

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FIVE

In re ANDREW G.,)
)
 A Minor.) No. A105329
_____)
)
PEOPLE OF THE STATE OF CALIFORNIA,)
)
 Plaintiff and Respondent,)
 vs.)
)
ANDREW G.,) No. 188442
) (Alameda County)
 Defendant and Appellant.)
_____)

APPELLANT’S OPENING BRIEF

Statement of the Case

A. Current Section 602 petition

On September 12, 2003, a two-count petition was filed pursuant to Welfare and Institutions Code¹ section 602, in which it was alleged in both counts that appellant had committed assault with a weapon with force likely to produce great bodily injury. (Pen. Code §245, subd. (a)(1).) It was further alleged as to both counts that appellant had

¹ Unless otherwise designated, all further statutory references are to the Welfare and Institutions Code.

committed the offense for the benefit of a criminal street gang. (Pen. Code §186.22, subd. (b)(1).) (CT 333-334.)

On October 17, 2003, appellant admitted amended count one,² and admitted the gang allegation enhancement. (RT 9-12.) On motion of the prosecutor, count two was dismissed. (RT 12-13.)

On October 31, 2003, the court ordered the probation department to find a placement with “gang intervention” services that would be willing to accept appellant. (RT 20-21.)

On December 11, 2003, appellant was committed to the California Youth Authority (“CYA”) for a maximum period of eight years. The court made the finding that this was an offense as defined by section 707, subdivision (b). Appellant was ordered to pay a restitution fine in the amount of \$100; and the amount of victim restitution was reserved. (CT 378-379; RT 29-30.)

On January 8, 2004, appellant was accepted by CYA for commitment. (CT 385.)

On January 13, 2004, the court found that the victim had not made a claim for restitution, so it was not ordered that appellant was not required to pay victim restitution. (RT 33.)

² The allegation was limited to the use of hands and feet in the offense, and all other allegations as to use of a weapon were stricken. (RT 9.)

On January 15, 2004, appellant filed a timely notice of appeal.
(CT 395.)

B. Appellant's Juvenile History

Appellant has no prior juvenile adjudications. The petition filed in the instant matter was the first juvenile petition filed in which it was alleged that appellant had committed a criminal offense. (CT 333-334, 340; RT 2, 18.)

Statement of Appealability

This appeal is from a disposition order in a juvenile case and is authorized by California Rules of Court, Rule 1435, subdivision (a).

Statement of Facts³

A. Facts of the Offense

The case at bar arose out of a fight in Union City. Appellant was 14-years old when he was arrested. Also arrested were Joshua Castrence, aged 19, Benjamin Copon, age 18, Johnathan Felarca, aged 19, arrested as adults; and, Robert A., aged 17, and, appellant's sister, Katherine G., aged 17, arrested as juveniles. (CT 32-34, 231-233, 256-257.)

³ Because there was no jurisdictional hearing conducted in this matter, all "facts" are from the probation officers report and other documents contained in the clerk's transcripts.

At about 12:45 a.m. on August 19, 2003,⁴ police officers responded to “In N Out Burgers” based on a report of a fight in which it was reported that some participants had weapons. (CT 355.) There they found two young Asian men, later identified as Jim A. and Jordan A., lying on the parking lot with a pool of blood near their heads. (CT 5, 32, 36, 47.) By the time the police arrived, the suspects had fled in automobiles. (CT 3, 356.) Jordan A. and Jim A. were taken to the hospital. Jordan A. was diagnosed with a concussion and scalp laceration. Jim A. was diagnosed with a head injury. (CT 34, 38, 242, 313.)

The incident began late in the evening on August 17, with the vandalism of two automobiles belonging to associates of appellant’s. On August 18, there was a birthday party at a residence, and while attending the party, appellant received several telephone calls on his cell phone from a person named “Jordan” who was believed to be one of the people responsible for vandalizing the two cars. “Jordan” was the member of a rival gang, Vicious Family. Appellant said that after he and Jordan had words, they decided to meet at In N Out Burgers to settle their differences. They took weapons with them because they were determined not to lose the fight. (CT 36, 40, 358.)

⁴ All further references to a date in the “Statement of Facts” are to the calendar year “2003.”

The group left the party in two vehicles, and drove to the In N Out. When they arrived, appellant saw a group of Filipino males walking into the restaurant. He walked up to the group and asked one of the males if he was “Jordan.” Appellant and Katherine told the police that the male acknowledged that he was “Jordan.” Appellant then started hitting Jordan with a closed fist. Appellant threw the first punch, but never used a weapon.⁵ (RT 17, 43.) An unknown suspect hit Jordan over the head with an object. Jordan’s friends ran over to help him at the same time the people who had arrived with appellant approached with Nunchukas, bats and a metal pole. (CT 36, 40, 41, 42.) Appellant said he began chasing Jason M., and appellant said he did not know what happened after he left. (CT 41, 47.) Appellant’s sister Katherine admitted to police that she was the person who had taken a metal pipe from the trunk of her car and hit one of the males a “couple of times” with it. (CT 40, 43.) Benjamin C. admitted, and was identified, as the person with the Nunchakas. (CT 40-41, 42, 46.) Robert A. admitted kicking one of the victims. (CT 42, 43.)

Jason M. identified appellant in a photo line-up as the person who had chased him. (CT 47.) Jordan A. identified appellant as the person who had “swung” at him. (CT 48.)

⁵ All references to use of a weapon were stricken from the single count admitted by appellant.

After being invited to appellant's residence by his mother, who had returned a policeman's call, the police contacted appellant and his sister there. Also present was Robert A. (CT 37-38.) At that time, the three told the police that the people that they attacked were the wrong people. (CT 37.) Appellant provided the police with the names of the two other male suspects and with their home telephone numbers. (CT 37, 41.)

B. Appellant's Social History

1. Appellant's Family

Appellant was born on October 27, 1988, and was 14-years old at the time of the offense. (CT 338, 355.) He was attending high school as a sophomore, and had been living with his mother, maternal grandfather and aunt at the time of the offense, but his immediate family was evicted from the home when appellant and his older sister, his only sibling, were arrested. The whereabouts of appellant's father was unknown. (CT 338, 355, 357.)

Appellant's mother reported that she separated from appellant's father in 1990, and divorced him in 1993, because he was physically abusive and had a gambling addiction. (CT 347.) The parents reconciled and remarried in 2000. Soon after the reconciliation, appellant's father kicked appellant in the chest, an incident which was reported to the police and for which appellant received medical attention. The probation

officer stated that appellant's mother was "rather vague" as to how serious her concerns were about the father's abuse. (CT 357.)

After the separation in 2000, appellant's mother and her two children rented and lived in the master bedroom of a four bedroom house shared with three unrelated men. (CT 357.)

In May 2003, appellant's mother and father reconciled again. It was her hope that he would take care of the children while she worked, but he did not do so. He moved out and had not contacted the family again. Appellant's mother said that appellant and his sister had been upset about their father's abandonment, lack of interest in them, and his abuse towards them. (CT 357-358.)

Appellant's mother worked as a nursing assistant, and frequently worked from 11:00 p.m. to 7:30 a.m., and was unable to provide any supervision for appellant and his sister when she worked. She knew that they frequently left home while she was working and stayed out late, and then lied to her about leaving, but always returned home before she arrived. (CT 357, 358.)

Appellant enrolled at James Logan high school in January 2003. Appellant's attendance record did not begin to slip until March 2003, and in April and March his attendance was sporadic. He did not attend school at all in May and June 2003. He never had any behavioral referrals while attending James Logan High School. (CT 358.)

2. Appellant's Substance Use and Gang Membership

Months prior to the incident, appellant had joined the Bhalana gang.⁶ Appellant told the probation officer that he had joined the gang because “it was something to do.” (CT 358.) The probation officer reported that appellant appeared to have little insight into any other reason for joining the gang. (CT 358.)

Appellant said that he cut school frequently so that he could “kick it” at his friend’s house, where they drank and played video games. (CT 358.) Appellant admitted that when his mother was at work, against his mother’s wishes, he and his sister would either go out or have friends over. (CT 358.)

Appellant reported having tried marijuana, but preferred to drink hard liquor, which he drank at least once a week. (RT 358.)

Argument

THE COURT ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT COMMITTED TO CYA AS A FIRST OFFENDER WHEN THERE WAS NO EVIDENCE OF PROBABLE BENEFIT TO APPELLANT FROM THE COMMITMENT

A. Introduction

At the time of the offense, appellant was 14-years old and had no prior juvenile record. (CT 333-334, 338, 366.) While it was the probation

⁶ In Filipino, “Bahalana” means “whatever happens.” (CT 50.)

department's recommendation that appellant be placed in a licensed rehabilitation facility that provided programs to address appellant's gang issues (CT 359), the court declined to follow that recommendation, and committed appellant to CYA for a maximum term of eight years (CT 378-379), without any evidence of benefit to appellant from the commitment.

At age 14, appellant had been physically abused and abandoned by his father. Because his mother was the family's sole support, and worked at a low paying job as a nurse's assistant on the graveyard shift, she was unable to provide appellant with any adult supervision while she was at work except for his older sister, who was also arrested in this case. (CT 337, 358.) At the time of the offense appellant had no positive adult male role models in his life. His maternal grandfather's response to his arrest was to evict appellant's family from their home. (CT 338, 355, 357.)

Prior to turning age 14, appellant had no reported legal problems, had no reported problems at school, and for all intents and purposes, under the family conditions in which he was raised, he conducted himself as a normal child. However, early in 2003, just after appellant had turned 14 the previous October, appellant's problems began to surface. From January to May 2003, appellant went from attending high school regularly, to sporadically, to not attending at all. (CT 358.) Appellant's

father returned to the family home for the third time in May 2003, and then left again, abandoning all contact with appellant and his sister. (CT 357-358.) Within this time period, appellant joined a “gang” composed of other Filipinos, for “something to do.” (CT 358.) The admitted offense occurred within four months of appellant’s father’s return to the family home, and not long after his father left again, abandoning appellant for the third time in ten years.

This tragic family history is the clear basis for the transformation of a well-behaved child into a troubled adolescent. Having no positive adult male role models, appellant became involved in a gang. Despite society’s obvious and appropriate abhorrence for much of the “gang lifestyle,” for an impressionable adolescent a gang can provide that sense of belonging that is missing from his life. It is extremely significant that in this case appellant’s offense was to be involved in a gang fight in which every other participant arrested, except for Robert A., was 17 to 19-years old.

What appellant does not need is to be placed in with the more sophisticated criminal element at CYA. What appellant *does need* is to be placed in a rehabilitation program which will deal with his issues of the physical abuse he suffered at the hands of his father and his inevitable despair at being abandoned by his father, not once, but three times in ten years. Appellant is still of an age where a program tailored

to his needs has a great possibility for success. He has a supportive mother, is obviously close to his sister, and there is nothing in the record to support a finding that appellant has become so jaded that he cannot be rehabilitated.

In ordering this commitment, the court committed a clear abuse of its discretion because there was *no* evidence on this record that appellant would benefit from a CYA placement.

B. Standard of Review

The court's decision to commit appellant to CYA is subject to a "showing that the court abused its discretion in committing a minor to CYA." (*In re Todd W.* (1979) 96 Cal.App.3d 408, 416; *In re Michael R.* (1977) 73 Cal.App.3d 327.) The analysis of whether the court abused its discretion in ordering appellant committed to CYA, this Court "must examine the evidence at the disposition hearing in light of the purposes of Juvenile Court Law." (*In re Michael R., id.*, 73 Cal.App.3d at pp. 332-333.) In this case, appellant's social and criminal history clearly establish that placing him in with criminally sophisticated juveniles at CYA will be detrimental to him; and that there was *no* evidence before the court that there would be any benefit to appellant from a CYA commitment or that there were any programs at CYA which could address appellant's gang issues.

C. The Probation Officer's Recommendations And the Court's Findings In Making the CYA Commitment

In the probation report prepared for the disposition hearing, the probation department, the probation officer stated:

[A] placement recommendation will be made pursuant to Section 726(a) W&I, with the gang conditions, no co-participant association, no victim contact, reserved restitution and a restitution fine. (CT 359.)

At the first disposition hearing, the court stated its opinion that appellant needed to be placed in a locked facility but said it was willing to consider a suspended CYA commitment, with a one year to 18-month term of out of home placement. The court continued the hearing for three weeks and asked the probation department to come up with specific recommendations for placements which provided gang intervention services. (RT 21.)

The probation officer then issued a one-page memorandum to the court which stated:

[The] Unit Supervisor [of the] Placement Unit... was contacted. He reported that their [sic] are a number of placements that [appellant] is eligible for that can address gang issues and develop a treatment program. [The supervisor] stated that a formal referral cannot be made until a placement order is actually made. [The supervisor] cautioned the Court that all the placements are unlocked facilities in the community and the minor can run if he chooses. If the safety of the community is the Court's concern then a CYA placement should be considered. (CT 371.)

At the disposition hearing, the court acknowledged that the probation officer had recommended a licensed rehabilitation facility. (RT 15.) The court stated that the probation department had found “a number of programs that can address gang issues” however, the court said “they were all open settings” and that the probation report “seemed” to make “a loose recommendation for the Youth Authority...” (RT 25.) The court then committed appellant to CYA for a maximum term of eight years. In ordering the CYA commitment, the court stated:

[T]his is a pretty serious offense. In spite of his age, I think the best solution for the community is the Youth Authority. He no doubt will need more treatment than he would receive in an ordinary group-home setting... (RT 29.)

The record will also reflect that the minor’s mental and physical qualifications are such to render it probable that he will be benefited by the California Youth Authority commitment, and that’s the finding pursuant to section 734. (RT 30.)

D. Applicable Statutory Law

While there have been changes in juvenile law, but the fundamental philosophy underlying the law has remained unchanged.

Section 202, subdivision (b) states, in pertinent part:

... Minors under the jurisdiction of the juvenile court as a consequence of delinquent conduct shall, in conformity with the interests of public safety and protection, receive care, treatment, and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances. This guidance *may include* punishment that is consistent

with the rehabilitative objectives of this chapter. [The goals must be] consistent with his or her best interests and the best interests of the public. (Italics added.)

Subdivision (e) states, in pertinent part:

As used in this chapter, “punishment” means the imposition of sanctions. ... Permissible sanctions, *may include* the following:

* * *

(3) Limitations on the minor’s liberty imposed as a condition of probation or parole.

(4) Commitment of the minor to a local detention or treatment facility, such as a juvenile hall, camp or ranch.

(5) Commitment of the minor to the Department of the Youth Authority.

“Punishment,” for the purposes of this chapter, does not include retribution. (Italics added.)

Despite the fact that “punishment” and “public safety” were added as considerations to be made by the juvenile court in fashioning a disposition order, this was only “a slight shift in emphasis, rehabilitation continues to be an important objective of the juvenile court law.” (*In re Teofilio A.* (1989) 210 Cal.App.3d 571, 576.)

In referring to the CYA guidelines and criteria for commitment, our Supreme Court pointed out in *In re Aline D.* (1975) 14 Cal.3d 557, 564-564: “As is evidence from the applicable statutes, ‘Commitments to the California Youth Authority are made only in the most serious cases and only after all else has failed.’ (Thompson, Cal. Juvenile Court Deskbook, §9.14, p. 123.) This concept is well established and has been expressed by the CYA itself. In light of the general purposes of juvenile commitments

expressed in Welfare and Institutions Code [§202]⁷... ‘commitment to the Youth Authority is generally viewed *as the final treatment resource* available to the juvenile court and which least meets the description [of the juvenile law.] Within the Youth Authority system, there is gathered from throughout the State the most severely delinquent youths which have exhausted local programs.’ (Italics added; California Youth Authority, Criteria and Procedure for Referral of Juvenile Court Cases to the Youth Authority (1971) p. 1. [para.]... The “criteria lists ... several “inappropriate cases’ for commitment, including (1) *youths who are dependent or primarily placement problems* -- ‘For these youths in need of a home and peer acceptance, as well as accepting adults, life in an institution might be totally fulfilling, resulting in an orientation to an institutional existence’; (2) *unsophisticated, mildly delinquent youths*, ‘for whom commingling with serious delinquents who make up the bulk of the Youth Authority population might result in a negative learning experience and serious loss of self-esteem’” and (3) *mentally retarded or mentally disturbed youths*, ‘for whom the probable benefits of treatment within the mental health system exceed those of programs within the Youth Authority....’” (Italics in original.)

Commitment to the CYA should only be made in the more serious cases, after all else has failed and as a last resort. [Citation.] If a minor will not benefit from CYA commitment, and if no appropriate placement exists, then the proceeding should be dismissed. (*Ibid.*)
(*In re Todd W.*, *supra*, 96 Cal.App.3d at pp. 417-418.)

“The courts have persistently shown a realistic concern for commingling of unsophisticated, mildly delinquent minors more criminally oriented groups of delinquents committed to California Youth Authority, thereby converting them to trained and sophisticated criminals.” (*In re Teofilio*

⁷ At the time of *Aline D.* the applicable section was §502. (*In re Todd W.*, *supra*, 96 Cal.App.3d at p. 417.)

A., *supra*, 210 Cal.App.3d at p. 577, quoting *In re Maria A.* (1975) 52 Cal.App.3d 901, 903.)

Prior to 1984, there had been no evaluation of the juvenile court's disposition order with "punishment and public safety protection in mind." (*In re Lorenza M.* (1989) 212 Cal.App.3d 49, 58.) The court in *Lorenza M.* expressed its concern that the guidelines and criteria used in 1974 "may or may not be applicable in 1989." (*Id.*, 212 Cal.App.3d at p. 57.) However, the court recognized that, "[t]he Legislature contemplated CYA commitment as *the last sanction in the scheme of "rehabilitative punishment."*" (*In re Lorenza M.*, *id.* 212 Cal.App.3d at p. 58. Italics added.)

While the law now states that "punishment" and "public safety" as purposes that should be *considered* by the court at a disposition hearing conducted as a result of a finding of delinquent conduct, section 202 makes it clear that the *primary purpose* of the juvenile law is still rehabilitation and the best interests of the minor, and that a commitment to CYA cannot be made solely on retribution grounds. (*In re Teofilio A.*, *supra*, 210 Cal.App.3d at p. 576, citing *In re Michael D.* (1987) 188 Cal.App.3d 1302, 1396.)

In the case at bar, despite the rote statement of "benefit" from a CYA commitment made by the court, there was no evidence presented in this case that there would be any benefit to appellant. Further, despite the

court's statement that appellant needed "more treatment" than he would receive in a group home (RT 30), there was no evidence of any effective or appropriate treatment programs at CYA available or for which appellant was eligible to treat appellant's "gang issues." There had never been a lesser restrictive alternative placement because this was appellant's *first* offense.

E. Appellant's Commitment to CYA Was A Clear Abuse of Judicial Discretion

1. There Is No "Probable Benefit" to Appellant From A CYA Commitment

Based on this record, rather than considering the critical factors which were directly related to the issue appellant's needs in determining his placement and without any evidence of probable benefit before it, the court rotely stated the statutory required finding that there was "probable benefit" to appellant from a CYA commitment. This was insufficient as a matter of law.

It is required that the juvenile court find that there is "probable benefit" to a minor from a commitment to CYA. Section 202 makes it clear that the primary purpose of juvenile law is still the rehabilitation and best interests of the minor. (*In re Teofilio A.*, *supra*, 210 Cal.App.3d at p. 576, citing *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1396.) Further, it is *required* that there be *substantial evidence* to support the court's placement order. (See, *In re Domanic B.* (1994) 23 Cal.App. 4th

366, 373-374, citing *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1397; *In re Telofilio A.*, *supra*, 210 Cal.App.3d at p. 579.) *Substantial* evidence is defined as “evidence that inspires confidence and is of ‘solid value.’” (*People v. Marshall* (1997) 15 Cal.4th 1, 34, citing *People v. Morris* (1988) 46 Cal.3d 1, 19 and *People v. Bassett* (1968) 69 Cal.2d 122, 139.) In this case, not only was the “evidence” insubstantial, as related to the issue of whether appellant would obtain probable benefit from a CYA commitment, there was *no* evidence that appellant would be benefited by a CYA commitment. Evidence of any benefit to appellant was, quite simply, missing.

The only “evidence” before the court of probable benefit from a CYA commitment was the probation report, and this court “must presume the judge predicated his disposition upon this report.” (*In re Teofilia A.*, *supra*, 210 Cal.App.3d at p. 577.) A probation officer is enjoined by section 280 “to represent the interests of each person” who has been adjudged a ward of the court and to “furnish the court such information and assistance as the court may require.” (§ 280.) “Since the inception of the juvenile court system the probation officer has borne the duty to advise and care for the juvenile defendant.” (*In re Michael C.* (1978) 21 Cal.3d 471, 477 [reversed on other grounds in *Fare v. Michael C.* (1979) 442 U.S. 707, 725].)

The probation department recommended that appellant be placed in a licensed residential treatment facility which had specific programs available to treat appellant's "gang issues." The probation department was able to identify several such placements for which appellant was eligible and in which he could be placed. While the court acknowledged that the probation department had recommended a licensed rehabilitation facility, and that the probation department had found "a number of programs that can address gang issues" the court said that they were "all open settings." (RT 25.) In making its commitment order, the court referred to the probation department's recommendation as one which "seemed" to be "a loose recommendation for the Youth Authority...." (RT 25.)

First, the court was in error. The probation department's recommendation was clear, and the probation department only mentioned a CYA commitment in terms of "the Court's concern" for "community safety..." Only then, did the probation report say that a "CYA placement should be considered." (CT 371.) Therefore, the only reference to a CYA commitment in the probation report was a "recited conclusion[]...not [supported by] solid evidence" (*In re Teofilio A., id.*, 210 Cal.App.3d at p. 545, citing *In re Jose P.* (1980) 101 Cal.App.3d 52, 59.) The probation officer's report and recommendation did not provide the "substantial evidence" required to support the juvenile court's

disposition order, the probation report did not mention a *single* program at CYA for which appellant would be eligible or that was available to treat appellant's specific needs.

Because the juvenile court did not have before it *any facts* about what programs were available to address appellant's problems at CYA, whether appellant would be placed in a treatment program, and whether the program would provide probable benefit to appellant, quite simply, the juvenile court did not properly exercise its judicial discretion. And, based on the facts contained in this report it is apparent that the juvenile court's disposition order was based solely on its concern that appellant be locked away.

What is clear on this record is that there is substantial evidence of the probable negative impact of a CYA commitment on appellant, an unsophisticated minor. This potential for a negative impact is well documented, and the courts have been aware of it for many years. (See, *In re Aline D.*, *supra*, 14 Cal.3d 557.)

2. There Was No Evidence To Support the Court's Finding That Appellant Needed To Be Placed In A Locked Facility

From the first disposition hearing, the court stated its insistence that appellant be placed in a "locked facility." (RT 21.) Ultimately, the court rejected the probation department recommendation based solely on

the fact that none of the residential treatment programs that had been recommended by the probation department were locked facilities.

There was *nothing* on this record to support the court's position that appellant had to be placed in a locked facility. As this was appellant's first offense, he had no history of violating the terms of probation, no history of defying court orders, and no history of refusing to participate in a treatment program. Further, there was nothing in appellant's personal history to indicate he needed to be in a locked facility as there was no evidence that appellant had ever run away from his home. While appellant violated his mother's rules by going out when he did not have permission, he was home every night.

There was *nothing* in this record other than the nature of appellant's offense which could lead any reasonable person to believe that appellant needed to be placed in a locked facility. But, appellant's offense was directly related to his "gang issues," and his participation was the most minimal participation of any of those arrested. He did not use any weapons during the fight and missed a portion of the fight because he chased Jason M. away from the fight. (CT 41, 44.) Thus, even under the facts of the offense, appellant was the least culpable in inflicting the injuries on the victims. While appellant does not seek to minimize the seriousness of his offense, it must be placed in its proper context.

There was nothing in the record or in the probation departments report or recommendation which supported the court's insistence that appellant be placed in a locked facility.

3. The Public Will Not Be Safer Because of Appellant's CYA Commitment

It is clear from this record that the court's sole reason for its order committing appellant to CYA was to serve what the court believed was the interest of society in its safety. The court's belief that society would be safer if appellant was locked away for up to eight years was not based on anything other than, appellant respectfully submits, "wishful" thinking. The simple fact is, that after spending years at CYA, appellant will not be rehabilitated. He will not receive effective treatment and he will be continually exposed to exactly those influences which led him to commit the offense in the first instance, older criminal males.

According to the recent study of the Bureau of Justice Statistics, of adult offenders released in 1994, 67% were recommitted within three years. A similar study of CYA recidivism showed that **91% of youth offenders released from the CYA will re-offend in the same time period.** These startling statistics quantify the ineffectiveness of the current juvenile justice system at rehabilitation and raise serious questions about the efficacy of current state policies.

(Report to the California Senate Joint Committee on Prison and Construction Operations, by the Center on Juvenile & Criminal Justice: "Aftercare As An Afterthought: Reentry and the California Youth Authority." (August 2002.) p. 1. Emphasis in original. Endnotes omitted. ["CJCJ Rpt."].)

Thus, while society may have some protection while appellant is in CYA's custody until he is age 21 (§607, subd. (a)), the statistical chances of society's safety being placed in jeopardy on appellant's release is quite high, because those factors and problems which led him to join a gang and commit the admitted offense will not only not be treated (CJCJ Rpt., p. 3.), but it is highly probable that they will be exacerbated.

So, the danger of increased criminality if appellant is not treated is real, and substantiated by many studies done on juvenile wards of CYA.

After being labeled and treated as a delinquent and housed with hundreds of other youth with criminal background, many offenders simply learn to be better criminals. ... Combined with the culture of violence within CYA institutions and camps, we can expect that institutional experiences, rather than rehabilitating, will only magnify the anger and criminal potential of this population. (CJCJ Rpt., p. 12.)

Thus, in this case, the record is devoid of any evidence to support the court's implied finding that society will be ultimately be safer because appellant has been committed to CYA.

Conclusion

The court's abuse of its discretion is clear on this record. The court ignored the probation department recommendation and committed a 14-year old first time offender to CYA for eight years, without any evidence, much less "substantial evidence," of benefit to appellant and

no evidence to support the court's finding that appellant needed to be in a locked facility. It is clear that rather than there being "probable benefit" to appellant, the record provides substantial evidence that there will be detriment to appellant, and ultimately to society, from this commitment.

The court's commitment order must be reversed, and this matter remanded for further disposition proceedings.

Date: June 8, 2004

RITA L. SWENOR
Attorney for Appellant

CERTIFICATE OF WORD COUNT

I, Rita L. Swenor, attorney for appellant herein, do certify pursuant to the laws of the State of California that the word count of this Appellant's Opening Brief is 5254 words, based on the count of the Microsoft Word 2000 program.

Dated: June 8, 2004

RITA L. SWENOR