



June 25, 2010

Deputy Attorney General Bruce Reeves
Office of the Attorney General
California Department of Justice
1300 I Street
Sacramento, CA 95814

Re: *In re Dugard* Mediation

Dear Bruce,

This letter summarizes the mediation that resolved Ms. Dugard's claims, which took place on June 24, 2010, at the JAMS office in San Francisco. The mediation resulted in an agreement for CDCR to pay Ms. Dugard and her two daughters \$20 million in return for their waiver of any claims against the state or any state agency, official, or employee.

FACTUAL AND PROCEDURAL POSTURE

Jaycee Dugard was 11 years old when she was kidnapped in 1991 near her home in South Lake Tahoe by Phillip Garrido and his wife, Nancy Garrido. Ms. Dugard was transported to the Garridos' home in Antioch, California and hidden in a makeshift shed in their backyard, where she was repeatedly raped over the course of years. Ms. Dugard gave birth to two daughters, one in August 1994 and one in November 1997, both fathered by Garrido. Ms. Dugard and her daughters were sequestered in this shed without access (or, possibly, with minimal access) to medical services, education, or social contact, for 18 years. In August 2009, while Garrido was supervised by California parole authorities, an investigation by state parole and local law enforcement led to the arrest of Phillip and Nancy Garrido, the discovery of Ms. Dugard's identity, and the reunion of Ms. Dugard and her daughters with their family.

In 1977, Garrido was convicted in state and federal court for kidnapping and raping a 25-year-old woman. A federal court sentenced him to 50 years for kidnapping, while a Nevada court imposed a five-years-to-life term for forcible rape. In January 1988, after serving 11 years of his federal sentence, the federal government paroled Garrido and released him to Nevada's authorities to serve his state sentence. Seven months later, Nevada paroled Garrido, returning him to the federal parole authorities to serve the remainder of his federal parole term. In 1999, Garrido was discharged from federal parole and returned to the jurisdiction of the Nevada parole authorities. Under the terms of an interstate parole compact, CDCR assumed parole supervision on Nevada's behalf because Garrido lived in Antioch, California. Garrido was under the

jurisdiction of federal parole authorities from August 1988 to January 1999, during which time he kidnapped Ms. Dugard, sexually assaulted her, and fathered her two daughters. From 1999 until his arrest in August 2009, CDCR had parole supervision of Garrido.

Through her attorneys, Ms. Dugard and her daughters filed claims with the California Victim Compensation and Government Claims Board. Those claims were held in abeyance pending the outcome of the mediation. Ms. Dugard's attorneys asserted potential claims for 1) Failure to Discharge a Mandatory Duty; 2) Negligence; 3) Negligent Hiring, Training, Retention, and Supervision; and 4) Infliction of Emotional Distress. The plaintiffs are Ms. Dugard and her two daughters, and CDCR and numerous Does were possible defendants.

LEGAL ANALYSIS

CDCR's analysis of Plaintiffs' four likely legal claims follows.

Failure to Discharge a Mandatory Duty.

Plaintiffs could assert that Defendants failed to discharge their mandatory duties under Government Code section 815.6, which states:

Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

The term "enactment" includes an ordinance or regulation. The statute's three-part test for determining whether liability may be imposed on a public entity is: 1) An enactment must impose a mandatory, not discretionary, duty; 2) the enactment must intend to protect against the risk of injury suffered by the plaintiff; and 3) breach of the mandatory duty must be a proximate cause of the injury suffered.

Plaintiffs support this claim by alleging that Defendants failed to give Garrido a "High Control" classification (Cal. Code Regs., tit. 15, § 3504); failed to refer Garrido for a mental-health assessment when he first came under CDCR's parole supervision (Cal. Code Regs., tit. 15, § 3610); failed to investigate a suspected parole violation (Cal. Code Regs., tit. 15, § 2617); failed to monitor Garrido by GPS for the term of his parole (Penal Code section 3000.07); failed to fulfill a mandatory duty not to deprive Plaintiffs of life, liberty, or property without due process (Article 1, Section 7(a) of the California Constitution); and various CDCR parole procedures (mandatory supervisor case review, mental-health assessment).

Although public entities are generally immune for the discretionary acts of their employees, they are not immune for the failure to discharge mandatory acts (Gov. Code, § 815.2). However, several cases have refined the definition of mandatory acts and upheld defendants' demurrers in similar circumstances. For example, in *Fleming v. State* (1995) 34

Cal.App.4th 1378, the court of appeal held that the state and the parole agent were entitled to immunity, where the parole agent did not arrest the parolee even though the parolee had violated the terms of his parole. The parolee subsequently kidnapped, tortured, raped, and killed a woman. The court held that the duty to arrest the parolee was permissive rather than mandatory, and further held that the defendants were immunized by Government Code section 845.8. A similar result was reached in *Brenneman v. State* (1989) 208 Cal.App.3d 812, in which a parolee molested and murdered a child. Defendant would argue that the duties that Plaintiffs cite are not mandatory and imposed no duty to act. For example, the California Code of Regulations, title 15, section 3610 states that a parole agent may refer a parolee for a mental health assessment at any time during the period of parole. Moreover, the duty to review Garrido's case file or monitor by GPS does not impose a mandatory duty to take a specific action.

Nevertheless, CDCR acknowledges that it missed opportunities to identify Ms. Dugard, as documented in the Office of Inspector General's report dated November 2009. That report concluded that CDCR failed to properly supervise and classify Garrido and missed opportunities to locate the victims and search the backyard shed. While CDCR could assert that it is entitled to immunity, the failure to discover Ms. Dugard before 18 years had elapsed is tragic.

Negligence.

Plaintiffs' second claim possible claim alleges negligence under California Government Code section 815.2 (a), which states:

A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

Plaintiffs assert that the exercise of parole functions, and the supervision of parole functions, was negligent. Plaintiffs allege that discretionary immunity would not apply because the acts and omissions related to operational and low-level ministerial tasks. That claim is supported by the allegations described above: that Garrido was mis-classified as a low-risk offender, that his controlling offense was non-sexual, that the parole supervisors failed to review the case file, that the parole agents' visits failed to locate the backyard shed, and that agents saw and spoke to Ms. Dugard and her eldest daughter but failed to investigate their identities or their relationship to Garrido.

Two immunities apply to this claim. Government Code section 845.8(a) states that a public entity is not liable for any injury resulting from determining whether to parole or release a prisoner, or from determining the terms and conditions of his parole, or from determining whether to revoke his parole. And Government Code Section 846 states that a public entity is not liable for injury caused by the failure to make an arrest or by the failure to retain an arrested person in custody. It is well-settled case law that section 845.8 extends immunity to even the negligent supervision of parolees, and parole agents are immune for actions related to the

determination whether to revoke parole. (*Fleming v. State of California, supra*, 34 Cal.App.4th at p. 1382; *Swift v. Department of Corrections* (2004) 116 Cal.App.4th 1365.)

Negligent Hiring, Training, Retention, and Supervision.

The third allegation of negligent hiring, training, retention, and supervision and is supported by the facts described above. This negligence claim would be subject to the same immunities provided by Government Code sections 845 and 846, as described above.

Intentional Infliction of Emotional Distress.

Plaintiffs assert a claim for Intentional Infliction of Emotional Distress, which has three elements: (1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff suffered severe or extreme emotional distress; and (3) the plaintiff's injuries were caused by the defendant's outrageous conduct. To satisfy the first element, the alleged conduct must be so extreme as to exceed all bounds of that usually tolerated in a civilized community. Further, the conduct must be directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware.

To support this claim, Plaintiffs first note lapses in CDCR's supervision of Phillip Garrido. This includes allegations regarding the failure to supervise him as a sex offender, to refer him for mental-health treatment for many years, and to thoroughly search the Garrido home and locate the shed in the backyard. None of these facts, however, demonstrate actions that were directed at Ms. Dugard or her daughters, nor were they intended to cause them emotional distress. Plaintiffs repeatedly emphasize that CDCR missed numerous opportunities to locate them, which in several respects contradicts the requirement that CDCR knowingly directed outrageous conduct toward them with the purpose to cause emotional harm. Second, Plaintiffs assert that Ms. Dugard was seen by at least three different CDCR parole agents. But there is no indication that any parole agent intentionally caused emotional distress to Ms. Dugard or her daughters.

MEDIATION CONSIDERATIONS

CDCR is legally protected by well-established immunities, but recognizes that this case has a unique and tragic character. Although Defendant's chances of prevailing on a dispositive motion—or, more likely, on parts of a dispositive motion—are good, CDCR also recognizes that a potential damages award could be extremely high.

CDCR's settlement posture was guided by several considerations. First, it is a virtual certainty that Ms. Dugard and her daughters will require counseling for the remainder of their lives, with varying degrees of intensity at different time periods. Second, neither of Ms. Dugard's daughters has received any education, and neither is presently equipped to handle the academic or social challenges that school will pose. Ms. Dugard has received no education since her abduction, and all three have expressed their desire to obtain an education. Third, CDCR

accepts as true the premise that this family wants to avoid press scrutiny, and will make every effort to respect that wish. Finally, CDCR and the state must be assured that it will not face further liability in any future case involving Plaintiffs.

An effort was made to offer a settlement to these Plaintiffs that would assist them with rebuilding their lives in the privacy that they need. Although very difficult to project, it is likely that the cost of therapy, assisted living, and counseling for Ms. Dugard and her two daughters will cost approximately \$7 million for their lifetimes. Educational costs for the three Plaintiffs would likely amount to at least \$450,000. Awards for similar cases are shown below, although it is important to note that this matter is virtually unique. It appears that no other case, aside from one in Vienna, Austria, is truly similar because most abducted children are not forced to give birth to their abductor's children. Our findings indicate that the average settlement award is \$2 million, although none of these cases match the uniquely tragic circumstances here. Two cases, however, are closer in character than the others, and justify the amount of the settlement here. In the first case, a state department of corrections failed to properly supervise dangerous parolees in the community, resulting in a jury verdict of \$22 million (\$15 million and \$6.3 million) to the plaintiffs. In the other case, a \$15.3 million jury verdict was awarded for an unmonitored felon who raped and murdered. The following table lists settlement awards:

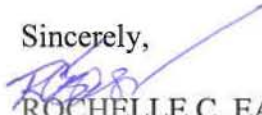
\$2.75 million	Settlement reached—at age 12, client lost his family in auto accident caused by unsupervised parolee.
\$1.9 million	Settlement reached—teenage daughter was killed by sex offender who was improperly supervised while on parole.
\$2.2 million	Settlement reached—death of husband and father occurred in brutal beating by man who would have been in jail had DOC properly supervised him.
\$1.4 million	Settlement reached—where plaintiff was severely injured and mother killed in auto accident caused by drug-dependent parolee who was not adequately supervised.
\$1.4 million	Settlement reached—after jury selection against Washington Department of Corrections on behalf of a woman who was kidnapped and murdered by negligently supervised parolee.
\$1.5 million	Settlement reached—for family of pregnant 18-year-old murdered in 1996 by juvenile offender placed in minimum-security facility.
\$5.5 million	Settlement reached—where DOC failed to provide even minimal supervision for Richard Hesper Wilson, who wounded two women in a shooting rampage, even though agency determined he required a high level of oversight.
\$2.25 million	Settlement reached—for families of two 16-year-old boys who were shot to death by unsupervised mentally ill parolee

SETTLEMENT RESULTS

Obviously, no amount of money could compensate these Plaintiffs for what they have endured, but the settlement was made with the intent of providing the financial support that they will need to rebuild their lives and also acknowledging the risk of a much higher jury award should Ms. Dugard or her daughters prevail on any claim. CDCR agreed to pay \$20 million to Ms. Dugard and her daughters, in return for their agreement to not bring any legal claim against CDCR, the State of California, or any California agency, official, or employee, related to the events associated with their abduction or captivity. The money will be put into a structured settlement that will be approved by the mediator, Judge Weinstein. The structured settlement will ensure that the Plaintiffs receive a lifetime annuity, and will ensure that the money is protected so that it is used exclusively for the benefit of the Plaintiffs.

Please feel free to contact me if any more information is needed.

Sincerely,



ROCHELLE C. EAST

Senior Assistant Attorney General

For EDMUND G. BROWN JR.
Attorney General