured wrist as he tried desperately to get behind cover of their police car and slipped on shattered windshield glass caused by a bullet impact. We were asked to assess the liability, if any, of the parole authorities for negligent release of a dangerous and violent prisoner to unsupervised parole, enabling him to acquire a firearm, which he used to shoot at the officers who were lawfully and properly engaging in enforcement action.

Establishing the requisite causal connection between the acts and omissions of parole authorities and the

injuries suffered by officers is always a difficult aspect of these cases because it involves the question of foreseeability of injury to police officers and other random, third-party victims of the parolee's violence and criminal assaults. But our assignment was more basic and put aside the question of whether causation could be proved. Instead, we are asked to determine whether, apart from the question of causation, the State and parole authorities are nevertheless protected by immunity or are otherwise not liable for the assaultive behaviors of the released prisoner.

In the course of this project, we examined California statutory immunities and California appellate decisions of the Supreme Court and Courts of Appeal. We also examined the availability of relief under the civil rights statutes, 42 USC § 1983, particularly the 14th Amendment's Due Process Clause, and the decisions of the United States Supreme Court and Ninth Circuit Court of Appeals that bear upon the issue.

We shall conclude that, based upon the facts of this case, the State, the parole authorities and other government officials are immune from liability for the injuries. We shall also conclude that the federal Due Process Clause may not be invoked by the officers as an alternate theory of liability for the acts and omissions of the parole officials involved in the decision to release Rueda, nor for their failure to adequately supervise Rueda after his release.

BRIEF STATEMENT OF THE FACTS

The officers were assigned to Foothill Area and were concentrating patrol efforts around the locations frequented by the violent and notorious street gang known as the Vineland Boys. They encountered a driver (Rueda) who tossed a beer can out the car window. An attempted traffic stop resulted in a dangerous pursuit. Ultimately the car stopped in the street and the driver got out and pointed a handgun at the officers and started firing. In the ensuing gunbattle, Rueda was struck twice in the head and once in the chest by the officers' rounds. He expired.

Rueda was in prison for felony evading and possession of a firearm fitted with a silencer. As will be seen, he was released to unsupervised parole due to negligent classification as a non-violent offender which made him eligible for early release according to Department of Corrections and Rehabilitation policies which State officials claim, are necessary to alleviate extreme conditions of overcrowding in the State's penal institutions.

DISCUSSION

We were asked whether the State or parole board officials can be held liable for the officers' injuries, on the basis that the State and parole officials adopted a policy to release certain prisoners on an unsupervised, irrevocable parole under an early-release program, the State claims is necessary to ease prison overcrowding. Prisoners were eligible for this parole if they were convicted of relatively low level, non-violent offenses. In determining Rueda's eligibility, his history of gang affiliation was not taken into account or was overlooked. Rueda was a known Vineland Boys gang member with violent tendencies. The Vineland Boys gang was responsible for the murder of Burbank Police Officer Matthew Pavelka several years ago.

Corrections officials have readily admitted to the media that the early release program is flawed and that many violent criminals have been released under the program who present a danger to the public.[1] However, despite this shocking admission, we find in this case there is no real potential for imposing liability on the State or parole officials. *Government Code* § 845.8 immunizes public entities and employees from liability for damages caused by the decision to grant, deny, or revoke parole, or by the setting of terms and conditions or supervision. This immunity is reinforced by the general immunity of public entities and officials for discretionary acts, codified as *Government Code* § 820.2. Case law has expanded the § 845.8 immunity to include negligence in the implementation of a supervision plan. These California statutes and decisions of state and federal courts in the Ninth Circuit mirror enactments and decisions in other states and federal circuits, and generally reflect the state of the law throughout the country. However in states outside of California, statutes and

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[1] It has been reported that there are presently 13,000 parolees in California who are "unaccounted for" and are thus termed "parolees at-large." The early release program implemented in 2009 reportedly kicked off with the mistaken release of 656 violent-crime prisoners who were erroneously classified as "non-violent" and should not have been eligible for early release to unsupervised parole. On the same evening this article was being edited on September 28, 2010, another violent parolee-at-large named Jack Schlesinger, driving a stolen car and armed with an assault rifle, fired upon three LAPD officers who returned fire, killing Schlesinger. *See*: *Los Angles Police Protective League Press Release*: "Failed State Parole System Almost Cost LAPD Officers Their Lives . . . Again," September 29, 2010;

http://lapd.com/news/pr/failed_state_parole_system_almost_cost_lapd_officers_their_lives_again/

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decisions in those states should be consulted.

On balance, all of the cases that follow hold that the purpose of the immunity protecting the State and parole officials from liability is to assure that decisions of this type can be made and implemented without fear of civil liability. A problem such as the State is addressing, the overcrowding of state prisons, has no perfect solution, and inevitably must result in either "inhumane" conditions inside (which in turn inevitably leads to litigation against the State, as has occurred over the years before United States District Judge Thelton E. Henderson [N.D.Cal.] over inadequate medical care and other substandard conditions of confinement) or increased risk outside. Yet State officials faced with this problem have made decisions to accept one of these evils: they have released thousands of violent criminals who remain at large and unaccounted for. Yet, all courts that have seriously considered this issue have refused to permit persons injured by parolees to submit claims to a jury that their injuries were caused by the failure of state or parole officials to exercise reasonable care in making decisions granting parole, denying parole, imposing supervision terms, or carrying them out.

The statutory immunities of public entities for injuries inflicted by others may be overcome in some cases under two general circumstances: **(1) where there is an opportunity to warn an *identifiable potential victim*; and (2) where the governmental actor *creates the danger* that resulted in the injury.**

The recognition of liability for an injury resulting from a failure to warn an identifiable potential victim was adopted in ***Tarasoff v. Regents of University of California*** (1976) 17 Cal. 3d 425, where a psychiatrist failed to warn a *particular* murder victim that a patient had threatened to kill her. That theory of third-party liability remains actionable, but only if the identity of the victim was reasonably foreseeable.

A random event such as the one in this case does not give rise to liability of parole authorities. In a case decided shortly after *Tarasoff*, the California Supreme Court in ***Thompson v. County of Alameda*** (1980) 27 Cal. 3d 741, 754, rejected the suggestion that parole authorities have a duty to give general warnings to local police or neighborhood parents about the release of a dangerous parolee, absent the *identification of a specific foreseeable victim*.

Under *Government Code* § 845.8, as construed in ***Duffy v. City of Oceanside*** (1986) 179 Cal. App. 3d 666, the State is immune from liability for all decisions to grant or revoke parole, and

there is no exception to that immunity for negligence in carrying out an adopted plan of supervision. After *Duffy*, the theory of liability for negligence in failing to warn a reasonably foreseeable particular victim still remains actionable.

Section 845.8 immunizes public entities and employees from liability "for: (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release." The California Supreme Court in ***Martinez v. State of California*** (1978) 85 Cal. App. 3d 430 briefly opened the door to the possibility of imposing liability on the State where a mentally disordered sex offender was granted parole, and raped and killed a 15-year-old girl.

The Supreme Court affirmed summary judgment for the defendants in the case, but recognized that the plaintiff argued that the "ministerial acts in carrying out the decision to release the person" is not covered by § 845.8 immunity, and "an allegation of negligence must be determined on a case-by-case basis...." *Id.* at 435, citation omitted. The Supreme Court determined that the plaintiff did "not allege negligence occurring after the decision to release" the offender. The plaintiff alleged that the prisoner had been declared a mentally disordered sex offender, and had received no psychiatric treatment or evaluation, but the Court found that "All of these acts and omissions are part of the discretionary act of releasing a prisoner and come within the government's immunity." *Id.*

Martinez opened the door to a possible exception from the immunity for negligence committed *after the decision to release* a prisoner on parole. The plaintiff conceded that "In making a decision to release a prisoner the actual decision, including the ministerial act of applying established rules and regulations to the particular case in question, is covered by governmental immunity...." *Id.*, citation omitted. Accordingly, the plaintiff was not arguing that the prisoner should have been denied parole, or should have been placed under certain terms and conditions, as that decision was concededly part of the decision whether or not to release the prisoner. But the plaintiff argued that the subsequent negligent supervision of the parolee might fall outside the immunity, and the Court, rather than rejecting that suggestion outright, merely found that the plaintiff had not alleged that the murder resulted from negligent supervision of the parolee.

At the same time as finding that plaintiff had not alleged negligence in supervision occurring after the decision to release, the Court in *Martinez* also

rejected a theory of willful failure to supervise, on a somewhat broader basis. The Court observed that "supervision of a parolee consists of the ministerial implementation of correctional programs which can hardly be isolated from discretionary judgments in adopting such programs. Thus, for correctional activities, both discretionary decisions and their ministerial implementation come under the blanket of immunity...." *Id.* at 436, citations and internal punctuation omitted.

At the time *Martinez* was announced, it appeared that the Supreme Court was receptive to an exception from immunity for negligence in performing ministerial duties of supervision, committed after the decision to release, though the Court's holding that discretionary and ministerial duties must be protected because they cannot be isolated from one another is exceedingly difficult to reconcile with its apparent receptivity to the negligent supervision claim.

The door that was cracked open in *Martinez* was slammed shut in *Duffy*. Plaintiff in *Duffy* was a city employee, murdered by a co-worker who was on parole after convictions for kidnaping and rape. *Id.* at 669. The victim's heirs brought a wrongful death action against the State for alleged negligent failure to control the parolee, and against the City employer, based on the *Tarasoff* failure-to-warn theory.

The parolee had made sexual advances on the particular employee victim, and she had complained of sexual harassment. The City, though familiar with the parolee's past, did not take appropriate action. Accordingly, the *Tarasoff* claim was actionable, because a foreseeable victim had become identifiable to an employer who had the ability to warn the victim. *Id.* at 673-675.

But the court held that § 845.8 immunized the State. The court observed that "plaintiffs argue that only discretionary decisions are protected by the immunity cloak of § 845.8. They contend the alleged negligence in this case involves the merely ministerial function of properly supervising [the killer's] parole." *Id.* at 673. Rejecting this argument, the court held that "'Ministerial implementation of correctional programs can hardly, in any consideration of the imposition of tort liability, be isolated from discretionary judgment made in adopting such programs.'" *Id.*, citations and internal ellipses omitted. The court in *Duffy* expressly rejected an assertion by plaintiffs that there was any confusion or ambiguity in the *Martinez* decision that left the door open to the plaintiffs' suggested distinction that immunity protects

discretionary decisions but not ministerial acts. The court stated, "we rejected Martinez' contention that parole supervision was merely the ministerial implementation of a discretionary correctional decision...." *Id.* at 673. In the court's view, *Martinez* "compels affirmance of the trial court judgment here in favor of the State." *Id.*

While the observation in *Duffy* that there was no confusion or ambiguity in the *Martinez* opinion is questionable when checked against the actual language of the *Martinez* opinion (as quoted above), the opinion in *Duffy* clearly communicates that the court meant exactly what it said in holding that both discretionary and ministerial decisions are protected by § 845.8 immunity because they cannot be isolated from one another. And when the Court appeared to reject the negligent supervision claim in *Martinez* only on the ground that plaintiff had not alleged conduct after the decision to release, the subsequent clarification in *Duffy* makes it doubtful that any type of subsequent conduct that such a plaintiff might allege would escape the protection of the § 845.8 immunity.

Subsequent cases have followed *Duffy*. In 1984, we prosecuted a lawsuit against the State, after two particularly vicious and violent parolees, Kenneth Gay and Raynard Cummings, murdered LAPD motorcycle officer Paul Verna of Valley Traffic Division on a traffic stop in Lake View Terrace, while driving a stolen car in 1983; ***Verna v. State of California***, et al., LASC No. MWC001940 (1984). We brought suit against the State on behalf of Sandy, Paul's widow, and Ryan and Bryce, Paul's sons. The action was based on negligent failure to supervise inasmuch as these two criminals, while completely unsupervised after release about three months earlier, went on a San Fernando Valley crime spree of small business robberies and home invasions wherein most victims were viciously beaten. When we took their depositions at San Quentin's death row, Gay and Cummings admitted that they were completely unsupervised and admitted killing Verna because they thought he had "made" the stolen car. Moreover, Cummings was actually an absconder who had been sent to California to do his parole from a Pennsylvania prison under the Interstate Compact Act. But when he got here, State authorities rejected him because he was "too violent." They told him to "go back to Pennsylvania." Of course, he didn't, and remained here and shortly hooked up with Kenneth Gay. Cummings told us during the death row depositions that when parole authorities told him he was rejected for California parole supervision, he asked them for some financial help to get back to Pennsylvania, since he came here

thinking he would be allowed to stay in California. He said he was refused. He said he told them, "Well, I ain't gonna sleep on no park bench!" He said he walked out of the parole office and never contacted them again. So he was here in California, supposedly on parole from imprisonment for violent crimes, without any parole supervision or support whatsoever. It was then that he met Kenneth Gay. The second prong of the *Verna* action was based on federal due process under 42 *USC* §1983. The results of the *Verna* case are discussed below.

In ***Brenneman v. State of California*** (1989) 208 Cal. App. 3d 812, the Court of Appeal affirmed dismissal of a wrongful death claim based on a parolee's molestation and murder of a 12-year-old girl, as the court recognized that § 845.8 immunity would preclude liability even if the State had a duty to supervise the parolee after his release, and even if the breach of that duty proximately caused the loss. The court observed that the § 845.8 immunity is a specific application of the general discretionary immunity created by *Government Code* § 820.2, which recognizes a distinction between ministerial and discretionary duties. But for the § 845.8 immunity, because of the difficulty of isolating the ministerial from the discretionary duties, both are protected. *Id.* at 820, citing ***County of Sacramento v. Superior Court*** (1972) 8 Cal. 3d 479, 485.

In ***Weissich v. County of Marin*** (1990) 224 Cal. App. 3d 1069, a convict who was released from prison killed the district attorney who had prosecuted him for arson 30 years earlier. Upon being convicted, the arsonist made death threats against law enforcement personnel, the district attorney, the trial judge, and the jurors. *Id.* at 344-345. Shortly before the prisoner was released at the end of his sentence, state corrections officials met with the district attorney and other targets of the threats, and allegedly gave assurances they would warn the intended targets of the released prisoner's behavior. *Id.* at 345. The corrections officials gave some subsequent warnings about the convict, but he obtained a gun and killed the prosecutor eleven years after his release from prison. *Id.* at 345.

In the wrongful death action based on breach of the duty to warn, the Court of Appeal affirmed the sustaining of a demurrer. *Id.* at 344. The court observed that defendants' voluntary assurance gave rise to a duty of care, but that it did not extend through the eleven-year interval between the release and the murder. The court found, "no express promise of open-ended duration is alleged." *Id.* at 348. The court also concluded that "it would be unreasonable to interpret the implied

promise by certain of defendants' representatives in 1977 as imposing a duty on defendants which obligated them in perpetuity to inform Weissich of [the arsonist's] criminal conduct." *Id.* The court distinguished *Duffy's* holding on the *Tarasoff* theory, by explaining that the City, as an employer, was in a special relationship with both the assailant and the victim. *Weissich, id.* at 350.

In ***Fleming v. State of California*** (1995) 34 Cal. App. 4th 1378, the court confirmed that § 845.8 immunizes the state and the parole officer for civil liability for a murder committed by a parolee. *Government Code* § 815.6 provides for exceptions to immunity for certain violations of mandatory enactments. Plaintiff in *Fleming* attempted to avoid the § 845.8 immunity by alleging violation of *Penal Code* § 3059, a statute calling for the arrest of a paroled prisoner who leaves the state without permission. The court held that § 3059 does not impose a mandatory duty that gives rise to civil liability. *Id.* at 1383-1384.

A possible alternative theory of liability might arise under 42 U.S.C. § 1983 as we attempted in *Verna*. However, federal law developments have imposed limitations on civil rights liability for negligence that preclude this theory as well. That is what dealt the *Verna* case the final blow, based on the U.S. Supreme Court's holding in ***DeShaney v. Winnebago County Department of Social Services*** (1989) 489 U.S. 189. Twenty-seven years after they murdered Paul Verna, Gay and Cummings remain alive in prison.

The *Martinez* case went to the United States Supreme Court on issues of § 1983 liability along with the constitutionality of *Government Code* § 845.8. In ***Martinez v. State of California*** (1980) 444 U.S. 277, 283-285, the state court decision was affirmed, and the Court held that the death was too remote a consequence to impose liability on the parole board under § 1983.

In ***Daniels v. Williams*** (1986) 474 U.S. 327, the United States Supreme Court held that federal civil rights liability cannot be imposed for simple negligence, and concluded that the defendant must be shown to have acted deliberately. *Id.* at 331. Following *Daniels*, the Supreme Court in *DeShaney* held that a State had no liability for molestation of a minor child by her father, despite failing to take action in response to complaints that the father was molesting the child. The Court held that the Fourteenth Amendment generally does not impose a duty upon states to protect persons from harm inflicted by others. *Id.* at 196-197. The court in *Verna* dismissed our federal claims based on *DeShaney*,

holding that the negligence of parole authorities, albeit shocking, did not rise to the level of a constitutional violation. Finally, in ***Bryan County v. Brown*** (1997) 520 U.S. 397, 410, the Supreme Court confirmed that the plaintiff must establish the defendant acted with "deliberate indifference" to a known peril.

Two major exceptions have been recognized in which a duty to warn of or prevent harm inflicted by third parties may exist: (1) where the government is in a special relationship with the victim, such as a custodial or employment relationship; and (2) where the government itself places the plaintiff in a dangerous situation that would not otherwise have existed. See, e.g., ***L.W. v. Grubbs*** (9th Cir. 1992) 974 F.2d 119, 121. In the context of protecting potential victims from violent criminal acts, the special relationship exception may give rise to a duty to warn if a specific potential victim is identifiable. *DeShaney*, 489 U.S. at 197-202. The Court in *DeShaney* concluded that no special relationship existed between the State and the minor child that would give rise to an affirmative duty. *Id.* In *Verna*, we were unable to demonstrate a special relationship between the State and Paul Verna. His tragic death followed a few minutes after he stopped Gay and Cummings for running a stop sign, a random traffic enforcement action.

The Ninth Circuit has demonstrated considerable flexibility in implementing the Supreme Court's culpability requirements for civil rights liability. In ***Wood v. Ostrander*** (9th Cir. 1989), the court reversed a summary judgment based on qualified immunity where a state trooper impounded a car and left a passenger abandoned five miles from home in a high crime area on a cold night, leading to the passenger accepting a ride from a passing motorist who raped her. *Id.* at 586. The court held that regardless of considerable judicial controversy over the precise level of culpability required to state a claim under § 1983, a showing of reckless indifference to the plaintiff's rights or safety is clearly sufficient, and these facts, if believed, would support a finding of that level of culpability. *Id.* at 587.

In ***Huffman v. County of Los Angeles*** (9th Cir. 1998) 147 F.3d 1054, where an off-duty Sheriff's deputy was sued under § 1983 for a fatal shooting in a bar, the Ninth Circuit rejected a theory of government-created danger based on the County's failure to sufficiently advise the deputy about the risk of carrying a gun off duty, and held that "the danger-creation plaintiff must demonstrate, at the very least, that the State acted affirmatively ... and with

deliberate indifference ... in creating a foreseeable danger to the plaintiff ... leading to the deprivation of the plaintiff's constitutional rights." *Id.* at 1061.

In ***Kennedy v. City of Ridgefield*** (9th Cir. 2006) 439 F.3d 1055, the Ninth Circuit denied qualified immunity to a police officer who failed to keep a promise to an informer to notify the informer before taking action against the suspect, where the failure to keep the promise enabled the suspect to shoot the plaintiff and her husband within eight hours of learning of the allegations against him. *Id.* at 1057. The court held that the government-created danger exception is tested according to whether the government's action placed the plaintiff in a more dangerous situation than the plaintiff otherwise would have faced. *Id.* at 1062.

In its latest application of the government-created danger exception, the Ninth Circuit found insufficient culpability in ***Johnson v. City of Seattle*** (9th Cir. 2007) 474 F.3d 634, where plaintiffs alleged that unduly passive crowd control tactics by police at the City's Mardi Gras festival resulted in rioting causing one death and over 70 injuries. The court held that the police decision to use passive tactics did not amount to affirmative conduct that placed the plaintiffs in greater danger than they otherwise would have faced without any police activity at all. *Id.* at 641.

These Ninth Circuit cases discuss numerous other precedents that test the "deliberate indifference" standard under varying facts. The City of Los Angeles may be in a special relationship with the officers as the employer, but it had no knowledge of the officers as a specific potential victim of Rueda.

CONCLUSION

Where a police officer or other third party victim is injured or killed by a dangerous parolee, the State and parole officials will be immune from suit for alleged negligence or recklessness in granting, setting the terms of, and in supervising parole, including failure to revoke parole, unless the officer or third party victim is identifiable as a particular potential victim of the parolee, and that with this knowledge, state officials fail to take reasonable steps to warn the victim, or where the State has undertaken a special duty toward a foreseeable victim of the parolee, and thereafter unreasonably fails to protect the victim who relies on the State for his/her protection, or where the State by its officials' affirmative conduct, has placed the victim in danger that the State created, or by its acts and omissions, substantially enhanced. Absent these

causation links, the states are generally immune from liability for the negligent, reckless or indifferent release of a known violent offender into the community, where that offender commits further violence upon unforeseeable victims.

Stay Safe!

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