NINTH CIRCUIT COURT OF APPEALS

Franceschi v. Yee  
C.D. CA Constitutional Law 3284  
Suspension of driver’s license for decades of tax delinquency did not violate procedural or substantive due process rights (Parker, J.)

Somers v. Digital Realty Trust Inc.  
U.S. Sup. Ct. 3291  
Order

CALIFORNIA COURTS OF APPEAL

In re Carlos J.  
C.A. 1st Criminal Law 3292  
No evidence supported juvenile court’s finding of probable benefit from DJF commitment (Simons, Acting P.J.)

Squire v. County of Los Angeles  
C.A. 2nd Employment Litigation 3297  
Departmental reprimands timely issued following grievance process (Ashmann-Gerst, J.)

In re S.K.  
C.A. 4th Family Law 3302  
County exercised due diligence in searching for relatives despite mother’s failure to cooperate (Fields, J.)

People v. Diaz  
C.A. 5th 3306  
Order modifying opinion

California Forms Books

- Business Litigation  
- Employment Law  
- Insurance Defense  
- Medical Malpractice  
- Products Liability

TRIED. TRUSTED. TRUE.  
Available online, on CD, and in print.

Download sample forms FREE at: http://at.law.com/books

All content in the California Daily Opinion Service is property of The Recorder and shall not be republished or photocopied without express written consent. Copyright 2018. ALM Media Properties, LLC. All rights reserved.

Before citing the California Daily Opinion Service, counsel should verify the continuing publication status of a case. Exhibits and appendices to opinions will be included whenever possible if they are reproducible and merit inclusion. While every effort is made to report accurately, minor errors may occur. To report errors, or for other inquiries, please contact: casesums@alm.com.
SUMMARY

Constitutional Law

Suspension of driver’s license for decades of tax delinquency did not violate procedural or substantive due process rights (Parker, J.)

Franceschi v. Yee

9th Cir.; April 11, 2018; 14-56493

The court of appeals affirmed a district court judgment of dismissal. The court held that the pending suspension of a taxpayer’s license for decades of unpaid taxes did not violate his procedural or substantive due process rights.

California Rev. & Tax. Code §19195 authorizes the California Franchise Tax Board (FTB) to publish a public list of the top 500 delinquent state taxpayers who owe in excess of $100,000. California Bus. & Prof. Code §494.5 provides for suspension of the driver’s license of any taxpayer on the delinquent list until full payment of the tax obligation is arranged. Attorney Ernest Franceschi failed to file any California state income tax returns between 1995 and 2012 and failed to pay any state income taxes, penalties, or interest for those years. His delinquency earned him a spot on the “top 500” list. Anticipating the revocation of his driving privileges, Franceschi filed suit under 42 U.S.C. §1983, alleging violations of his procedural and substantive due process rights and the Equal Protection Clause. He also alleged that the 2012 enactment of §494.5 constituted a bill of attainder.

The court of appeals affirmed, holding that there was no evidence supported the juvenile court’s finding of probable benefit from DJF commitment (Simons, Acting P.J.)

In re Carlos J.

C.A. 1st; April 10, 2018; A151369

The First Appellate District reversed a juvenile court commitment order. The court held that no evidence supported the juvenile court’s finding that a Department of Juvenile Facilities (DJF) commitment would benefit the juvenile offender.

Following his participation in a drive-by shooting, 15-year old Carlos J. admitted an allegation of assault with a firearm and a criminal street gang enhancement. Despite his admitted gang involvement, he did not have an extensive juvenile record. He had been diagnosed with PTSD resulting from his exposure to extreme gang violence as a young child. A psychologist’s report indicated that Carlos was developmentally immature and suffered from extreme anxiety. He seemed “genuinely motivated to alter his behavior and affiliations” and was amenable to treatment. The psychologist recommended placement in a structured setting where he would have access to therapy “to meet his dual needs of addressing his trauma condition and developing…pro-social life skills.” Carlos’ probation report recommended a DJF commitment, stating that Carlos had “proven himself to be a public safety risk and…must be contained in a state facility where his educational, therapeutic, and emotional issues can be addressed in a secured facility.” Counsel argued against a DJF placement because of the deeply entrenched gang mentality within that environment.

The juvenile court ordered Carlos committed to DJF with a maximum term of confinement of seven years.

The court of appeal reversed, holding that no substantial evidence supported the juvenile court’s finding of probable benefit from DJF commitment. Under Welf. & Inst. Code §734, “no ward of the juvenile court shall be committed to [DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by [DJF].” Although the People argued on appeal that Carlos “could significantly benefit from DJF’s strictly-controlled environment and intensive treatment to address his issues,” there was no evidence before the juvenile court regarding any “intensive treatment” Carlos might receive at DJF. The probation officer’s unexplained and unsupported assertion of possible benefit was not evidence of “reasonable, credible, and of solid value” from which the juvenile court could make an informed assessment of the likelihood a DJF placement would be of benefit to Carlos, in light of his specific needs. Further, the law required the juvenile court, not the probation department, to make the finding of prob-
able benefit. The court could not make that finding without evidence in the record of the DJF programs expected to be of benefit to Carlos.

### Employment Litigation

**Departmental reprimands timely issued following grievance process (Ashmann-Gerst, J.)**

**Squire v. County of Los Angeles**

C.A. 2d; March 21, 2018; B276887

The Second Appellate District affirmed a judgment. The court held that amended reprimands issued to county law enforcement officers following the officers’ utilization of a departmental grievance process did not constitute “new” reprimands and thus were not subject to the one-year limitations period set forth in the Public Safety Officers Procedural Bill of Rights Act (POBRA).

Los Angeles County Sheriff’s Department officers Matthew Squire and Ernesto Masson each received written reprimands from the department dated May 22, 2014. The reprimands concerned inappropriate conduct alleged to have occurred between “September of 2008 and continuing through May 31, 2013.” They refused to sign the reprimands and filed formal grievances. The grievances resulted in modification of the reprimands, but were otherwise denied. Both officers thereafter received supplemental reprimands in September 2014, containing the same file numbers as the prior reprimands and referencing the same alleged misconduct.

The officers filed a petition for writ of mandate, seeking to compel the county to rescind and purge the September 2014 reprimands from their records, and seeking civil penalties. They argued the reprimands should be rescinded because they were not issued within the one-year limitations period set forth in POBRA. The trial court denied the petition, finding that the September 2014 reprimands were merely modifications of the May 2014 reprimands, rather than new reprimands, and were therefore timely.

The court of appeal affirmed, holding that the September 2014 reprimands were timely. The trial court and the parties adopted May 31, 2013, as the beginning date of the one-year limitations period. Thus, the department had until May 30, 2014, to finish its investigation and provide notice to the officers of its proposed discipline. It was undisputed that the department completed its investigation and issued the May 2014 reprimands within this one-year time period. The September 2014 reprimands, in contrast, were not subject to the one-year limitations period. POBRA provides, at Gov. Code §3304(e) that “[w]here a disciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.” Because the September 2014 reprimands did not constitute new discipline or allege conduct different from that previously alleged, the officers’ claim that the September 2014 reprimands were untimely necessarily failed.

### Family Law

**County exercised due diligence in searching for relatives despite mother’s failure to cooperate (Fields, J.)**

**In re S.K.**

C.A. 4th; April 11, 2018; E068464

The Fourth Appellate District affirmed dependency court orders. The court held that the county exercised due diligence in searching for a relative placement for the dependent minor, despite his mother’s failure to cooperate.

S.K. was removed from mother R.B. shortly after birth based on mother’s untreated substance abuse. Riverside County Department of Public Social Services searched unsuccessfully for relatives with whom S.K. could be placed. At the jurisdictional/dispositional hearing, the court ordered S.K. removed from mother’s physical custody, granted her reunification services, and directed her, “by end of business day tomorrow to make contact with the social worker and provide any and all names of relatives or family friends that [mother] would like considered for placement of this child, including their telephone and home address and whatever else information she has...” Mother failed to contact the county with the information, and failed to appear at a hearing on relative placement two months later. The court found the county had exercised due diligence in attempting to locate relatives, despite mother’s lack of cooperation, and ordered it to continue its efforts to identify potential relative placements.

Mother appealed, challenging the court’s finding that the county had exercised due diligence in trying to locate relatives for placement of S.K.

The court of appeal affirmed, holding that the record supported the dependency court’s finding of due diligence. For several weeks after the jurisdictional/dispositional hearing, the county diligently pursued mother at her known phone number and at the maternal grandmother’s phone number, despite the dependency court’s order that mother contact the county with the needed information. When the social worker finally got mother on the phone, she inexplicably said she had to call back, and then never did. Mother’s own conduct helped the investigation. Under these circumstances, where mother had the information, the county diligently pursued mother, and mother failed to comply with court orders to cooperate with the county, substantial evidence supported the finding that DPSS exercised due diligence. This was particularly true where mother did not provide the county with a correct name for one of her relatives, which undeniably hindered the ability to search for that person.
FRANCESCO v. CALIFORNIA DAILY OPINION SERVICE
April 12, 2018
NINTH CIRCUIT COURT OF APPEAL

FULL TEXT OPINION

Ninth Circuit Court of Appeals

Cite as 18 C.D.O.S. 3284

ERNEST JOSEPH FRANCESCHI, JR., Attorney, an individual, Plaintiff-Appellant,
v.
BETTY T. YEE, President of California Franchise Tax Board in her Official Capacity; GEORGE RUNNER, Board Member of California Franchise Tax Board in his Official Capacity; JEAN SHIOMOTO, Director of California Department of Motor Vehicles in her Official Capacity; MICHAEL COHEN, Board Member of California Franchise Tax Board in his Official Capacity, Defendants-Appellees.

No. 14-56493
United States Court of Appeals for the Ninth Circuit
D.C. No. 2:14-cv-01960-CAS-SH
Appeal from the United States District Court for the Central District of California
Christina A. Snyder, District Judge, Presiding
Argued and Submitted November 15, 2017
Pasadena, California
Filed April 11, 2018
Before: Michael Daly Hawkins, Barrington D. Parker,* and Sandra S. Ikuta, Circuit Judges.
Opinion by Judge Parker

* The Honorable Barrington D. Parker, United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit, sitting by designation.

COUNSEL
Ernest J. Franceschi Jr. (argued), Franceschi Law Corporation, Los Angeles, California, pro se Plaintiff-Appellant.
Matthew C. Heyn (argued), Deputy Attorney General; Stephen Lew, Supervising Deputy Attorney General; Paul D. Gifford, Senior Assistant Attorney General; Office of the Attorney General, Los Angeles, California; for Appellees.

PARKER, Circuit Judge:

This action challenges the constitutionality of Section 19195 of the California Revenue and Taxation Code and Section 494.5 of the California Business and Professions Code. Section 19195 establishes a public list of the top 500 delinquent state taxpayers who owe in excess of $100,000. In turn, Section 494.5 provides for suspension of the driver’s license of a taxpayer on the delinquent list until full payment of the tax obligation is arranged.

Appellant Ernest J. Franceschi, Jr., Esq. is a major tax delinquent. Anticipating the suspension of his driver’s license after the publication of the next edition of the top 500 list—which would include him—Franceschi sued, under 42 U.S.C § 1983, challenging Sections 19195 and 494.5 on various federal constitutional grounds. The District Court rejected his claims and dismissed the complaint. See Franceschi v. Chiang, No. 2:14-cv-01960-CAS-SH, 2014 WL 12069866 (C.D. Cal. Aug. 4, 2014). Franceschi appeals and we affirm.

I. BACKGROUND

Franceschi is an attorney who has been licensed to practice law in California since 1984. Appellee Betty Yee is the chairwoman of the California Franchise Tax Board (the “FTB”); appellees George Run and Michael Cohen are members of the FTB; and appellee Jean Shiomoto is the director of the California Department of Motor Vehicles.

Despite being a member of the bar for many years, Franceschi failed to file any California state income tax returns between 1995 and 2012 and failed to pay any state income taxes, penalties, or interest for those years, contending that he owed none. For each of those years, the FTB gave written notice of proposed deficiency assessments of taxes, interest, and penalties (an “NPA”).

California’s Revenue and Taxation Code sets forth a framework under which a delinquent taxpayer, like Franceschi, has multiple opportunities to challenge deficiency assessments. Cal. Rev. & Tax Code § 19031, et seq. At the outset, the FTB is required to send the taxpayer notice of the proposed deficiency assessment for any tax deficiency it proposes to assess. Id. § 19033(a). The taxpayer may then file a protest within sixty days. Id. § 19041(a). If the taxpayer files a protest, the FTB must reconsider the assessment and, if the taxpayer so requests, grant the taxpayer a hearing on the deficiency. Id. § 19044(a). If the deficiency is not resolved at this stage, a taxpayer has further recourse by appealing to the State Board of Equalization. Id. § 19045. After the State Board of Equalization rules on the matter, a still dissatisfied taxpayer can then petition the State Board of Equalization for rehearing. Id. § 19048.

Still further, a taxpayer has an additional opportunity to be heard on the validity of his or her tax delinquency by paying the taxes and filing a claim for refund with the FTB. Id. § 19382. Utilization of this procedure here would have permitted Franceschi to both challenge the original assessments
and to retain his driver’s licence while doing so. If the FTB denied the claim he could have sued for a refund in California Superior Court. Franceschi concedes that he did not avail himself of any of these multiple remedial procedures.

If, however, a taxpayer like Franceschi fails to protest the NPA within sixty days, the proposed deficiency assessment becomes final. Id. § 19042. Once the assessment becomes final, the FTB can demand payment and the amount owed becomes a lien on the taxpayer’s real property in California. Id. §§ 19049, 19221.

The FTB compiles a list of the top 500 tax delinquents in the state (the “Top 500 List”). Id. § 19195(a). Specifically, Section 19195 directs the FTB to “make available as a matter of public record at least twice each calendar year a list of the 500 largest tax delinquencies in excess of one hundred thousand dollars ($100,000).” Id. Prior to placing a delinquent taxpayer on the Top 500 List, the FTB is required to provide thirty days’ notice to the taxpayer. Id. § 19195(d).

If within thirty days after this notice, the delinquent taxpayer does not remit the amount due or make arrangements with the FTB for payment, the delinquent taxpayer is named on the Top 500 List. Id.

Important for this appeal, effective January 1, 2012, Section 494.5 was enacted to provide that a state governmental licensing entity “shall suspend” a license if a licensee’s name is included on the Top 500 List. Cal. Bus. & Prof. Code § 494.5(a)(1). Specifically, Section 494.5 provides that, on at least ninety days’ notice, the California Department of Motor Vehicles “shall suspend” the driver’s license of any licensee whose name is included on the Top 500 List. Id. § 494.5(a)(2), (b)(1), (f)(1). Within this notice period, a delinquent taxpayer can challenge inclusion and seek to avoid revocation of a driver’s license by (1) presenting a written submission that the tax delinquency was paid, (2) entering into a payment agreement, or (3) demonstrating financial hardship. Id. § 494.5(h).

Franceschi’s cumulative tax deficit encompasses the years 1995 through 2012. After the enactment of Section 494.5 in 2012, the FTB, in April 2012, March 2013, and March 2014, served him with NPAs for the years 2010 through 2012. Franceschi then had sixty days to protest these additional proposed deficiencies. He took no steps to do so.

Franceschi alleges that he received notice from the FTB dated February 2014 indicating that he was to be included in the next publication of the Top 500 List because he owed $242,276.73 in back taxes. Franceschi further alleges that he anticipated that the DMV would suspend his driver license after the next publication of the Top 500 List.

In an effort to forestall his suspension, Franceschi sued under 42 U.S.C. § 1983, asserting claims for violations of his procedural and substantive due process rights, and the Equal Protection Clause. In addition he claimed that the 2012 enactment of Section 494.5 constituted a bill of attainder. See Franceschi, 2014 WL 12069866, at *1. Franceschi also sought a preliminary injunction seeking to prohibit the publication of his name on the Top 500 List and the suspension of his driver’s license. During the pendency of this action, after the District Court denied Franceschi’s application for interlocutory relief, the DMV suspended his driver’s license.

The defendants moved to dismiss Franceschi’s lawsuit under Federal Rule of Civil Procedure 12(b)(6). The District Court concluded that the statutory scheme Franceschi challenged was constitutional. It held, among other things, that Franceschi had received adequate notice and an opportunity to be heard before his license was suspended. It also determined that the application of Sections 19195 and 494.5 to him did not violate his substantive due process rights by impermissibly burdening his right to practice his profession or having retroactive effect, did not violate his equal protection rights, and did not constitute a bill of attainder. Id. at *1—*13. Accordingly, the District Court denied Franceschi’s request for injunctive relief and dismissed his lawsuit.

This appeal followed. We review de novo the District Court’s decision to dismiss Franceschi’s complaint under Rule 12(b)(6). See Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030–31 (9th Cir. 2008).

II. DISCUSSION

A. Procedural Due Process

Franceschi’s procedural due process claim has two elements. He must plausibly allege: “(1) a deprivation of a constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections.” Hufford v. McEnaney 249 F.3d 1142, 1150 (9th Cir. 2001) (citation omitted). Most licenses are constitutionally protected property and cannot be taken away without procedural due process required by the Fourteenth Amendment. See Bell v. Burson, 402 U.S. 535, 539 (1971). “[T]he Due Process Clause applies to the deprivation of a driver’s license by the State[]” Dixon v. Love, 431 U.S. 105, 112 (1971).

The essence of procedural due process is that “individuals whose property interests are at stake are entitled to ‘notice and an opportunity to be heard.’” Dusenberry v. United States, 534 U.S. 161, 167 (2002) (quoting United States v. James Daniel Good Real Prop., 510 U.S. 43, 48, (1993)). It is well-established that because due process is a flexible concept, “[p]recisely what procedures the Due Process Clause requires in any given case is a function of context.” Brewster

1. The Top 500 List includes the taxpayer’s name and address, the amount of tax delinquency, the taxpayer’s occupation, and the type, status, and license number of any occupational or professional license held by the tax delinquent. Id. § 19195(c).

2. Section 494.5 was originally passed in 2012 but was amended in 2013, in a manner not relevant here.

3. Furthermore, the State Bar of California “may recommend to refuse to issue, reactivate, reinstate, or renew a license and may recommend to suspend a license if a licensee’s name” is included on the Top 500 List. Id. § 494.5(a)(3), (b)(1).

4. Franceschi also brought a claim for violation of the Privileges or Immunities Clause which the District Court dismissed. On appeal, he abandons this claim.
On appeal, Franceschi advances two main arguments why the challenged statutory scheme provides inadequate process prior to the deprivation of his driver’s license. First, he argues that Section 494.5 does not provide an adequate opportunity to be heard prior to license revocation. Second, he argues that Section 494.5’s payment plan and financial hardship exemptions are illusory. Neither of these contentions has merit.

The Supreme Court has held that a driver’s license can be revoked without a pre-revocation hearing. See Dixon, 431 U.S. at 112–15. Franceschi has no response to Dixon. He nevertheless goes on to argue that he should have been afforded a pre-deprivation hearing. Specifically, Franceschi argues that at such a pre-deprivation hearing, he would have been able to demonstrate that his actual tax delinquency was below the threshold $100,000 for inclusion on the Top 500 List when time-barred assessments, interest and penalties on time-barred assessments are excluded.5

Franceschi’s arguments overlook the fact that he had a readily available, constitutionally valid, pre-deprivation opportunity to prevent the suspension of his license. After receipt of the notice of revocation and before his license was suspended, Franceschi could have challenged his threatened suspension by paying his taxes and filing a refund claim with the FTB. See Cal. Rev. & Tax Code § 19382. The payment of his tax liability would have allowed him to retain his driver’s license. He would then have the opportunity to file a refund claim and challenge the original tax assessment. In the event the FTB denied his refund claim, he could still obtain relief by suing for a refund in California Superior Court.

Courts have consistently held that pay first, litigate later procedures such as these satisfy due process in the context of tax collection. See Todd v. United States, 849 F.2d 365, 369 (9th Cir. 1998) (collecting Supreme Court cases holding that in the federal context, “taxpayers do not have the right to a hearing prior to collection efforts by the IRS”); see also Bob Jones Univ. v. Simon, 416 U.S. 725, 746–48 (1974); Aronoff v. Franchise Tax Bd., 383 P.2d 409, 410 (Cal. 1963) (“The due process clause does not guarantee the right to judicial review of tax liability before payment.”) (quoting Modern Barber Colls. v. Cal. Emp’t Stabilization Comm’n, 192 P.2d 916, 919 (Cal. 1948))). More generally, where tax liability is involved, postponement of a judicial inquiry is not a denial of due process if the opportunity for an ultimate judicial determination of the tax liability is adequate. See Phillips v. Comm’rr of Internal Revenue, 283 U.S. 589, 595 (1931) (observing that when an “adequate opportunity is afforded for a later judicial determination of the legal rights, summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained”). California, therefore, provides tax delinquents with a constitutionally adequate procedure to challenge the amount of their tax delinquency, either before or after the deprivation of a license under Section 494.5.

Moreover, as noted, Franceschi had multiple opportunities to challenge the tax deficiencies that the FTB proposed at the time of their assessment and well before he faced license suspension. For each of the years from 1995 through 2012, for which Franceschi failed to file a tax return, he received written notices of proposed deficiency assessments. Further, Franceschi does not contest that he received these notices and in fact concedes that he became obligated to the FTB as far back as 1995. These procedures afforded him multiple opportunities to challenge the validity of the assessments that led to the revocation of his driver’s license. For whatever reason, he failed to avail himself of any of them. What Franceschi seeks is a forum in which to dispute his tax delinquencies well after the time they become final. Franceschi does, however, have access to such a forum, but must satisfy his tax deficiencies first.

This result is congruent with the three-part procedural due process test that the Supreme Court established in Mathews v. Eldridge, 424 U.S. 319 (1976). See, e.g., Gant v. Cty. of Los Angeles, 772 F.3d 608, 619 n.12 (9th Cir. 2014). Under Mathews we consider (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) the government’s interest in minimizing the cost and burden of additional or substitute procedures. 424 U.S. at 335.

First, the private interest at issue here is a driver’s license and, while subject to a level of constitutional protection, a driver’s license is not a fundamental right and can be suspended without a prior hearing. See Dixon, 431 U.S. at 113–15. Second, the risk here that the challenged statutory scheme will result in the erroneous deprivation of a protected interest is low. The facts supporting the suspension have already been established through prior proceedings with adequate process involving multiple opportunities to challenge the deficiency assessments. Cf. Air N. Am. v. Dep’t of Transp., 937 F.2d 1427, 1438 (9th Cir. 1991) (“[T]he due process clause does not require a hearing when . . . there are no factual questions to resolve.”). Franceschi nonetheless argues that he did not have the same incentive to challenge the deficiency assessments before Section 494.5 established that his license could be revoked. To the extent that Franceschi suggests that his lack of incentive to challenge the initial assessments created

5. Specifically, Franceschi argues that a substantial amount of his tax delinquency is time-barred by Section 13680 of the California Revenue & Taxation Code, which establishes a ten year statute of limitations. However, this is incorrect. Section 13680 is inapplicable because it only concerns the collection of gift and estate taxes, not the collection of income taxes, as the District Court correctly concluded. See Cal. Rev. & Tax. Code § 13680 (referring to the “collection of any tax imposed by this part” (emphasis added)); see generally Cal. Rev. & Tax. Code, Part 8 (referring to “Gift and Death taxes”). We note that to the extent that Franceschi can advance a credible argument that his tax delinquency is time-barred, he is free to do so in a refund action.

v. Bd. of Educ. of Lynwood Unified Sch. Dist., 149 F.3d 971, 983 (9th Cir. 1998); see also Morrissey v. Brewer, 408 U.S. 471, 481 (1972).
a greater risk of erroneous deprivation, we think that risk is adequately mitigated by the availability of a refund action under Section 19382. Finally, California obviously has a strong interest in revenue collection, and the challenged statutory scheme appropriately reflects the importance of this interest. See Jolly v. United States, 764 F.2d 642, 646 (9th Cir. 1985). In sum, we readily conclude that the Mathews factors have been met and that Franceschi was not denied procedural due process.

B. Substantive Due Process

Franceschi contends that the statutory scheme set forth in Sections 19195 and 494.5 violates his substantive due process rights in two respects: first, by impermissibly burdening his chosen profession, and, second, by acting retroactively. Neither argument has merit.

1. Burden on Profession

The Due Process Clause of the Fourteenth Amendment includes “a substantive component that protects certain individual liberties from state interference.” Mullins v. Oregon, 57 F.3d 789, 793 (9th Cir. 1995); see also Martinez v. City of Oxnard, 337 F.3d 1091, 1092 (9th Cir. 2003) (per curiam) (observing that the Due Process Clause protects individuals from state action that “interferes with rights implicit in the concept of ordered liberty” (internal quotation marks and citation omitted)). The range of liberty interests that substantive due process protects is narrow and “[o]nly those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause.” Mullins, 57 F.3d at 793. Substantive due process has, therefore, been largely confined to protecting fundamental liberty interests, such as marriage, procreation, contraception, family relationships, child rearing, education and a person’s bodily integrity, which are “deeply rooted in this Nation’s history and tradition.” Moore v. East Cleveland, 431 U.S. 494, 503 (1977); see also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992).

A “right” to drive to work does not resemble any of these categories. To be sure, the liberty component of the Due Process Clause includes a generalized right to choose one’s field of employment, but that right is subject to reasonable government regulation. Conn v. Gabbert, 526 U.S. 286, 291–92 (1999) (collecting cases). “[I]t is well-recognized that the pursuit of an occupation or profession is a protected liberty interest that extends across a broad range of lawful occupations[,]” although the precise contours of this liberty interest have not been defined. Dittman v. California, 191 F.3d 1020, 1029 (9th Cir. 1999) (quoting Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 65 n.4 (9th Cir. 1994)). What is clear is that, as observed by the Supreme Court, “the line of authorities establishing the liberty interest [in pursuing a profession] ‘all deal[] with a complete prohibition of the right to engage in a calling[,]’” Id. (quoting Conn, 526 U.S. at 292).

Franceschi argues that the enforcement of Sections 19195 and 494.5 violates his liberty interest in the pursuit of his profession because the ability to drive is essential to a “meaningful” pursuit of the practice of law and, thus, the suspension of an attorney’s license for reasons unrelated to public safety and solely attributable to tax indebtedness materially interferes with his constitutionally protected liberty interest to practice law without inconvenience.

This contention has no merit for the obvious reason that the revocation of his driver’s license does not operate as a complete prohibition on his ability to practice law, which it must to violate substantive due process. Franceschi attempts to sidestep this straightforward requirement by arguing that a driver’s license is “indispensable” to the practice of law while at the same time conceding that “it may be possible to get to some courts on a bus or other public transportation.” He nevertheless argues doing so would be burdensome and time consuming. No doubt an inability to drive oneself around Los Angeles could make the practice of law more difficult. However, Franceschi still has access to public transit, taxis, or services such as Lyft or Uber. Accordingly, whatever burden may exist does not amount to a “complete prohibition” on Franceschi’s ability to practice law, and thus, does not rise to a violation of substantive due process. See Lowry v. Barnhart, 329 F.3d 1019, 1023 (9th Cir. 2003) (holding that an “indirect and incidental burden on professional practice is far too removed from a complete prohibition to support a due process claim”).

To resist this conclusion, Franceschi cites Arizona Dream Act Coalition v. Brewer, 757 F.3d 1053 (9th Cir. 2014), for the proposition that the inability to obtain a driver’s license will likely result in irreparable harm. However, Arizona Dream Act Coalition is inapposite. There, the plaintiffs were undocumented immigrants who were brought to the United States as children and were allowed to remain pursuant to a federal program then in existence (the Deferred Action for Childhood Arrivals program). Id. at 1057–58. Arizona officials implemented a policy that denied driver’s licenses to these individuals. Id. at 1058. The plaintiffs sought a preliminary injunction prohibiting the implementation of the policy, arguing that it violated the Equal Protection Clause and the Supremacy Clause. Id. the district court concluded that the policy violated the Equal Protection Clause but nonetheless denied the request for a preliminary injunction. Id. In reversing, this Court concluded that the plaintiffs demonstrated a likelihood of success on their equal protection claim and were likely to suffer irreparable harm unless the policy was enjoined because the lack of a driver’s license “diminished their opportunities to pursue their chosen professions.” Id. at 1068.

Here, Franceschi contends that in Arizona Dream Act Coalition, this Court implicitly recognized that the deprivation of a driver’s license does not need to amount to a “complete prohibition” on the ability to pursue a profession for substantive due process purposes. All that needs to be shown,
he contends, is that it operates as a “limitation” or “diminishes opportunity” to pursue a chosen profession. However, Arizona Dream Act Coalition says nothing of the sort. On the contrary, Arizona Dream Act Coalition involved an equal protection claim and sheds little light on Franceschi’s substantive due process claim. Concluding that, where plaintiffs have shown a likelihood of success on the merits of their equal protection claims, the denial of a driver’s license would cause irreparable harm as required to support the issuance of an injunction, does not establish that the denial of a driver’s license would amount to a substantive due process violation. Concededly, the revocation of Franceschi’s driver’s license will complicate his law practice. But this complication is not a substantive due process violation since it does not amount to a complete prohibition on his ability to practice law. See Lowry, 329 F.3d at 1023.

Even if Sections 19195 and 494.5 operated as a de facto complete prohibition on Franceschi’s ability to practice law—which they do not—the sections would still withstand constitutional scrutiny. A state may regulate entry into a profession, so long as the regulation is rationally related both to a legitimate state interest and to the applicant’s fitness or capacity to practice the profession. Dittman, 191 F.3d at 1030. When reviewing a challenge to a legislative act that does not infringe on a fundamental right, rational basis review applies, under which we need only determine “whether the legislation has a ‘conceivable basis’ on which it might survive constitutional scrutiny.” Id. at 1031 (quoting Lupert v. Cal. State Bar, 761 F.2d 1325, 1328 (9th Cir. 1985)).

Here, the ability to practice law in California is not a fundamental right, and Section 494.5 is related to a legitimate state interest: the collection of tax revenue. The government obviously has a powerful interest in the prompt collection of revenue. See Phillips, 283 U.S. at 597. The “[f]ailure to honor legal commitments and obligations is a proper ground for refusing to issue a certificate as to the possession of the requisite character and moral fitness” for the practice of law. Dittman, 191 F.3d at 1032 (alteration in original) (citation omitted). It is therefore rational for California to require that those who practice law be current on tax obligations as a condition of licensure, as their failure to do so could speak to moral character. See id.; c.f. People v. Cully, 675 N.E.2d 1017, 1024 (Ill. Ct. App. 1997) (noting that “[i]f the licensee culpably does not repay [his student loan], this calls his moral character into question and could constitute conduct that defrauds or harms the public”). Accordingly, the challenged statutory scheme does not impermissibly burden Franceschi’s chosen profession.

2. Retroactivity

Franceschi argues that the statutory scheme—and specifically Section 494.5’s 2012 enactment—violates substantive due process by operating retroactively to impose a penalty that did not exist at the time his tax deficiencies were first assessed in 1995. A statute does not operate retroactively “merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law.” Landgraf v. USI Film Prods., 511 U.S. 244, 269 (1994) (internal citation omitted). A statute operates retroactively when it “attaches new legal consequences to events completed before its enactment.” Id. at 269–70; see also Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).

Section 494.5 does not operate retroactively because it does not sanction Franceschi for past conduct: the incurrence of past-due tax obligations. Rather it is his current refusal to discharge his tax obligations that exposes him to license revocation. In other words, the effective date of Section 494.5 is not dispositive because Section 494.5’s sanction is dependent on a taxpayer’s current conduct (whether a taxpayer takes steps to discharge a past-due tax obligation) and not on past conduct (the incurrence of a past-due tax obligation). Consequently, Section 494.5 does not attach new legal consequences to events completed before its enactment. Moreover, after Section 494.5 was enacted, Franceschi received additional proposed assessments in April 2012, March 2013, and March 2014, all of which he ignored. For these reasons, this substantive due process claim fails.

C. Equal Protection

The Fourteenth Amendment provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Governmental conduct, such as revocation of a driver’s license, that “neither proceeds along suspect lines nor infringes fundamental constitutional rights” is subject to rational basis review and, as such, does not violate the Equal Protection Clause “if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 313 (1993) (citation omitted); see also Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012).

Franceschi argues that Section 494.5, together with Section 19195, impermissibly singles out taxpayers who fall within the class of California’s 500 largest tax delinquents (provided they owe more than $100,000). Franceschi contends that because this selection criteria has the effect of meting out unequal treatment to similarly situated individuals, it is arbitrary and unreasonable.6

We have no difficulty in concluding that a citizen’s failure for nearly twenty years to pay unusually large amounts of past-due taxes supplies a rational basis for the state’s action. This is especially so because legislatures have particularly “broad latitude in creating classifications and distinctions in tax statutes.” Armour, 566 U.S. at 680 (quoting Regan v.

6. For the first time on appeal, Franceschi argues that the public disclosure of his alleged tax liability on the Top 500 List violates his right to privacy under the California Constitution. We decline to reach this contention. See Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999) (observing that, as a general rule, the court does not consider arguments that are raised for the first time on appeal).
Taxation With Representation of Wash., 461 U.S. 540, 547 (1983)).

California has a legitimate—and significant—interest in the prompt collection of tax revenue. See Jolly, 764 F.2d at 646. As the District Court correctly concluded, the California legislature’s decision to single out the 500 individuals and corporations with the largest tax delinquencies via Section 19195 and then impose sanctions on that group through Section 494.5 isrationally related to California’s legitimate interest in the prompt collection of tax revenue. Although the California legislature could have established an incrementally higher or lower threshold for tax delinquency, that the legislature chose a $100,000 cutoff does not render the statutory scheme unconstitutional. See Beach Commerc’ns, 508 U.S. at 316 (noting that “the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration” (alteration in original) (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))). For these reasons, Franceschi’s equal protection claim fails.

D. Bill of Attainder


The key features of a bill of attainder are “that the statute (1) specifies the affected persons and (2) inflicts punishment (3) without a judicial trial.” SeaRiver, 309 F.3d at 668 (citing Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 847 (1984)). The “clearest proof” is required before courts can conclude that a legislative enactment is as a bill of attainder. Id. (citing Communist Party of United States v. Subversive Activities Control Bd., 367 U.S. 1, 83 (1961)).

Not every law which burdens some persons or groups is a bill of attainder; after all, practically every law burdens someone. “How the class is designated and what purposes the law furthers governs the specificity analysis[,]” United States v. Munsterman, 177 F.3d 1139, 1142 (9th Cir. 1999). “If a law merely designates a properly general characteristic . . . and then imposes upon all who have that characteristic a remedial measure reasonably calculated to achieve a nonpunitive purpose,” there is no attainder. Id. (quoting Laurence H. Tribe, American Constitutional Law § 10-4 at 643 (2d ed. 1988)). Franceschi contends that the combined effect of Sections 19195 and 494.5 is to single out the largest 500 tax debtors for legislative punishment and for these reasons the sections constitute a bill of attainder. This contention has no merit.

In considering whether a statute singles out a person or class, we look to various established guideposts. See SeairVer, 309 F.3d at 669. “First, we look to whether the statute or provision explicitly names the individual or class, or instead describes the affected population in terms of general applicability.” Id. (citation omitted). Sections 19195 and 494.5 do not expressly name Franceschi. He does not contend that when the provisions were enacted anyone in the legislature had him in mind as opposed to the thousands of other residents who were persistently delinquent in their taxes. To the contrary, Section 19195 is couched in general terms and Section 494.5 simply refers to Section 19195. Accordingly, this factor weighs against the conclusion that the Sections constitute a bill of attainder.

Second, we determine “whether the identity of the individual or class was ‘easily ascertainable’ when the legislation was passed.” Id. (quoting United States v. Brown, 381 U.S. 437, 448–49 (1965)). The group of the 500 largest tax delinquents with delinquencies over $100,000 was no doubt ascertainable at the time Section 494.5 was enacted, as the list could have been calculated. But this fact adds little to the analysis because the list was fluid. Such taxpayers may have paid their taxes, prevailed in litigation, died, or filed for bankruptcy. Thus, at the time Section 494.5 was enacted, there was manifest uncertainty as to who would be affected.

“Third, we examine whether the legislation defines the individual class ‘by past conduct [that] operates only as a designation of particular persons.’” Id. (alteration in original) (quoting Selective Serv. Sys., 468 U.S. at 847). “Thus, this third inquiry seeks to determine whether the statute is retrospective, or whether it carries the potential to encompass a larger class than the individual or group allegedly targeted.” Id. at 670.

As noted, the Top 500 List is not static. Section 19195 directs the FTB to update the list twice a year, and the 500 largest tax delinquents will not necessarily remain the same on different versions of the List. In this way, Sections 19195 and 494.5 can affect a growing number of persons over time and their effect is not limited to any particular group in existence at the time of the statute’s enactment. Accordingly, this factor weighs against the conclusion that Sections 19195 and 494.5 specify the affected persons.

Franceschi, however, argues that the Top 500 List’s fluidity is “of no moment” because the category itself, the “Top 500 tax delinquents,” remains constant even though particular members “come and go” from the list. In support, Franceschi cites Brown, 381 U.S. 437. This argument makes no sense. If names “come and go” from a list, then the list does
not remain constant. Moreover, Franceschi misunderstands both Brown and the specificity requirement. In Brown, the Supreme Court held that a statute that imposed criminal liability upon Communist Party members who became officers in labor unions was a bill of attainder. Brown, 381 U.S. at 456/62. In doing so the Supreme Court rejected the argument that the challenged statute did not constitute a bill of attainder because it did not “inflict[] its deprivation” upon named individuals but instead targeted the membership of the Communist Party. Id. at 461 (“We cannot agree that the fact that [the challenged statute] inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder.”). However, the Supreme Court in Brown held that certain individuals were targeted, and, as such, the specificity requirement was clearly met there. See id. at 452 (“The moment [the challenged statute] was enacted, respondent was given the choice of declining a leadership position in his union or incurring criminal liability.”). Tellingly, the statute in question in Brown had a trailing five-year disqualification period: it disqualified from holding union office not just present members of the Communist Party but also any one who within the previous five years had been a member of the Communist Party, an easily ascertainable group. See id. at 458. The situation here is different. Franceschi does not dispute that the group of taxpayers who find themselves subject to suspension is not static. And even more importantly, these taxpayers have the power to escape license revocation by fulfilling their tax obligations.

“Finally, we review whether the past conduct defining the affected individual or group consists of ‘irrevocable acts committed by them.’” SeaRiver, 309 F.3d at 669 (quoting Selective Serv. Sys., 468 U.S. at 848). “If the defining act is irrevocable, the individual or class may not escape the effect of the legislation by correcting the past conduct, thereby exiting the targeted class.” Id. at 671 (citing Selective Serv. Sys., 468 U.S. at 851). Sections 19195 and 494.5 do not focus on irrevocable conduct. The non-payment of delinquent taxes is the action that led Franceschi (and others) onto the Top 500 List and to license suspension. A taxpayer can escape publication on the Top 500 List (and the attendant consequences) by, among other ways, making other payment arrangements with the FTB for full satisfaction of the tax delinquency, filing for bankruptcy protection, or making payment arrangements satisfactory to the FTB. See Cal. Rev. & Tax. Code § 19195(b). Franceschi argues that it “appears” that the exemptions and releases from a Top 500 List are granted or denied in a “completely arbitrary and capricious manner,” and that, as such, the methods which the statute provides for exiting the list are “largely illusory.” However, Franceschi does not allege that he ever applied for or was denied a release from the Top 500 List, arbitrarily or otherwise. In the absence of plausibly pleaded allegations of arbitrary and capricious administration of the Top 500 List, we need not entertain his bare argument on appeal that the list is administered in such a manner. In sum, far from being triggered by past and ineradicable actions, license suspension as a result of Sections 19195 and 494.5 turns on the continuing fact of nonpayment, something which a delinquent taxpayer can rectify. Selective Serv. Sys., 468 U.S. at 851 (citing Communist Party, 367 U.S. at 81). Because all the relevant guideposts point against Franceschi, and because he has unquestionably not adduced the “clearest proof” that the statutory scheme constitutes a bill of attainder, we reject his contention that the statutory scheme constitutes a bill of attainder.8

III. CONCLUSION

For these reasons, we AFFIRM the judgment of the District Court.9

8. Because Franceschi fails to show that Sections 19195 and 494.5 meet the specification prong of a bill of attainder claim, we need not consider whether the statutory scheme inflicts punishment or fail to provide a judicial trial. See Fowler Packing Co., 844 F.3d at 809 (explaining that where one element is not satisfied, “we need not address whether [the statutes] satisfy the other two elements of a bill of attainder claim”).

9. We GRANT Franceschi’s unopposed motions, filed February 24, 2015 and February 27, 2015, to take judicial notice of orders in other proceedings. See United States v. Navarro, 800 F.3d 1104, 1109 n.3 (9th Cir. 2015). We also GRANT Appellees’ unopposed motion, filed April 30, 2015, to take judicial notice of legislative history pertaining to Section 494.5. See Anderson v. Holder, 673 F.3d 1089, 1094 n.1 (9th Cir. 2012).
The judgment of the District Court is reversed and the case is remanded for proceedings consistent with the opinion of the United States Supreme Court in Digital Realty Tr., Inc. v. Somers, 138 S. Ct. 767 (2018).
California Courts of Appeal

Cite as 18 C.D.O.S. 3292

In re CARLOS J., a Person Coming Under the Juvenile Court Law.


No. A151369
In The Court of Appeal of the State of California First Appellate District Division Five (Sonoma County Super. Ct. No. 38816-J) Filed April 10, 2018

COUNSEL

Violet Elizabeth Grayson, under appointment by the Court of Appeal.
Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Jeffrey M. Laurence, Senior Assistant Attorney General, Eric D. Share and Huy T. Luong, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

Welfare and Institutions Code section 7341 provides that “No ward of the juvenile court shall be committed to the [Department of Juvenile Facilities (DJF)] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJF].”2 Appellant Carlos J. (appellant), born September 2001, appeals from the juvenile court’s order committing him to the DJF. Because there is no specific information in the record regarding the programs at the DJF, we hold that no substantial evidence supports the juvenile court’s finding of probable benefit from the commitment. Consequently, we reverse the commitment and remand for a new disposition hearing.

BACKGROUND

In January 2017, the Sonoma County District Attorney filed a petition under section 602, subdivision (a) (Petition), alleging that appellant committed attempted murder (Pen. Code, §§ 664/187, subd. (a)) and assault with a firearm (Pen. Code, § 245, subd. (a)(2)), with firearm and criminal street gang enhancements. In February, the Petition was amended to add a third count for assault with a firearm (Pen. Code, § 245, subd. (a)(2)) with a criminal street gang enhancement (Pen. Code, § 186.22, subd. (b)(1)(B)). Appellant admitted the third count and enhancement and the other counts were dismissed.

According to the probation officer’s disposition report, the Petition is based on an incident that occurred on January 1, 2017. Appellant and an older male participated in a gang-related shooting in Santa Rosa. The 18-year-old victim was standing in the driveway of a residence when appellant and the other male passed in a car. They parked down the street and approached. After a verbal confrontation, appellant and the co-participant drew firearms and shot five or six times in the direction of the victim. The victim fled toward the residence.

The police investigation identified appellant and the co-participant, and police officers interviewed appellant at his high school. Appellant admitted to the shooting. He said the victim had tried to “jump him” about a year earlier. He also said he had “heat for Northerners” because they had harmed his family. The older male co-participant had driven the car and provided the firearm he used. A belt worn by appellant and photographs on his phone indicated an association with the Sureños gang.

In April 2017, following a contested dispositional hearing, the juvenile court committed appellant to the DJF. This appeal followed.

DISCUSSION

Appellant contends the finding of probable benefit from a DJF commitment is not supported by substantial evidence. We agree.

I. LEGAL BACKGROUND

“We review the [juvenile] court’s placement decision for an abuse of discretion. [Citation.] We review the court’s findings for substantial evidence, and ‘ “[a] trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence.” ’ ” (In re Nicole H. (2016) 244 Cal.App.4th 1150, 1154.)

“ ’ “In determining whether there was substantial evidence to support the commitment, we must examine the record presented at the disposition hearing in light of the purposes of the Juvenile Court Law.” ’ ” (In re Calvin S. (2016) 5 Cal. App.5th 522, 527–528.) The general purpose of the law, which encompasses both dependency and delinquency proceedings, is described in section 202, subdivision (a), which states that “The purpose of this chapter is to provide for the

---

1. All undesignated section references are to the Welfare and Institutions Code.
2. As of July 1, 2005, the correctional agency formerly known as the Department of the Youth Authority (or California Youth Authority) became known as the “Department of Corrections and Rehabilitation, Division of Juvenile Facilities.” (§ 1710, subd. (a).) References in the record and case authorities to the California Youth Authority are treated as references to the DJF. References to the Division of Juvenile Justice are also treated as references to the DJF.
protection and safety of the public and each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor’s family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare or for the safety and protection of the public. If removal of a minor is determined by the juvenile court to be necessary, reunification of the minor with his or her family shall be a primary objective. If the minor is removed from his or her own family, it is the purpose of this chapter to secure for the minor custody, care, and discipline as nearly as possible equivalent to that which should have been given by his or her parents. This chapter shall be liberally construed to carry out these purposes.”

Section 202, subdivision (b) contains additional language specifically applicable to the placement of juveniles in delinquency proceedings: “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.” Although section 202 “emphasis[es] the protection and safety of the public, and recognize[es] punishment as a form of guidance that holds the minor accountable for his or her behavior” . . . “the Legislature has not abandoned the traditional purpose of rehabilitation for juvenile offenders,” and “[j]uvenile proceedings continue to be primarily rehabilitative.” [Citation.] Thus, “[o] ne of the primary objectives of juvenile court law is rehabilitation, and the statutory scheme contemplates a progressively more restrictive and punitive series of dispositions starting with home placement under supervision, and progressing to foster home placement, placement in a local treatment facility, and finally placement at the [DJF].” [Citation.] Although the [DJF] is normally a placement of last resort, there is no absolute rule that a [DJF] commitment cannot be ordered unless less restrictive placements have been attempted.” ( In re Calvin S., supra, 5 Cal.App.5th at p. 528.) A juvenile court may properly consider “a restrictive commitment as a means of protecting the public safety.” ( In re Carl N. (2008) 160 Cal. App.4th 423, 433.)

In order to ensure the necessity of a DJF placement, there must be evidence “supporting a determination that less restrictive alternatives are ineffective or inappropriate.” ( In re Teofilio A. (1989) 210 Cal.App.3d 571, 576.) More importantly in the present case, “there must be [substantial] evidence in the record demonstrating . . . a probable benefit to the minor by a [DJF] commitment . . .” ( In re Angela M. (2003) 111 Cal.App.4th 1392, 1396; see also In re Calvin S., supra, 5 Cal.App.5th at p. 528; In re M.S. (2009) 174 Cal. App.4th 1241, 1250.) That is because section 734 provides that “No ward of the juvenile court shall be committed to the [DJF] unless the judge of the court is fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by the [DJF].”

Evidence of probable benefit is required not only by section 734, but also by the language of section 202, subdivision (b) mandating that delinquent minors “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.” (§202, subd. (b).) A similar mandate appears in rule 5.790(h) of the California Rules of Court. That rule provides that, where a minor’s welfare requires that he be removed from his parent’s custody (§ 726, subd. (a)(3)) (as the juvenile court found in the present case), “[t]he decision regarding choice of placement must take into account . . . [t]hat the setting is the environment best suited to meet the child’s special needs and best interest.” (Rule 5.790(h).)

“‘Substantial evidence’ is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value. [Citations.] ‘Substantial evidence . . . is not synonymous with “any” evidence.’ Instead, it is ‘‘‘substantial’’ proof of the essentials which the law requires.’” ( Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651.) “Substantial evidence is . . . not merely an appellate incantation designed to conjure up an affirmation. To the contrary, it is essential to the integrity of the judicial process . . . ‘The Court of Appeal “was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review.’” ( Id. at p. 652.)

The juvenile court is required to “consider the broadest range of information” in determining how best to rehabilitate a minor and afford him adequate care.” ( In re Robert H. (2002) 96 Cal.App.4th 1317, 1329.)

II. DISPOSITIONAL FACTS, RECOMMENDATIONS, AND FINDINGS

Appellant, who was 15 years old at the time of the January 2017 shooting, was raised in Santa Rosa and Mexico. He did not have a substantial record of involvement with the juvenile court system.4 Appellant admitted he started regularly smoking marijuana at about age 14. Appellant’s most recent high school grade point average was 0.50, although he had been receiving good grades at juvenile hall. He had 30 incidents of “defiance” at

3. All undesignated rule references are to the California Rules of Court.

4. In January 2016, police encountered appellant in the company of Sureños gang members who were drinking alcohol in a car. In February 2016, appellant was referred to the probation department after his arrest for resisting a peace officer (Pen. Code, § 148, subd. (a)). In that incident, it was reported to the police that appellant and an associate were attempting to break into a residence. Appellant ran from the police. Appellant was referred to a diversion program, but he did not successfully complete the program for unspecified reasons.
high school from 2013 to 2016, he had been suspended for “harassment,” and he had been disciplined for fighting on four occasions. He had not been disciplined at juvenile hall.

The probation department’s disposition report recommended that appellant be committed to DJF. In explaining the recommendation, the probation officer cited the gravity of the underlying offense and appellant’s association with the Sureños gang. She expressed doubt appellant would be able to avoid violence in the future, pointing out that appellant said he “‘still wanted to get’ ” the victim a year after being threatened. The probation officer indicated that, in making her recommendation, she had considered appellant’s “acceptance of responsibility for his actions, his lack of a prior record and his demonstration of appropriate behavior during his recent detainment.” But the probation department concluded appellant “presents a serious risk to the safety of others. The disposition that offers the most community protection, is his removal from society and placement in a structured facility that can offer gang intervention services.” (Italics added.)

In rejecting a less restrictive placement, the probation officer opined that, “Programming available at the local level is insufficient to meet the minor’s treatment, educational, and social needs. [Appellant] is too impulsive to be monitored within the community and placement within congregate care or Probation Camp is not a viable option, given his lack of maturity, impulsivity issues and the serious nature of the offense. Additionally, [appellant’s] expedited return to the community may put him at serious risk for re-offending, ultimately endangering the safety of others.”

Based on a traumatic experience reported to the probation officer, appellant’s counsel requested that he be evaluated by a psychologist for Post-Traumatic Stress Disorder (PTSD). According to the psychologist’s report, when appellant was under the age of five, his home in Santa Rosa was invaded by Norteños gang members carrying bats and knives. Appellant and his sister hid in a bedroom while the gang members destroyed the family’s property. While appellant was visiting his father in Mexico during the summer of 2016, he personally witnessed a friend’s murder. Appellant and his uncle were talking to the friend when a car full of masked men pulled up and shot the friend as he ran away. The gunmen also sprayed bullets in the direction of appellant and his uncle. A few days later a second friend was killed.

The psychologist opined that appellant “reported what appears to be symptoms of

Acute Trauma Reaction.” She said appellant “is a highly anxious teenager prone to addressing the world in a detailed, hypervigilant manner. . . . [Appellant] likely engages in ruminate thinking much of the time, and . . . he is apt to feel both worried and stressed.” The psychologist opined that appellant’s judgment was limited by “developmentally normal immaturity,” he had “limited impulse control,” he “seems genuinely motivated to alter his behavior and affiliations,” and he was amenable to treatment. She recommended he receive “on-going individual psycho-therapy in whatever setting the Court determines as most appropriate.” She discouraged a DJF placement, concluding, “Given his youth and his history of trauma and active PTSD, this writer respectfully suggests that [appellant] be re-evaluated for a possible commitment [to] the Probation Camp, or for a placement program that can provide both high structure and therapy, to meet his dual needs of addressing his trauma condition and developing . . . pro-social life skills.”

The probation officer filed a supplemental report that summarized the psychologist’s conclusions and re-affirmed the recommendation of a DJF commitment. The report stated, “[Appellant] has proven himself to be a public safety risk and he must be contained in a state facility where his educational, therapeutic, and emotional issues can be addressed in a secured facility. After serving his term and receiving gang intervention services and other appropriate resources, he will return to the community and be supervised by Probation.”

No witnesses testified at the disposition hearing. The prosecutor briefly argued for a DJF commitment based on appellant’s gang association and the seriousness of the offense. Appellant’s counsel argued at length that a less restrictive placement would both protect the public and be beneficial to appellant. Regarding DJF, counsel observed, “We have to consider not only the safety of the community, but [appellant’s] welfare as well. Despite reforms, [DJF] is still an entry to the adult prison system. It is still a program in which people come out of there much more gang-entrenched than they were when they went in. The kids that go there are forced on day one to pick a side: Are you a Southerner? Are you a Northerner?” Counsel continued, “That is exactly what we want to avoid with [appellant]. He grew up in that gang environment as a result of his family -- his extended family, not his immediate family. But also as a result of his neighborhood. . . . We need to get him away from this environment and [DJF] is not the way to do that.” Counsel also observed, “There’s nothing in the [probation] report to reflect that [appellant] will get the kind of counseling he needs. There’s nothing in [DJF’s] history to suggest he will get the kind of counseling he needs. [¶] I think it would be an enormous mistake for this Court to send him to a program designed to build a better gang member.”

The juvenile court ordered appellant committed to DJF with a maximum term of confinement of seven years. The court acknowledged the psychologist’s “report does reflect that [appellant] may be suffering from some [PTSD] that certainly needs to be addressed.” But the court reasoned, “The concern about [appellant] is that even though he is 15, and I realize he has not a substantial prior record, but unfortunately his gang associations go back to middle school. . . . [T]he Court cannot go past the seriousness of this particular offense. Any time somebody takes out a gun and empties the gun towards another individual, not only does it provide for a danger to the intended victim, but also unintended victims, and the Court simply cannot get over the seriousness of the
offense in this case of firing a weapon multiple times for the purposes of gang activities.”

The juvenile court found, using the language of section 734, “that the mental and physical condition and qualifications of this youth render it probable that the youth will benefit from the reformatory, discipline or other treatment provided by the [DJF].” The court observed that it “is aware that in the past the [DJF] has not been adequate sometimes for the rehabilitation of minors; however, recent changes has limited the number of participants in the [DJF] and [the DJF] has been able to provide additional services to the youth now incarcerated.”

In closing, the juvenile court told appellant, “I just simply could not get over the seriousness of this case. . . . The Court feels that the possibilities are limited as to what I can do under the circumstances and that’s why I’m imposing the [DJF] commitment.”

III. ANALYSIS

In arguing there was substantial evidence of probable benefit from a DJF commitment, respondent asserts, “Appellant’s impulsive and gang-related shooting, troubling school and delinquency background, substance abuse, and inability to control his anger showed that he could significantly benefit from DJF’s strictly-controlled environment and intensive treatment to address his issues.” [Italicics added.] However, as is apparent from the above summary of the record, there was no evidence before the juvenile court regarding any “intensive treatment” appellant might receive at the DJF. In order for a juvenile court to make the determination of probable benefit required by section 734; the determination of “appropriate” treatment in a minor’s “best interest” required by section 202, subdivision (b); and the determination of whether the DJF is “best suited” to meet a minor’s “special needs and best interest” required by rule 5.790(h), there must be some specific evidence in the record of the programs at the DJF expected to benefit a minor.

Respondent argues there was evidence of probable benefit in the record, because the probation officer’s report recommending a DJF commitment stated that appellant should be placed “in a state facility where his educational, therapeutic, and emotional issues can be addressed in a secure facility.” Respondent asserts, “The obvious inference from this statement is that DJF is that ‘state facility’ which provides for appellant’s needs.” Respondent also argues this court should “presume that the reporting probation officer executed her duties in crafting the report and recommendation, which would imply a meaningful examination of how appellant would benefit from DJF programs.” (See Evid. Code, § 664 (“It is presumed that official duty has been regularly performed”).) We agree the report can fairly be read as asserting that the DJF is the best placement to address appellant’s needs and it can be presumed that assertion was based on some knowledge of the DJF. However, the law required the juvenile court, not the probation department, to make the finding of probable benefit. The court could not make that finding, and this court cannot review the adequacy of the evidence supporting the finding, without evidence in the record of the programs at the DJF expected to be of benefit to appellant. The probation officer’s unexplained and unsupported assertion of possible benefit is not evidence of “reasonable, credible, and of solid value” from which the juvenile court could make an informed assessment of the likelihood a DJF placement would be of benefit to appellant, in light of his specific needs. (Roddenberry, supra, 44 Cal.App.4th at p. 651.)

For example, the juvenile court acknowledged the psychologist’s finding that appellant suffered from PTSD and declared, “that certainly needs to be addressed.” Nevertheless, the court had no information before it regarding any mental health services at the DJF. Respondent points out that among the findings in the probation department’s proposed order adopted by the juvenile court is that the DJF “is authorized to provide routine medical, dental and mental health treatment to the minor.” However, that authorization is not evidence such treatment is available at the DJF, much less that any available mental health services are adequate to address appellant’s PTSD. Given the consensus that appellant has serious mental health needs, the availability of appropriate treatment at the DJF was at least a necessary piece of information for the juvenile court to consider in determining probable benefit.

Perhaps the most critical issue for the juvenile court to consider in determining probable benefit to appellant was the need to weaken his affiliation with the Sureños gang. Appellant’s underlying offense was very serious and comparable to offenses committed by others confined at the DJF. On the other hand, appellant was relatively young at 15 years old, did not have a substantial prior criminal record, and had been successful in juvenile hall. The probation officer’s report addressed this issue by asserting, “The disposition that offers the most community protection, is [appellant’s] removal from society and placement in a structured facility that can offer gang intervention services.” It can be inferred from that statement, and the ultimate recommendation of a DJF commitment, that the DJF offers some sort of gang intervention services. However, the report contains no information about the nature of the gang intervention services, in order to allow the juvenile court (and this court on review) to make an assessment of the appropriateness and adequacy of the programs for appellant.

5. We note that the juvenile court observed, “recent changes [have] limited the number of participants in the [DJF] and [the DJF] has been able to provide additional services to the youth now incarcerated.” Respondent does not suggest that general observation regarding undefined “additional services” is sufficient to show probable benefit from a DJF commitment. Accordingly, we need not and do not consider to what extent such comments are properly considered in undertaking a review for sufficiency of the evidence. (See In re Calvin S., supra, 5 Cal.App.5th at p. 529 [stating that juvenile court’s statement about juvenile hall “is not evidence, let alone substantial evidence”].)
To be clear, we do not suggest that the juvenile court on a proper record could not make a finding of probable benefit to appellant from a DJF commitment. But the law unambiguously requires the probable benefit finding to be made on the basis of actual evidence in the record. We recognize that the participants in the below proceedings—the juvenile court, the probation department, and counsel for appellant and respondent—frequently participate in placement determinations and have some knowledge of the programs at the DJF and other placements. It may be reasonable in such circumstances for participants in the proceedings to speak in “shorthand” about placements and other matters. Nevertheless, judicial review by this court, requires some concrete evidence in the record about relevant programs at the DJF. Otherwise, this court’s review for substantial evidence is an empty exercise, not meaningful appellate review of a legal proceeding resulting in commitment of a minor to the DJF. (See Roddenberry, supra, 44 Cal.App.4th at p. 652.)

We also want to be clear regarding what we believe is and is not part of the initial showing required to support a DJF commitment. Considering the significance of a decision to send a minor to the DJF and the statutory mandates of sections 202 and 734, it is reasonable and appropriate to expect the probation department, in its report or testimony, to identify those programs at the DJF likely to be of benefit to the minor under consideration. Where a minor has particular needs, the probation department should also include brief descriptions of the relevant programs to address those needs. It will likely be acceptable for the probation department to include substantially similar information about the DJF in most of its reports, with appropriate updates and customization based on the needs of the minor involved.

The People bear the burden of showing the appropriateness of a proposed placement, and the basic information outlined above is properly considered part of the initial burden of production on the issue and the minimum required substantial evidence of probable benefit. (Evid. Code, §§ 500, 550.) We observe that probation officers in prior cases have been able to provide at least some specific information about relevant programs expected to be of benefit to the minors involved. For example, in In re M.S. (2009) 174 Cal.App.4th 1241, the probation officer listed numerous specific programs at the DJF expected to be of benefit to the minor and provided additional information about the available medical services, which were of particular importance to the minor. (Id. at pp. 1248–1251.) In In re Pedro M. (2000) 81 Cal.App.4th 550, 556, disapproved on another ground in People v. Gonzales (2013) 56 Cal.4th 353, it is unclear whether the probation officer identified the relevant DJF programs, but the officer did provide specific information about the sex offender treatment program, which was the minor’s most critical need. (Pedro M., at p. 556.) Similarly, in In re Jesse McM. (1980) 105 Cal. App.3d 187, the probation officer provided specific information about the mental health treatment then available at the DJF, which was the most critical need of the minor in that case. (Id. at p. 193.) We do not suggest those cases provide a perfect template for an initial showing of probable benefit, but they demonstrate that probation officers are capable of providing far more specific information than was provided in this case.

Nevertheless, the probation department is not required in its report and initial testimony to provide in-depth information about the DJF’s programs or to preemptively respond to even predictable criticisms of the DJF. Under Evidence Code, section 664, where the probation officer has identified programs of benefit to a minor and provided brief information about the most important programs, it may be presumed the probation officer’s recommendation is based on an assessment the programs are available and appropriate. If a minor wishes to dispute the availability or efficacy of particular programs, or to suggest that other conditions at the DJF undermine the programs, the minor must present sufficient evidence to reasonably bring into question the benefit he or she will receive from the adoption of the probation department’s recommendation. (See generally Sargent Fletcher, Inc. v. Able Corp. (2003) 110 Cal.App.4th 1658, 1666-1168.)

For example, appellant argues it was critical for the record to contain some specific information about the DJF’s gang intervention programming in light of the risk that juveniles confined in institutions such as the DJF may become more entrenched in criminality. (See Miller v. Alabama (2012) 567 U.S. 460, 472, fn. 5 [citing article stating that “Numerous studies ... indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of juvenile delinquency.”].) Appellant also cites to and quotes extensively from articles and reports alleging problems with the DJF’s treatment programs. Those sorts of materials, or testimony along similar lines, if properly presented to the juvenile court at the time of disposition, would then obligate the People to present more in-depth information about the DJF in order to show probable benefit. For example, the People might respond with testimony showing improvements

---

6. The minor in the case did not challenge the sufficiency of the evidence of probable benefit (In re M.S., supra, 174 Cal.App.4th at p. 1250), and it is unclear how much information the probation department provided about the relevant DJF programs.

7. We describe a shifting burden of production of evidence because the framework is useful in capturing how the quantum of the evidence necessary to show probable benefit depends on the existence of evidence raising questions about the benefits of a DJF commitment. We recognize, however, that juvenile delinquency proceedings are unique and do not suggest that legal principles from other burden shifting contexts are directly applicable in the present context. (See, e.g., McDonnell Douglas Corp. v. Green (1973) 411 U.S. 792, 802 [employment discrimination]; Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 850 [summary judgment]; People v. Wheeler (1978) 22 Cal.3d 258, 281 [race-based peremptory challenges].)

8. Those materials were not presented to the juvenile court below and are unnecessary to this court’s decision; our decision is based on the absence of evidence regarding the DJF’s programs, not any conclusions about the inadequacy of the programs. Further, we need not and do not address the admissibility of such materials.
in the gang intervention programs or showing flaws in the analysis in the minor’s evidence. Such information would enable the juvenile court to balance the benefits of the gang intervention services against the risk that confinement at the DJF would harden the minor’s gang affiliation and criminality. The bottom-line is that, where a minor has concerns about a particular aspect of the DJF and presents evidence supporting those concerns, it may be necessary for the People to provide additional information to the juvenile court in order for the court to make a properly supported finding of probable benefit.

Finally, we note the approach described herein should help effectuate section 202, subdivision (d), which provides that “Juvenile courts and other public agencies charged with enforcing, interpreting, and administering the juvenile court law shall consider the . . . best interests of the minor in all deliberations pursuant to this chapter. Participants in the juvenile justice system shall hold themselves accountable for its results. They shall act in conformity with a comprehensive set of objectives established to improve system performance in a vigorous and ongoing manner.” Providing the best available information about the DJF, and thereby enabling an informed and transparent discussion of the institution’s strengths and weaknesses in the context of particular cases, should be of assistance in holding the juvenile justice system in general, and the DJF in particular, “accountable for its results.” (§ 202, subd. (d).)

We make no attempt in this decision to comprehensively set forth the type and quantum of information the probation department should provide, either in its initial presentation at the time of disposition or in response to any showing made by a minor raising concerns about the DJF. As the juvenile court in the present case had no specific information before it regarding programs at the DJF, reversal and remand for a new disposition hearing is required.9

**DISPOSITION**

The juvenile court’s order committing appellant to the DJF is reversed, and the matter is remanded for a new disposition hearing.

SIMONS, Acting P.J.

We concur. NEEDHAM, J., BRUINIERS, J.

---

9. We need not and do not address appellant’s other alleged bases for reversal, including that the juvenile court erred in committing him to the DJF solely due to the seriousness of the underlying offense and that there was no substantial evidence supporting a finding there were no appropriate less-restrictive placements. Finally, because we reverse and remand for a new dispositional hearing, we need not address the conceded clerical error in the recording of the maximum term of confinement.
lants each received written reprimands from the Department dated May 22, 2014 (the May 2014 reprimands). The May 2014 reprimands concerned conduct between “September of 2008 and continuing through May 31, 2013.”

Masson’s reprimand stated: “[Y]ou engaged in conduct of a sexual nature, and/or such conduct that would reasonably be considered inappropriate for the workplace, by failing to follow up with an email from a subordinate supervisor which raised concerns of a LET’s [Law Enforcement Technician] [redacted] unprofessional and/or inappropriate dress in the workplace.”

Squire’s reprimand stated: “[Y]ou engaged in conduct of a sexual nature, and/or such conduct that would reasonably be considered inappropriate for the workplace, by having knowledge of a personal relationship between a subordinate supervisor [redacted] and a LET [redacted] and failing to take appropriate action.”

The May 2014 reprimands each cited a violation of the Department’s Manual of Policy and Procedure (Manual) section “3-01/121.30 Policy of Equality – Inappropriate Conduct Toward Others (Gender).” The reprimands concluded: “You are hereby reprimanded for your conduct in this incident and advised that any future violations of a similar nature may result in more severe discipline.”

Masson and Squire each refused to sign the May 2014 reprimands, which were never placed in their personnel files.

The Grievance Process

Under their collective bargaining unit’s Memorandum of Understanding (MOU), appellants each filed formal grievances.

Masson’s grievance, filed on May 28, 2014, argued the underlying e-mail did not raise any concerns regarding the unnamed officer’s unprofessional and/or inappropriate dress in the workplace, and did not ask him to address any issues. Masson asked that the status of his violation be changed to “Unfounded” and that “no written reprimand be issued re the underlying e-mail.”

Masson’s “First Level Supervisor” denied his grievance on June 4, 2014. Masson then submitted his grievance to the “Second Level Supervisor” on June 9, 2014, and it was deferred to the “Executive Level.” On July 22, 2014, Chief Jacques A. La Berge, along with another commanding officer, held a grievance hearing. In his written decision, Chief La Berge stated that Masson’s grievance was “DENIED,” and continued: “However, I agree that the [Policy of Equality] section listed on the Written Reprimand ‘3-01/121.30 POE – Inappropriate Conduct toward Others (based on sex)” inaccurately describes the offense in question and appropriate findings. . . . I have determined that the [Manual] findings and Written Reprimand should be modified and corrected to: 3-01/122.05 Policy of Equity – Duties of Supervisors and Managers.” Chief La Berge stated in his written decision that he had spoken to Masson’s representative on September 16, 2014, and that she would notify Masson “ahead of the service of the revised Written Reprimand.” Chief La Berge signed the decision on September 16, 2014, and it was signed off by the “Sheriff or Alternate” on October 7, 2014. A formal letter of decision was sent to Masson by Captain Gregory P. Nelson on October 8, 2014, which stated that the Department had rendered its decision on Masson’s grievance, that his grievance was “denied,” and that the May 2014 reprimand “should be modified and corrected” to state the appropriate Manual section violated.

Squire’s grievance, filed on June 4, 2014, argued the investigation did not support the alleged violation. Squire requested “that the facts and circumstances of the case be reconsidered and that the Written Reprimand be revoked, further that no mention of this be made in grievant’s Performance Evaluation nor used for any other personnel purpose.”

Squire’s grievance also went through the same three levels, and Chief La Berge, along with another commanding officer, held a grievance hearing on the same day as Masson’s hearing, July 22, 2014. As with Masson, Chief La Berge’s written decision stated that Squire’s grievance was “DENIED,” but the reprimand “should be modified and corrected to: 3-01/122.05 Policy of Equity – Duties of Supervisors and Managers.” Chief La Berge’s written decision likewise stated that he had spoken with Squire’s representative on September 16, 2014, who would notify Squire of his decision. Chief La Berge signed the decision on September 16, 2014, and it was signed off by the Sheriff or Alternate on October 20, 2014. Captain Nelson sent a formal letter of decision to Squire on October 23, 2014, which stated that the Department had rendered its decision on Squire’s grievance and that the May 2014 reprimand “shall be corrected. The original charge of Manual of Policy and Procedures (MPP) section 3-01/121.30, Policy of Equality—Inappropriate Conduct Towards Others (based on sex), shall be rescinded and replaced with MPP section 3-01/122.05, Policy of Equality—Duties of Supervisors and Managers. As a result, your grievance shall be granted in part.”

The September 2014 Reprimands

Inexplicably, prior to the formal letters of decision signed by Captain Nelson, Masson was presented with a written reprimand on September 25, 2014, that was signed by Chief La Berge on September 26, 2014, and Squire was presented with a written reprimand on September 29, 2014, that was signed by Chief La Berge on October 3, 2014 (the September 2014 reprimands). Masson and Squire also refused to sign the September 2014 reprimands. The September 2014 reprimands contained the same date as the May 2014 reprimands (May 22, 2014), and the same file number of IV2335853. The Manual section violation was changed on each to “3-01/122.05 Policy of Equity – Duties of Supervisors or Managers.”

Masson’s reprimand stated: “[Y]ou failed to fulfill your Department reporting requirements, by not following up with an email from a subordinate supervisor which raised con-
cerns of an LET’s [redacted] unprofessional and/or inappropriate dress in the workplace, and/or failing to immediately contact the Department’s Intake Specialist Unit.”

Squire’s reprimand stated: “[Y]ou failed to fulfill your Department mandated reporting requirements, by having knowledge of a personal relationship between a subordinate supervisor [redacted] and an LET [redacted] although you did speak to Sgt. [redacted] about the inappropriate relationship and the perceptions of other employees, you failed to immediately contact the Intake Specialist Unit.”

The September 2014 reprimands contained the same disciplinary result as the May 2014 reprimands: “You are hereby reprimanded for your conduct in this incident and advised that any future violations of a similar nature may result in more severe discipline.” The September 2014 reprimands were placed in appellants’ personnel files.

The Writ Petition and Ruling

Appellants filed a petition for writ of mandate against the County of Los Angeles and its Board of Supervisors (the County), seeking an order directing the County to rescind and purge the September 2014 reprimands from appellants’ records, and seeking civil penalties. In opposition to the writ petition, the County submitted the declaration of Captain Nelson, who stated that the September 2014 reprimands were the result of the formal grievance process initiated by each appellant and constituted modifications of the original May 2014 reprimands. The trial court denied the writ petition in a lengthy tentative decision, which was adopted as the final decision after oral argument. The court found the September 2014 reprimands were modifications of the May 2014 reprimands rather than new reprimands, that they were the result of appellant’s grievances, and that they were therefore timely. This appeal followed.

DISCUSSION

I. STANDARD OF REVIEW

Appellants brought their writ petition under Code of Civil Procedure section 1085. “A writ of traditional mandamus (Code Civ. Proc., § 1085) may be used to compel the performance of a duty that is purely ministerial in nature or to correct an abuse of discretion.” (Khan v. Los Angeles City Employees’ Retirement System (2010) 187 Cal.App.4th 98, 105–106.) “Mandamus is an appropriate remedy to compel the exercise of discretion by a government agency, but does not lie to control the exercise of discretion unless under the facts, discretion can only be exercised in one way.” (Ghiolotti Construction Co. v. City of Richmond (1996) 45 Cal.App.4th 897, 904.) The role of the appellate court in a mandamus proceeding is the same as that of the trial court. The appellate court considers the record of the agency to determine whether it abused its discretion, namely, whether its “decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.” (Khan, supra, 187 Cal. App.4th at p. 106.) To the extent there are issues of statutory interpretation, these are reviewed de novo on appeal where there are no disputed factual issues. (Ibid.)

II. POBRA

POBRA “sets forth a list of basic rights and protections which must be afforded all peace officers . . . by the public entities which employ them.” (Baggett v. Gates (1982) 32 Cal.3d 128, 135.) POBRA balances the public interest in maintaining the efficiency and integrity of the police force with the officer’s interest in receiving fair treatment. (Jackson v. City of Los Angeles (2003) 111 Cal.App.4th 899, 909 (Jackson).) One of POBRA’s basic protections is the speedy adjudication concerning accusations of misconduct. (Alameda v. State Personnel Bd. (2004) 120 Cal.App.4th 46, 63.) Speedy adjudication permits peace officers to prepare a fair defense on the merits and marshal facts while memories and evidence are still fresh. (Jackson, supra, at p. 909.)

To this end, POBRA requires that investigation of a peace officer’s alleged misconduct be completed within one year of discovery in order for a public agency to take punitive action against the officer. Specifically, Government Code section 3304, subdivision (d)(1) (hereafter section 3304(d)) provides: “Except as provided in this subdivision and subdivision (g), no punitive action, nor denial of promotion on grounds other than merit, shall be undertaken for any act, omission, or other allegation of misconduct if the investigation of the allegation is not completed within one year of the public agency’s discovery by a person authorized to initiate an investigation of the allegation of an act, omission, or other misconduct. This one-year limitation period shall apply only if the act, omission, or other misconduct occurred on or after January 1, 1998. In the event that the public agency determines that discipline may be taken, it shall complete its investigation and notify the public safety officer of its proposed discipline by a Letter of Intent or Notice of Adverse Action articulating the discipline that year, except as provided in paragraph (2). The public agency shall not be required to impose the discipline within that one-year period.” (Section 3304(d), italics added.)

“[T]he fundamental purpose of this provision is to place a one-year limitation on investigations of officer misconduct . . . to ensure that an officer will not be faced with the uncertainty of a lingering investigation, but will know within one year of the agency’s discovery of the officer’s act or omission that it may be necessary for the officer to respond in the event he or she wishes to defend against possible discipline.” (Mays v. City of Los Angeles (2008) 43 Cal.4th 313, 322 (Mays).)

Following Mays, section 3304(d) was amended effective January 1, 2010. (Stats. 2009, ch. 494, § 1.) Among other things, the amendment added the following language: “Letter of Intent or Notice of Adverse Action articulating the discipline that year.” “The amendment was enacted to legislatively overrule the holding of Mays that subdivision (d) of the pre-2010 version of section 3304 did not require ‘notification of the specific discipline contemplated by the public agency’ (Mays, supra, 43 Cal.4th at p. 322), as opposed to merely
notice that disciplinary action may be taken’ (id. at p. 325)."
(Neves v. Department of Corrections & Rehabilitation (2012) 203 Cal.App.4th 61, 68, fn. 3; Earl v. State Personnel Bd. (2014) 231 Cal.App.4th 459, 465, fn. 5 [Section 3304(d) “was amended in 2010 to abrogate the portion of Mays holding that the specific discipline to be imposed need not be included in the notice”].)

III. ANALYSIS

A. Notice of Proposed Discipline Was Timely

The trial court and the parties adopted May 31, 2013, as the beginning date of the one-year limitations period. Thus, under section 3304(d) the Department had until May 30, 2014, to finish its investigation and provide notice to appellants of its proposed discipline. It is undisputed that within this one-year period, the Department’s investigation was completed and the initial May 2014 reprimands were issued.

We were initially troubled that it appeared from the record the Department had simply imposed discipline, rather than providing notice of proposed discipline, within the one-year deadline. We therefore asked the parties to provide additional briefing on the issue of whether the Department had complied with section 3304(d)’s notice requirement.

In their supplemental response, appellants did not squarely address this issue. Rather, they reiterated the arguments made in their original briefs; namely, that the May 2014 reprimands did not allege the misconduct upon which discipline was ultimately based; the May 2014 reprimands were rescinded and therefore cannot be deemed as complying with section 3304(d); and it would be contrary to public policy to give effect to the “falsely and maliciously” backdated September 2014 reprimands.

In its supplemental response, the County pointed out that appellants “did not, and apparently still do not question the adequacy or timeliness of the May 2014 reprimands, aside from their unsubstantiated claim that the amended reprimands constituted new discipline.” The County persuasively argued that appellants have “repeatedly and even insistently waived” the issue of whether the Department complied with section 3304(d)’s notice requirement. (See Tisher v. California Horse Racing Bd. (1991) 231 Cal.App.3d 349, 361 [failure to brief an issue a waiver]; Franz v. Board of Medical Quality Assurance (1982) 31 Cal.3d 124, 143 [failure to raise an issue in the trial court a waiver].)

Moreover, the County has convinced us that, even if there was no waiver or forfeiture here, the May 2014 reprimands were for all practical purposes intended discipline. This is so because, as Captain Nelson established in his declaration, the May 2014 reprimands were never placed in appellants’ personnel files. Only the September 2014 reprimands were placed in their files. As the County points out, other provisions of POBRA recognize that only those documents actually placed in a peace officer’s personnel file give rise to procedural rights by the officer, including that an officer must be given an opportunity to sign the document (Gov. Code, § 3305), and must be given an opportunity to respond to an adverse comment placed in his or her file (Gov. Code, § 3306).

Our conclusion that the May 2014 reprimands in fact constitute notice of proposed discipline also comports with the policy behind section 3304(d). At its essence, section 3304(d) is a statute of limitations for the investigation period. (See Mays, supra, 43 Cal.4th at p. 321.) While the 2010 amendment of section 3304(d) added references to “Notice of Adverse Action” and “Letter of Intent,” the amendment did not define these new terms nor specify what they must include, other than an articulation of the proposed discipline. Nor did the amendment suggest that the fundamental purpose of section 3304(d) had changed from a limitations period to a notice provision. The purpose of notice is to “‘apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” (California School Employees Assn. v. Livingston Union School Dist. (2007) 149 Cal.App.4th 391, 399.) This is precisely what happened here, as discussed next.

B. The September 2014 Reprimands Are Not Subject to the One-Year Limitations Period

It is undisputed that both appellants utilized the grievance and multi-step review procedures of their applicable MOU, which included grievance hearings for both appellants before the chief and one other commanding officer. As set forth in Captain Nelson’s formal letters to each appellant and as established in his declaration, the September 2014 reprimands were a direct result of the formal grievance process initiated by each appellant. Indeed, appellants do not suggest the Department would have any reason to reconsider or modify the May 2014 reprimands had appellants not filed formal grievances.

POBRA provides: “Where a predisciplinary response or grievance procedure is required or utilized, the time for this response or procedure shall not be governed or limited by this chapter.” (Gov. Code, § 3304 subd. (e).) It goes without saying that if a peace officer is not required to initiate a grievance procedure within the one-year limitations period, the public employer cannot be required to issue its response to the grievance within that same year. Thus, the September 2014 reprimands are not subject to the one-year time frame in section 3304(d). As a result, the entire theory upon which appellants base their appeal therefore fails.

Appellants try to avoid this result by claiming that the grievance procedures used by them were not “predisciplinary” as required by the statute. 2

1. Because our analysis does not require resort to the legislative history of section 3304(d), we deny appellant’s request to take judicial notice of this history.

2. Appellants attached the incorrect MOU grievance provisions to the record, attaching “Appendix C” pertaining to the District Attorney’s Office, rather than “Appendix B” pertaining to the Department.

3. Appellants’ argument that the County raises this statutory issue for the first time on appeal is without merit. Our review of the record
conclusion that the May 2014 reprimands constituted notice of intended discipline, appellants’ grievance procedures were necessarily predisciplinary.

C. The September 2014 Reprimands Do Not Constitute New Discipline or Allege Different Conduct

Appellants also try to avoid the result that section 3304(d) is inapplicable to the September 2014 reprimands by arguing that the September 2014 reprimands were “new” discipline—i.e., they “contained different charges concerning different alleged misconduct” and therefore “fundamentally change the nature of the May 2014 reprimands.”

To support their argument, appellants make a comparison of the two reprimands. In doing so, appellants’ focus is too narrow and incomplete or, as the trial court aptly found, a “mischaracterization” of the reprimands. A careful reading of Squire’s two reprimands shows that the May 2014 reprimand accuses him not only of personally engaging in sexual conduct, but also of “having knowledge of a personal relationship between a subordinate supervisor [redacted] and a LET [redacted] and failing to take appropriate action.” (Italics added.) Squire’s September 2014 reprimand omits the reference to his own personal sexual conduct, but still accuses him of “having knowledge of a personal relationship between a subordinate supervisor [redacted] and an LET [redacted] and failing to immediately contact the Intake Specialist Unit.” (Italics added.) In other words, both reprimands concern the same underlying conduct of failing to report someone else’s misconduct. Indeed, the record shows that Squire had a consistent understanding of the charges brought against him. His second level reviewer wrote: “The grievant challenged the charge against him of not taking appropriate supervisory action regarding a possible equity violation that was sexual in nature. . . .” (¶) . . . (¶) Lt. Squire said he did not notify his supervisor or the Intake Office at Equity because he felt he met the requirement in this case by counseling [redacted].

Masson’s May 2014 reprimand accuses him not only of personally engaging in sexual conduct, but also of “failing to follow up with an email from a subordinate supervisor which raised concerns of a LET’s [redacted] unprofessional and/or inappropriate dress in the workplace.” (Italics added.) Likewise, Masson’s September 2014 reprimand omits the reference to his own personal sexual conduct and accuses him of “not following up with an email from a subordinate supervisor which raised concerns of an LET’s [redacted] unprofessional and/or inappropriate dress in the workplace, and/or failing to immediately contact the Department’s Intake Specialist Unit.” (Italics added.) Again, the two reprimands address the same underlying conduct.

It is true that the September 2014 reprimands identify violations of different Manual sections than the May 2014 reprimands. It is also true that appellants did not request in their formal grievances that any changes be made to the Manual sections asserted. But contrary to appellants’ position, this does not remove the September 2014 reprimands from the grievance process. The different Manual sections identified by Chief La Berge were more accurate in light of the omission of allegations of appellants’ own sexual misconduct. While the May 2014 reprimands referred to “Inappropriate Conduct Toward Others (Gender),” the September 2014 reprimands more correctly referred to “Duties of Supervisors or Managers.” Appellants point to nothing in their MOU that would preclude the Department from making a more accurate finding in written reprimands issued after a grievance hearing.

Most importantly, the September 2014 reprimands did not increase or change the level of discipline. The discipline imposed on appellants remained exactly the same; namely, a written reprimand. Thus, there is no merit to appellants’ contention that the September 2014 reprimands constituted “new” discipline.

Appellants’ writ petition was properly denied.

D. Civil Penalties and Sanctions

Appellants request that in the event we find the existence of a POBRA violation and reverse the judgment, we should award each of them a $25,000 civil penalty under Government Code section 3309.5, subdivision (e) for the Department having “maliciously” violated POBRA. Because we do not find any POBRA violation, we do not address this request.4

The County likewise requests that sanctions be imposed against appellants under Government Code section 3309.5, subdivision (d)(2) for “filing a bad faith or frivolous action” on appeal. Appellants are correct that the County did not seek such sanctions below. We decline to order an award of sanctions for the filing of this appeal.

DISPOSITION

The judgment denying the petition for writ of mandate is affirmed. The County is entitled to recover its costs on appeal.

ASHMANN-GERST, J.

We concur: LUI, P. J., HOFFSTADT, J.

---

4. We note that appellants incorrectly state the trial court “never reached the issue of awarding Section 3309.5 penalties.” The trial court expressly found there was no malicious backdating of the September 2014 reprimands because “they bear proper signature dates.”
In re S.K., a Person Coming Under the Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent,
v.
R.B., Defendant and Appellant.

No. E068464
In The Court of Appeal of the State of California
Fourth Appellate District
Division Two
(Super.Ct.No. INJ1700110)
APPEAL from the Superior Court of Riverside County.
Susanne S. Cho, Judge. Affirmed.
Filed April 11, 2018

COUNSEL

Donna P. Chirco, under appointment by the Court of Appeal, for Defendant and Appellant.
Gregory P. Priamos, County Counsel, and James E. Brown, Guy B. Pittman, Carole Nunes Fong, and Prabhath Shettigar, Deputy County Counsel, for Plaintiff and Respondent.

OPINION

I. INTRODUCTION

S.K. was born with methamphetamine in his system and, after defendant and appellant, R.B. (mother), absconded with him, he was hospitalized with toxic levels of oxycodone in his system. The juvenile court removed S.K. from mother based on her untreated substance abuse. On appeal, mother challenges the court’s finding that the social worker exercised due diligence in conducting an investigation “to identify, locate, and notify” S.K.’s relatives of his removal. (Welf. & Inst. Code, § 358, subd. (b)(2)).\(^1\) We affirm.

II. FACTS AND PROCEDURE

Plaintiff and respondent, Riverside County Department of Public Social Services (DPSS), received a referral in February 2017 alleging newborn S.K. was exhibiting signs of drug withdrawal, but mother refused to allow a toxicoLOGY screen. Hospital staff “bagged” S.K. to obtain a urine sample and left him in a crib at mother’s bedside. The bag was either improperly secured or tampered with and did not produce a sample sufficient to run a toxicoLOGY screen. The medical social worker opined that it was possible but unlikely that the bag was improperly secured. Mother denied tampering with the bag. The hospital ordered a meconium drug screen,\(^2\) which results would be available in four to five days.

When interviewed at the hospital, mother reported that she was not in a relationship with G.K. (father) and father did not want anything to do with her or S.K. She was living “on and off” at maternal grandmother’s home or the home of a close friend. She planned to reside with her close friend upon discharge from the hospital. Mother admitted to using drugs in the past but denied using after learning of her pregnancy. The meconium test was positive for methamphetamine and opiates. DPSS verified that hospital staff had given mother morphine and Norco on the day she went into labor.

After DPSS’s initial contact with mother, she disappeared and ceased contact with DPSS. Approximately one month later, in late March 2017, DPSS received another referral alleging S.K. and mother had been transported to the hospital by ambulance. S.K. had suffered a seizure when mother was feeding him. His urine drug screen revealed a toxic level of oxycodone in his system. Hospital staff admitted S.K. to the neonatal intensive care unit. He was “in danger of not pulling through this ordeal.” He was unable to breathe without assistance and was nonresponsive. Mother denied breastfeeding S.K. and said that she only fed him formula. She could not explain how S.K. got oxycodone in his system. She said she “sporadically” used methamphetamine and used heroin, but never around S.K.

Mother wanted DPSS to contact S.N. about placing S.K. with her. S.N. is the mother of one of father’s adult children—that is, one of S.K.’s half siblings. Mother described S.N. as a good friend who had babysat S.K. before. DPSS contacted S.N., who was willing to take placement. S.N. had abused substances in the past and had her own dependency history, but she had been clean and sober since 2002.

Neither mother nor S.N. had contact information for father. DPSS’s search of the Jail Information Management System revealed no matches for father.

In April 2017, DPSS filed a petition alleging that (1) S.K. tested positive for methamphetamine and opiates at birth, and approximately a month later, he suffered a seizure and had high levels of oxycodone in his system, (2) mother had an extensive and untreated history of abusing controlled substances, (3) father’s whereabouts were unknown and he had failed to provide for S.K., and (4) mother failed to cooperate with preplacement preventative services. (§ 300, subds. (b), (g).)

At the detention hearing in April 2017, the court found a prima facie case that S.K. came within section 300, subdivisions (b) and (g), and detained him from the parents. S.K.’s condition had improved and the hospital was ready to discharge him. Mother was not present, but mother’s counsel

---

1. All further statutory references are to the Welfare and Institutions Code.

2. Meconium is “[t]he greenish material which is in the intestine of the fetus. It consists of the secretions of the intestine and stomach, bile, etc., and it constitutes the first stools of the newborn infant.” (2 Schmidt, Attorneys’ Dictionary of Medicine (1992) p. M-53.)
indicated she was also asking for placement with maternal
great-aunt S.B. While mother provided a last name for ma-
ternal great-aunt, it was not her married name, and mother
was unsure of her married name. Mother told counsel she had
given the phone number for maternal great-aunt to the social
worker. The court noted: “[DPSS] is obviously obligated to
look at any and all reasonable relatives or suitable relatives
for placement. So to the extent that . . . [S.B.], unknown mar-
rried name, was given as a potential relative, [DPSS] will
make inquiries and see if that person is available for relative
placement.” S.K.’s counsel also asked that DPSS look into
placement with C.W., who was the paternal grandmother and
legal guardian of mother’s first child (and thus another one
of S.K.’s half siblings). The court ordered DPSS to look into
C.W. and ordered mother to disclose the names, addresses,
and phone numbers of relatives, to the extent she had that
information. The court noted that father’s name sounded fa-
miliar. Mother’s counsel agreed and thought he might be a
“possible father on another case.” The court ordered DPSS
“to look into the father’s name.”

DPSS placed S.K. in a foster home in early April 2017. It
conducted a CWS/CMS database search for maternal great-
aunt and C.W., but the search yielded no results.3 The ju-
risdictional/dispositional report did not contain a statement
from mother because DPSS had been unable to contact her
despite multiple attempts. The telephone number mother had
provided was disconnected, and DPSS received no response
to the messages it left at maternal grandmother’s home.
Mother did not appear for a scheduled visit with S.K. DPSS
had been trying to contact mother, in part to get contact infor-
mation for maternal great-aunt and C.W. But because it had
been unable to reach mother, and because its database search
yielded no results, DPSS had not contacted either woman to
discuss placement. DPSS had left a message for S.N. and sent
her notice of S.K.’s removal.

In the three weeks between the detention and jurisdiction-
al/dispositional hearings, DPSS conducted searches for fa-
ther in an online directory (www.whitepages.com), the CWS/
CMS database, the superior court’s databases, the local jails
and state prisons databases, and DPSS records to determine
whether father had ever received aid at an address in River-
side. It also checked with child support services. Still, it had
not located father. The social worker referred the case to the
parent locator unit for a further search.

At the jurisdictional/dispositional hearing in April 2017,
mother submitted a waiver of rights and the court found the
allegations of the petition to be true. As to the placement is-
ue, mother objected that DPSS had not used due diligence
to locate possible relatives for placement. Mother denied in-
tentionally losing contact with DPSS. She indicated she had
been trying to contact the social worker formerly assigned to
the case and finally spoke with the current social worker the
day before the hearing. She also indicated she had spoken
with maternal great-aunt that morning, and maternal great-
aunt said DPSS had not contacted her. The court stated: “So
we were doing a search in the computer looking for infor-
mation for [maternal great-aunt] so we could notify her or
contact her. So if you have that person’s phone number or
address and so forth, turn it over to [DPSS] so that we can
give them notice that we are interested in looking at people
for placement. Okay?” Mother replied, “Okay.” Mother also
informed the court and the parties that C.W. was deceased.
Later in the hearing, mother again raised the issue of the
search for relatives. She said she had given maternal great-
aunt’s phone number to the prior social worker on the case,
even if the current social worker said she did not have any
information. The court told mother’s counsel: “We need to
have your client meet with the social worker or talk to the
social worker and give us complete information of everyone
that she would like considered so we can do proper consid-
eration. [¶] I’m going forward with the jurisdiction hearing,
however, I’ll set a further proceeding[] to discuss your con-
tention regarding the court’s intended finding of using due
diligence by [DPSS]. So I’ll leave that finding alone today
so I can make it at a later date.”

The court ordered S.K. removed from mother’s physical
custody and granted her reunification services. It also direct-
ed: “Mother is ordered by end of business day tomorrow to
make contact with the social worker and provide any and
all names of relatives or family friends that she would like
considered for placement of this child, including their tele-
phone and home address and whatever else information she
has and provide it to the social worker by tomorrow, 5:00
p.m.” Mother’s counsel indicated she would “send her over
to [DPSS] today.” The court ordered DPSS “to exercise due
diligence toward resolving all these issues,” and it scheduled
a hearing in one month for “further proceedings regarding
relative placement.” The court further ordered mother to ap-
pear at the next hearing. As to father, the court found he was
merely an alleged father and his whereabouts were still un-
known, and it denied reunification services for him.

That same day, after the jurisdictional/dispositional hear-
ing, DPSS tried to contact mother by phone, but the num-
ber was disconnected. It then left a message on maternal
grandmother’s phone requesting a return call. Six days later,
mother contacted DPSS, but she said she needed to call back
with relatives’ names and addresses because “she was us-
ing a friend’s phone.” Nine days after that, DPSS again tried
to contact mother at her last known phone number, which
was still disconnected, and again left a message on maternal
grandmother’s phone.

The further hearing on relative placement took place in
June 2017. Mother had not contacted DPSS again as of that
hearing date. She was not present at the hearing. Her coun-
sel acknowledged mother had not complied with the court’s

3. CWS/CMS is the Child Welfare Services Case Management
System. (§ 16501.5, subd. (a).) It is a statewide case information sys-
tem used by child welfare services agencies to manage their cases and
provide statewide access to information about children receiving ser-
dices. (See §§ 16501.5-16501.7.)
order to contact the social worker with relative information, but counsel still argued DPSS lacked due diligence in trying to locate relatives. The court found: “The court at this time, based upon the limited information we have gathered from the mother thus far, will make a finding that [DPSS] is actively working towards relative assessments if there are any available. The duty is ongoing. It does not end simply because we had a hearing denying services to one side or offering services or other [sic]. [DPSS] must continue to do so.” DPSS was waiting for S.N. to return its call, and the court ordered DPSS to continue its efforts to assess her for placement. It also asked DPSS if it had “figure[d] out who the child was that [father] fathered on the other dependency cases so we can look in those files.” DPSS replied that it had not yet, but would do so that afternoon. The court directed DPSS to “keep every report filled with information about what we have done to pursue relative placement.”

III. DISCUSSION

Mother contends the court erred when it found DPSS exercised due diligence in trying to locate relatives for placement of S.K. We disagree.

A. Standard of Review

Mother does not identify which standard of review we should apply to the court’s finding of due diligence. We review a juvenile court’s placement decisions for abuse of discretion (In re Sabrina H. (2007) 149 Cal.App.4th 1403, 1420), and DPSS asserts we should likewise review the due diligence determination for abuse of discretion because it involves relative placement issues.

A placement decision is fundamentally about what is best for the child, and we routinely apply the abuse of discretion standard to decisions in this vein. (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2017) ß 2.190[14][c], p. 2-684 (“A reviewing court employs the abuse of discretion standard in many instances where the trial court exercises its discretion in determining what is best for the dependent child . . . .”)). By contrast, whether DPSS has diligently searched for relatives is not a determination about what is best for the child. The two types of decisions are not so analogous that the standard of review for one should necessarily apply to the other.

The due diligence question is primarily a factual matter that considers DPSS’s reported efforts, and we should therefore review the court’s determination for substantial evidence. In a more analogous situation, one reviewing court applied the substantial evidence standard to the juvenile court’s conclusion that the county exercised due diligence in trying to locate a parent to give him notice of the dependency proceeding. (In re Sarah C. (1992) 8 Cal.App.4th 964, 973-974.)

This is also the standard applied to the court’s determination of whether a county has provided reasonable reunification services to a parent. (In re Taylor J. (2014) 223 Cal.App.4th 1446, 1451; Angela S. v. Superior Court (1995) 36 Cal.App.4th 758, 762.) The due diligence finding is more akin to a finding of reasonable reunification services than a placement decision. Accordingly, we examine the whole record and ask whether any substantial evidence, contradicted or uncontradicted, supports the court’s finding, indulging all reasonable inferences in support of it. (In re Misako R. (1991) 2 Cal.App.4th 538, 545; In re Amy M. (1991) 232 Cal.App.3d 849, 859-860.) But were we to review the finding under the more deferential abuse of discretion standard advanced by DPSS, our result would be the same.

B. Substantial Evidence Supported the Court’s Due Diligence Finding

When DPSS initially removes a child, within 30 days the social worker must conduct an investigation to identify and locate adult relatives of the child. (§ 309, subd. (e)(1).) The social worker must use due diligence in this investigation. (§ 309, subd. (e)(3).) “Adult relatives” means “all grandparents, parents of a sibling of the child, if the parent has legal custody of the sibling, adult siblings, . . . other adult relatives suggested by the parents,” and other adults who are “related to the child by blood, adoption, or affinity within the fifth degree of kinship, including stepparents, stepsiblings, and all relatives whose status is preceded by the words ‘great,’ ‘great-great,’ or ‘grand,’ or the spouse of any of these persons.” (§§ 309, subd. (e)(1), 319, subd. (f)(2).) DPSS must give any adult relatives that it locates notice of the child’s removal and an explanation of the options to participate in the care and placement of the child. (§ 309, subd. (e)(1)(A), (B).)

Later, if the court removes the child from the parents’ custody at the disposition hearing, it “shall make a finding as to whether the social worker has exercised due diligence in conducting the investigation . . . to identify, locate, and notify the child’s relatives.” (§ 358, subd. (b)(2); accord, Cal. Rules of Court, rule 5.695(e)(1).) The court may consider, among other things, whether the social worker has (1) asked the child in an age-appropriate manner about his or her relatives, (2) obtained information about the location of relatives, (3) reviewed the case file for any information regarding relatives, (4) contacted all identified relatives, (5) asked located relatives for the names and locations of others, and (6) used online search tools. (§ 358, subd. (b)(3); Cal. Rules of Court, rule 5.695(f).)

The court shall order the parents to disclose to the social worker the names, addresses, and any other known identifying information of relatives. (§ 361.3, subd. (a)(8)(B).) Thus, “[t]hroughout the dependency process, the responsibility for identifying potential relative placements is shared by all participants.” (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure, supra, ß 2.127[3], p. 2-434.)

4. Although the court did not expressly use the term “due diligence,” we construe its comments as an implied finding of due diligence. On appeal, the parties do not dispute that the court made a due diligence finding.
When the court finds the social worker has not used due diligence, “the court may order the social worker to exercise due diligence in conducting an investigation to identify, locate, and notify the child’s relatives . . . and may require a written or oral report to the court.” (Cal. Rules of Court, rule 5.695(e)(2).) But the investigation of relatives “shall not be construed as good cause for continuance of the dispositional hearing.” (§ 361.3, subd. (a)(8)(B).)

Here, substantial evidence supported the court’s finding of due diligence. Mother objects to that finding for two principal reasons—DPSS relied only on mother to obtain contact information for maternal great-aunt, and it did not search its records for father’s other dependency case so that it could locate paternal relatives. As to maternal great-aunt, mother said she knew her phone number and had given it to the previous social worker. The court ordered mother several times to disclose all known contact information for relatives. It specifically told her to turn over maternal great-aunt’s phone number again. For whatever reason, the current social worker did not have it. Mother suggests DPSS was not diligent because there is no evidence the current social worker asked the previous one for the phone number. But mother shared the responsibility for helping to identify relatives, and knowing the information, it was easy enough for her to simply provide the phone number again. For several weeks after the jurisdictional/dispositional hearing, the social worker diligently pursued mother at her known phone number and maternal grandmother’s phone number, even though the court ordered mother to contact DPSS no later than the day after the hearing. When the social worker finally got her on the phone, she inexplicably said she had to call back because she was on a friend’s phone, and then never did. Mother’s own conduct held back the investigation. Under these circumstances, where mother has the information, DPSS diligently pursues mother, and mother is not complying with court orders to cooperate with DPSS, substantial evidence supported the finding of the juvenile court that DPSS exercised due diligence. This is particularly true where mother did not provide DPSS with maternal great-aunt’s correct last name, which undeniably limited its ability to search for her.

As to father, the record supports the conclusion that DPSS was diligently trying to locate him and thus his relatives. He was the only avenue available to obtain information about his relatives. Mother faults DPSS for admitting at the last hearing that it had not yet looked into father’s “other dependency cases.” Although counsel for DPSS declared this, the record shows otherwise. The social worker searched multiple databases for father, including the CWS/CMS database, the statewide database child welfare services agencies use to manage their cases and provide statewide access to information about children receiving services. (See §§ 16501.5-16501.7.) The search returned no results for father. Mother operates as if he definitely had a dependency case for another child, but the court only thought his name sounded familiar, which was no confirmation that such a case existed. Thus, substantial evidence supported the conclusion that DPSS was diligently trying to locate father. In sum, the court did not err.

IV. DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

FIELDS J.

We concur: RAMIREZ P. J., CODRINGTON J.
THE PEOPLE, Plaintiff and Respondent, v. TURLOCK HERNAN DIAZ et al., Defendants and Appellants.

No. F071348
In The Court of Appeal of the State of California
Fifth Appellate District
(Super. Ct. No. 1423449)
Filed April 10, 2018

ORDER MODIFYING OPINION AND DENYING REHEARING

[CORE CT:

It is ordered that the opinion filed herein on March 20, 2018, be modified in the following particulars:

1. In a published portion of the opinion, the paragraph commencing at the bottom of page 2 with “In the published portion” and ending at the top of page 3 with “discussed in this opinion” is modified to read as follows:

In the published portion of this opinion, we hold that Diaz’s conviction on count II need not be vacated as a lesser included offense of felony murder as charged in count I. In the unpublished portion, we hold: (1) The trial court did not err by refusing to bifurcate the gang enhancements; (2) Any error in the admission of gang-related evidence was harmless; (3) The trial court was not required to give CALCRIM No. 375 on its own motion regarding Pantoja’s prior offenses; (4) Neither defendant is entitled to reversal based on a theory of cumulative prejudice or of ineffective assistance of counsel; (5) Diaz is entitled to have his case remanded to the juvenile court for a transfer hearing; (6) Whatever the outcome of the transfer hearing, the court must exercise discretion whether to strike the section 12022.53 enhancement as to Diaz, but Diaz is not entitled to have the enhancement stricken or its imposition barred; (7) Diaz’s argument, that his sentence constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution, is moot, but, if his case remains in a court of criminal jurisdiction, he is entitled to a limited remand pursuant to People v. Franklin (2016) 63 Cal.4th 261 (Franklin); (8) In light of recent statutory amendments, Pantoja is entitled to a limited remand pursuant to Franklin; and (9) Clerical errors in both defendants’ abstracts of judgment must be corrected. Accordingly, we affirm Pantoja’s judgment in its entirety, but remand for the limited purpose of affording him the opportunity to make a record of information relevant to his eventual youth offender parole hearing. As to Diaz, we conditionally reverse his convictions and sentence and remand for further proceedings, as discussed in this opinion.

2. On page 89, in an unpublished portion of the opinion, the last sentence of the first full paragraph, the name “Diaz” is changed to the words “both defendants” and the word “him” is changed to the word “them” so that the sentence reads:

We also conclude, however, that both defendants should receive a limited remand to afford them an adequate opportunity to make a record of information that will be relevant to the parole authority as it fulfills its statutory obligations under those statutes.

3. On page 92, in an unpublished portion of the opinion, following the first full paragraph and prior to the subheading “C. Clerical Errors in the Abstracts of Judgment” the following paragraphs are added:

At the time Pantoja was sentenced, he was not entitled to a youth offender parole hearing, as such hearings were limited to juvenile offenders who committed their controlling offenses before age 18. (§ 3051, former subd. (b)(3).) Pantoja was 18 years old at the time of the offenses in this case. Subsequently, the Legislature amended subdivision (b)(3) of section 3051 to require youth offender parole hearings for offenders who committed their controlling offenses before, first, age 23 (stats. 2015, ch. 471, § 1, eff. Jan. 1, 2016) and, most recently, age 25 (stats. 2017, ch. 675, § 1, eff. Jan. 1, 2018).

Because of the state of the law when Pantoja was sentenced, there was no mention of youthfulness at his sentencing hearing. In light of the recent statutory amendments, however, he is now entitled to the opportunity to make a record of information that will be relevant to his eventual youth offender parole hearing. (See Franklin, supra, 63 Cal.4th at p. 284.) We will remand his matter for that limited purpose.

4. On page 92, in an unpublished portion of the opinion, following the now third full paragraph, after the sentencing ending “for that limited purpose” add as footnote 71 the following footnote:

We directed the Attorney General to respond. The Attorney General agreed Pantoja is entitled to a Franklin hearing, and expressly stated the People have no objection to a limited remand for that purpose. As a result, we conclude a modification of our opinion to so provide ade-
quately resolves the issue, without the need for rehearing.

5. In the published disposition, the paragraph commencing at the bottom of page 93 with “As to Pantoja” and ending at the top of page 94 with “to the appropriate authorities” is modified to read as follows:

As to Pantoja, the judgment is affirmed in its entirety. The matter is remanded to the trial court for the limited purpose of affording Pantoja an adequate opportunity to make a record of information that will be relevant to the parole authority as it fulfills its statutory obligations under Penal Code sections 3051 and 4801, subdivision (c). The trial court shall cause to be prepared an amended abstract of judgment that reflects that liability for victim restitution is joint and several, and that conviction on count II was by jury, and shall cause a certified copy thereof to be transmitted to the appropriate authorities.

This modification changes the judgment. Appellant Pantoja’s petition for rehearing is denied.

DETJEN, J.

WE CONCUR: POOCHIGIAN, Acting P.J., PEÑA, J.