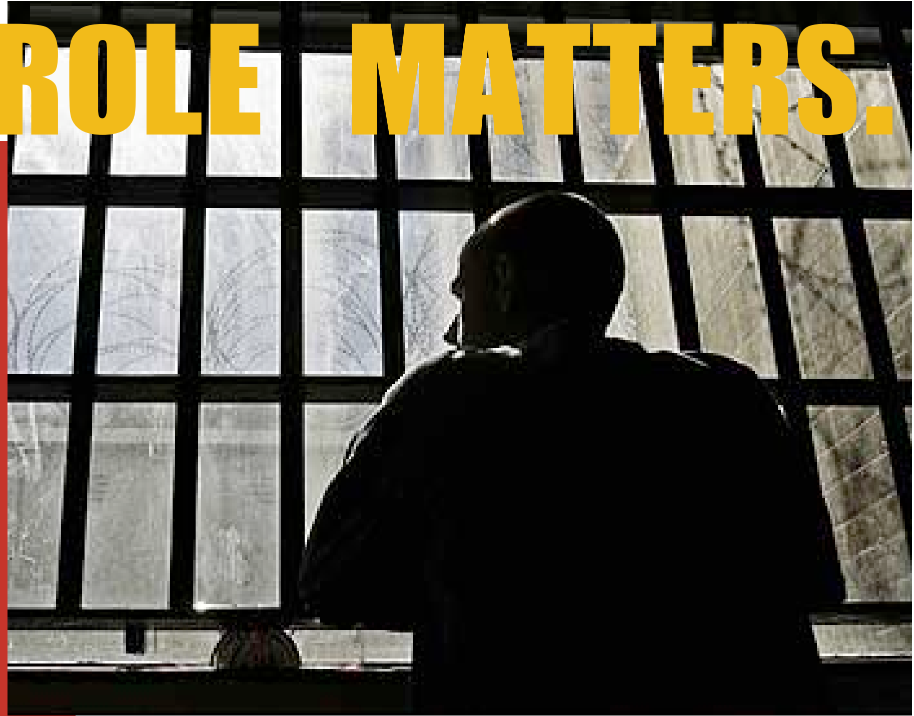
# PARROLE MATTERS.

FALL 2009 Issue



## Parole Matters.
## In this issue, we discuss the effect of disciplinary offenses or rules violations.

**Getting a disciplinary offense or having a record of past rules violations is not an insurmmountable obstacle to getting a parole date before the Board or in the Courts. Obviously, it doesn't help your parole prospects, but a rules violation or administrative counseling chrono can be overcome. In this issue, we describe how. Read on, you will learn how to deal with rules violations and your right to parole.**

Parole Matters is published by Charles Carbone, Esq.
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# CAN LIFERS OVERCOME A RULES VIOLATION?:

## Yes, it can be done, and here's how.

So, you are a lifer who happens to have a CDC-115 or 128 which is worrying you and perhaps threatening your parole prospects. Breathe deeply. Here, we offer some "insight" of our own into how the courts, the Governor, and the Board view 115s and 128s.

As a general rule of thumb, CDC 115s are not helpful to parole. Among 115s, violent 115s – threatening staff, mutual combat, possession of a weapon – are the worst. If you have one of these within the last 1 to 5 years, we strongly recommend carefully considering waiving your hearing for a year or more so you have more disciplinary-free time between the violent/assaultive 115 and your next hearing.

If the 115 is not violent, you have options. If it is an *isolated* incident, you can go to the Board hearing with greater confidence that the 115 will not ruin, without exception, your chance at a date. But, you must be prepared to speak in detail about why the 115 occurred, what you learned from it, how you take responsibility, and how it is not indicative of larger criminal mindedness. In some rare cases, a lifer can actually use a recent 115 to his/her advantage provided the prisoner offers profound insight and honesty on the 115 at the hearing. Be careful, however, because we have seen cases where the Board discounts a recent non-violent 115, but the Governor relies on it to reverse a Board parole grant. The Governor is much more likely than the Board to put weight in a 115.

**Going to Board with a recent 115 needs to be done carefully so as to avoid a multi-year denial or a record of being seen as a disciplinary problem. Plus family members often don't understand how easy it is to incur one in prison.**

If you have a pattern of non-violent 115s or 128s, this too can pose a problem. Arguably, a pattern of 128-s can be worse than a single non-violent 115. A pattern of 115s or 128-s (three or more of either) tells the Board you do not appreciate that you must "conform" yourself to rules and regulations. A pattern of either 115s or 128-s can be devastating to your parole prospects. In a word, stop. The only way around a pattern of misconduct is to break from it, remain disciplinary-free, and start programming. Otherwise, the Board, the courts, and the Governor will all lead to a dead-end. When denying parole, the Board typically cites the prisoner's general record of misconduct, referencing serious misconduct (CDC-115s) and minor misconduct (CDC 128 counseling chronos), often lumping them together as the disciplinary record.

While Title 15 specifies that only "serious misconduct" demonstrates parole unsuitability [Cal. Code Regs. tit. 15, § 2402(c)(6)], since the First District's decision this year in *In re Reed*, (2009) 171 Cal.App.4th 1071 (review by California Supreme Court denied June 10, 2009), the Board can rely on either a 115 or even a single 128- to deny parole.

If you are appealing a parole denial in the courts and the Board denied you because of a 128-A, first educate the court on the difference between a CDC-115 and a CDC 128. A CDC 128 counseling chrono documents minor misconduct; therefore, your CDC 128s are not part of your disciplinary record. *In re Reed*, 171 Cal.App.4th 1071, 1086 (2009); *In re Smith*, 109 Cal.App.4th 489, 505 (2003) (where petitioner had no CDC-115s and four CDC 128s, the court found no evidence to support the Governor's conclusion that petitioner had a disciplinary record) ["In prison argot, 'counseling chronos' document 'minor misconduct,' not discipline"].

Since the California Supreme Court's decision in *In re Lawrence*, the Board cannot deny parole simply because you have a disciplinary record. *In re Lawrence*, 44 Cal.4th 1181, 1212; *see also*, *In re Shaputis*, 44 Cal.4th 1241, 1254-1255 (2008). The facts of the disciplinary record, like any other factor cited for the denial, must support the conclusion that you are **currently** dangerous. *Lawrence*, 44 Cal.4th at 1191, 1212. While your disciplinary record serves as evidence that an unsuitability factor exists – namely, that you "engaged in serious misconduct in prison" [Cal. Code Regs. tit. 15, § 2402(c)(6)] – you want to argue there is no connection between the disciplinary record and your present risk to public safety.

A thoughtful discussion of a recent or past 115 or 128 before the Board can turn that negative into a positive reflection on the prisoner's ability to learn from his/her mistakes, accept responsibility, and take careful note of how his/her conduct became unlawful.

This is true.
It can be done.

Don't jeopardize your parole by using a cell phone in prison. You will be denied parole for this rules violation.

Depending on the facts of your case, there are two ways to argue this. First, argue the age of the CDC-115 or 128 (if old, and generally this is older than 5 years) show that the disciplinary(ies) offer no evidence of ***current*** dangerousness. If you have violent CDC-115s this is going to be your best argument.

You also want to argue other case factors that occurred since the CDC-115s provide further evidence you are not currently dangerousness. Here are a few:

- Laudatory chronos from institutional staff members who describe you as "a model inmate" and/or commend you for your: (1) attitude; (2) how you interact with staff and other prisoners; (3) your institutional record of rehabilitative self-help programming; (4) your performance in education and work programs; and, (5) positive contributions you made to the institution, such as volunteer work, leadership positions, mentoring fellow prisoners, working with at-risk youth, and, successfully mediating conflicts inside the institution.

- The psychologist's finding that you pose a low level of risk if released into the community. Here, stress the fact that the psychologist found you posed a low risk even after considering your entire disciplinary record. That tends to prove the psychologist did not believe the disciplinary record evidenced current dangerousness.

- Any statements by psychologists noting your maturity; your ability to "control your impulses"; that you do not possess "pro-criminal attitudes"; you have a "pro-social orientation" and/or a track record of "responsible behavior."

There is no hard-and-fast rule for how old the CDC-115s must be to lose their relevance to current dangerousness. But the general standard is 5 years. Particularly for violent CDC-115s, the older they are, the stronger your argument.

For prisoners with more recent CDC-115s – meaning, they occurred in the past 5 to 10 years – and are non-violent, you can argue they offer no evidence of current dangerousness because of the nature of those 115s. The cases *In re Rico*, (2009) 171 Cal.App.4th 659, and *In re Palermo*, (2009) 171 Cal.App.4th 1096, will help you in this argument.

In *In re Rico*, the Court of Appeal, Second Appellate District, held the Board's denial was not supported by some evidence of current dangerousness because Rico's CDC-115s (one for tattooing and another for refusing a urinalysis test) were non-violent; and, he had not received another 115 in 12 years. *In re Rico*, 171 Cal.App.4th 659, 679 (2009).

In *In re Palermo*, the petitioner had two CDC-115s: in 1994 for participating in a work strike, and, in 2002, for theft of state property. *In re Palermo*, (2009) 171 Cal.App.4th 1096, 1104-1105 (2009). (Palermo's 2003 CDC-115 for unauthorized use of a copy machine was later reduced to a CDC 128-A. *Id*. at 1104.) The Court of Appeal, Third Appellate District, held Palermo's "nonviolent and relatively minor misconduct" offered no evidence that Palermo continued to pose a danger to society. *Id*. at 1112. Also relevant to the Court's finding that Palermo's disciplinary record offered no evidence of current dangerousness was the fact that Palermo received "only three [disciplinary reports] during almost 20 years of incarceration." *Id*.

Now, taking the facts of those cases, argue how your case is similar to, or, if possible, better than the petitioners in *Rico* and *Palermo*. If your non-violent CDC-115s are several years old, discuss how they compare to *Rico* and *Palermo*. For example, let's say your last 115 occurred 10 years ago. Then, your case is as good as Rico's whose last CDC-115 occurred 12 years before his contested Board hearing; and, your case is better than Palermo who got a 115 only four years before his hearing. *Rico*, 171 Cal.App.4th at 679; *Palermo*, 171 Cal.App.4th at 1104-1105.

Next, discuss why the 115s were issued. If you have any CDC-115s for tattooing, refusing a urinalysis test, theft of state property, or a work strike, then your case is directly on point with *Rico* and *Palermo*. This furthers your argument that your CDC-115s no longer offer evidence of current danger-

ousness because, in Rico and Palermo, those specific 115s failed to offer evidence of current dangerousness.

If, however, you do not have any of the 115s *Rico* and *Palermo* had, you can still argue the non-violent and non-criminal 115s do not establish a link between your past criminality and your present risk to public safety. *U.S. v. Crawford*, 372 F.3d 1048, 1071 (9th Cir. 2004) (courts look to whether an inmate's past criminal history has repeated itself in current or recent behavior for evidence of a present risk to public safety). This argument is particularly relevant if your 115s have nothing to do with your reasons for committing your life crime.

For example, let's say, prior to committing the life crime, you had a drug and/or alcohol problem, or you were involved in a gang; and these factors played a role in your life crime. While incarcerated, you received CDC-115s for violating grooming standards, smoking, and destruction of state property. But, you don't have any 115s for drugs, alcohol, or gang activity. Because you have not committed any misconduct directly related to the causative factors of the life crime, your CDC-115s fail to offer evidence of current dangerousness as this record demonstrates you denounced the very behavior that was a key component of your crime.

Lastly, regardless of the nature of the CDC-115s, if, like *Palermo*, you have relatively <u>few</u> CDC-115s over a <u>long</u> period of incarceration – for Palermo it was only three disciplinary reports in nearly 20 years of incarceration – you want to argue this too indicates the disciplinary record offers no evidence of current dangerousness. If your case is factually similar to Palermo, meaning you have about the same number of disciplinary write-ups in a similar time period, you can argue your case is like that of *Palermo*. If you have fewer in the same or longer time period, then argue your case is stronger than *Palermo*.

If the Board relies on your CDC 128 counseling chronos, you will need to argue *In re Reed*. *In re Reed*, 171 Cal.App.4th 1071 (2009). While the Court gave the Board leeway to invoke a counseling chrono as a basis for the denial, there is good news. *Reed* was narrowly decided and factually specific, so you will have several options for distinguishing your case from *Reed*.

In *Reed*, the Board denied parole because Reed received a CDC 128-A counseling chrono for leaving a job assignment early. *Reed*, 171 Cal.App.4th at 1078. Critical to the Board's decision to rely on the 128-A were the following facts: (1) at Reed's previous hearing in 2005, the Board specifically told Reed to "remain disciplinary-free, not even a 128"; (2) within two months of that hearing, Reed got the 128-A for leaving his job early; (3) Reed had a total of 19 128-As; and, (4) by the time of Reed's 2006 contested hearing, the job-related CDC 128-A was just over a year old. *Id*. at 1078-1079. The Board cited the CDC 128-A as the "princip[al]" reason for the denial. *Id*. at 1078.

In his habeas petition, Reed argued the CDC 128-A counseling chrono was not "some evidence" of current dangerousness. *Reed*, 171 Cal.App.4th at 1079. The Court of Appeal, First Appellate District, however, rejected Reed's argument and upheld the Board's denial. *Id*. at 1075. The Court concluded that evidence a prisoner won't comply with the conditions of his release was an "antisocial act within the meaning of *In re Lawrence* and *In re Rosenkrantz*"; and, Reed's counseling chrono evidenced current dangerousness because it was probative of his inability to comply with the conditions of his parole, namely, to maintain employment upon his release. *Id*. at 1082, 1085.

It is clear from Reed that not just <u>any</u> CDC 128 will provide the necessary "some evidence" of current dangerousness. Rather, there must be something about the counseling chrono that indicates you won't comply with parole conditions. This leaves the door wide open to distinguish your case from *Reed*:

- **<u>Your 128s are not work-related.</u>** If your record does not include work-related 128s, then argue your 128s don't offer evidence that you are unable to maintain employment upon your release. Besides no job-related counseling chronos, you can also point to affirmative evidence which proves you will maintain employment when you parole:

- Positive work reports and laudatory chronos from supervisors, especially if they note you are reliable, show up

A rules violation can be overcome:

- ASK:

Is it relevant to how you are going to perform on parole?

Does it relate to your life crime or the reasons why (such as abusing drugs, impulsivity, etc.) your life occurred?

How old is it? Anything over 5 years begins to be irrelevant.

Is it part of a larger pattern of 115's or 128's? If not, is it an isolated instance?

Are you credibly innocent of the 115 or 128?

Were you later given a credit reinstatement as evidence of its minor nature and your ongoing success?

What have you done since to address how the rules violation occurred to begin with?

to work on time, follow instructions, display a strong work ethic, and your performance is consistent.

- Your marketable skills and vocational certifications. With specialized skill and on-the-job experience, you are more likely to find and maintain employment.

- Job offers that are part of your parole plans. When people in the community say they want to hire you, this shows they are confident in your ability to do the job and perform at a level that ensures you stay employed.

- Any offers of financial assistance from family members and friends. In the event you cannot find work or you lose a job, you will have the means to support yourself until to find employment.

- **You complied with the previous Board panel's recommendations to remain free of CDC-115s and CDC 128s.** What really irked the Board in *Reed* was the fact that, only two months after the previous Board panel specifically told Reed not to get any more 128-As, he got the 128-A for leaving work early. Chances are at your last hearing the Board told you to remain disciplinary-free and not get any more 128-As. If you did, then argue your case is not like Reed because you complied with the previous Board's recommendations where Reed did not.

- **Your CDC 128s are older than Reed's.** The Board also didn't like the fact that Reed's most recent CDC 128-A was only a year old by the time Reed appeared before the 2006 Board panel. The older your CDC 128s , the stronger your argument that your case is not like *Reed*.

- **Your CDC 128s were not the primary reason for the denial.** In *Reed*, the Board relied on the CDC 128 as the "principal" reason for the denial. Here, you can argue your CDC 128s are less relevant to your current dangerousness because the Board did not rely on them as heavily as in *Reed*.

- **There is no evidence in the record that you won't comply with the conditions of parole.** Offer up evidence that proves you are capable of complying with any conditions the Board sets for you:

- You benefit from extensive community support.

- You have viable parole plans and marketable skills.

- The Board and/or the psychologist concluded you had good parole plans.

- The psychologist noted your parole plans – including your community support – reduced your risk of recidivism; or, the doctor concluded you were likely to follow the conditions of your parole.

In addition to *Reed* there are two other cases you can argue that are relevant to the CDC 128-As. In *Palermo*, in addition to the petitioner's CDC-115s, the Court held Palermo's 128-A for unauthorized use of a copy machine (it was originally a CDC-115 but later reduced to a 128-A) did not provide some evidence of current dangerousness. *Reed*, 171 Cal.App.4th at 1104-1105. In *In re Mark Smith*, the Court found Smith's CDC 128s did not support the Governor's reversal of the Board's parole grant. *In re Mark Smith*, 109 Cal.App.4th 489, 505 (2003).

While this analysis is not exhaustive, hopefully your understanding of the importance of 115s and 128-As has deepened. Of course, lastly, the best way to "deal" with write-ups is avoid them altogether. In prison, you have to think strategically, and your biggest objective is going home. If anything threatens that prospect, turn and walk away. Your parole plans will thank you for it.

By: Susan L. Jordan, Esq.
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## RECENT PAROLE CASES YOU MUST KNOW ABOUT.

By Charles Carbone, Esq.

Parole Matters keeps you informed on the latest, greatest, and worst state and federal parole cases. And rather than giving you more than what you need or can understand, Parole Matters presents the cases just as they are viewed by the courts, lawyers and judges.

"Case law" often distilling cases to their essential "holding" or rule of law which the case stands for. The ruling of the case is what you actually need along with the citation to read it yourself provided you can use the cases in your legal briefs. On these pages appear the most recent parole cases you need along with the actual importance of the case identified.

**In re Below**
2009 WL 3155023
(Sixth Appellate District Court of Appeals)
(October 2009)
This is a positive decision affirming the lifer's parole when he had no juvenile or adult criminal history other than the commitment offense. He had one 128 for being out of bounds in 1999. And the fact that the victim was on life support for a day and a half prior to death did not make the crime exceptional. What's more the Court took into account the stress around the victim having an affair with the lifer's wife, and found that the psychological report was favorable because the psychologist found a low risk despite the inmate's insight being described as "minimal."

**In re Dean Anchor**
2009 WL 3110934
(Sixth Appellate District Court of Appeals)
(September 2009)
This is a good decision by the California Court of Appeals which ruled that the inmate had good insight into the life crime despite not being able to remember exactly what happened during the crime. The lifer did express remorse, had no history of mental illness, and understood the role of drugs in the crime. Not remembering the crime was not minmizing.

PAROLE MATTERS: Know the law. It's your life.

**In re Delgado**
2009 WL 3087493
(Second Appellate District Court of Appeals)
September 2009

This is another good Court of Appeals decision in which the Court embraced the same sentiment of *In re Anchor* that the lifer did not minimize his responsibility by not being able to remember the life crime because he was in a alcohol induced black-out. The Court also took note of supportive psychological evaluations from 2004 to 2007. His risk assessments were moderately low or no higher than the average citizen as long as he maintained his sobriety. And the Court noted no 115's since the lifer began participation in AA.

**In re Larry Jones**
2009 WL 3247309
(Second Appellate District Court of Appeals)
October 2009
This is a favorable Court of Appeals decision in which the Court overruled the Governor's reversal and ordered the lifer released. This is important because the Attorney General has argued that the Court can only ordere a re-review by the Governor. This is not so. The Court can order the lifer released. The Governor relied on the gravity of the life crime and minimization but the Court over-ruled the Governor for not establishing a nexus between either factor and a present risk to the public.

**Milot v. Haws**
628 F. Supp. 2d 1152 (2009)
(USDC for Southern District of CA)
This is a favorable federal decision finding that the lifer's past history of 115's did not pose a present risk because the psychological evaluations were still supportive of release and the lifer had programmed significantly since getting the 115s.

**Nix v. Hartley**
2009 WL 3055398
(USDC for Central District of CA)
This is another good federal decision affirming a lifer's parole when the Board arbitrarily required another vocation when the Board did not state how he stood to benefit further from

an additional vocation, and the reason he couldn't obtain one was that the vocational programs were canceled at the prison.

**In re Noah Ignacio**
2009 WL 1699668
(Fifth Appellate District Court of Appeals)
June 2009
The Court of Appeals issued this good decision finding the lifer suitable and overruling the Governor when the facts of the crime and prior criminal history provided no connection to a present risk to public safety. Because the Governor made his decision prior to the ruling of *In re Lawrence*, the Court sent the decision back to the Governor. However, this is another indication that the Court has the power to order a lifer released instead of just ordering a re-hearing of parole.

**Branham v. Davison**
2009 WL 3055404
(USDC for Central District of CA)
September 2009
This is positive federal case overuling the Board on the topic of insight by finding that the lifer did understand that her fear and anger over her husband's threats caused her to kill him. She also had a 40 year record of non-violence. And her unstable social history had no bearing on current dangerousness especially when she had developed long term healthy relationships in prison.
indication that after 17 years of disciplinary-free behavior despite the victim's next of kin opposing parole. The Court also over-ruled the Board that the motive was supposedly "trivial" when the crime was over an understandable jealous rage when the lifer learned his pregnant wife was cheating. The Court found that next-of-kin opposition "can not add weight where there is no evidence of unsuitability to place in the balance."

**In re Nestle v. Davison**
2009 WL 2997225
(USDC for Central District of CA)
This is a good federal decision finding that even a horrific first degree murder must have a connection to the lifer's present dangerousness. Plus hte lifer's in-prison rehabiliation was "exemplary." And his past unstable socia history of being raised by god parents, dropping out of school and divorce was no longer relevant. The Court also noted that 2001 and 2004 psychological evaluations were no longer relevant at hte time of a 2006 hearing.

**Williams v. Sisto**
2009 WL 3300038
(USDC for Eastern District of CA)

This is a bad decision by the federal court ruling that a 2004 115 for distribution of drugs in prison was evidence of a present risk to the public.

**Moore v. Hartley**
2009 WL 2390604
(USDC for Eastern District of CA)
This is another bad federal case which concluded that the lifer did not understand the severity of his alcoholism and the nature of addiction because he stated that he's "not currently addicted" to alcohol. This was seen as minimizing and not understanding the reasons for his life crime. Plus, the lifer did not understand that he may need additional training once released to work as a optical technician.

**In re Donald Lewis**
172 Cal. App.4th 13 (2009)
(Sixth Appellate District Court of Appeals)
This is a mixed case finding that five consolidated lifer cases did bring a valid claim over the Board's pattern of calling every life crime "exceptional," but ruling that the cases have to be resolved individually.

**Bell v. Hartley**
2009 WL 981375
(USDC for Eastern District of CA)
This is bad federal decision finding that the lifer completely lacked remorse because at not time during the hearing did he show any signs.

**Clairborne v. Carey**
2009 WL 3233828
(USDC for Eastern District of CA)
This is a bad decision which ruled that parole was properly denied because the lifer hadnpt served the minimum number of years required by his sentence.

**Ramirez v. Clark**
2009 WL 2905728
(USDC for Eastern District of CA)
This is another bad federal decision denying parole because the lifer had not served the time required of his sentence.

## WHO ARE THE BEST PAROLE COMMISSIONERS FOR LIFERS?

At present, those commissioners (who are still on the Board) with the highest number and percntage of parole grants are:

1. Commissioner Garner at 15%.
2. Commissioner Prizmich at 13%.
3. Commissioner Anderson at 12%.
4. Commissioner Gillingham at 11%.
5. Commissioner Petrakis at 10%.
6. Commissioner Chrones at 9%.
7. Commissioner Arbaugh at 9%.
8. Commissioner O'Hara at 8%.
9. Commissioner/Chairman Doyle at 7%.

The BPH as a whole granted parole 7% from January to August 2009. The Board also issued 81 fifteen year denials (1%) during this same period.

**Make sure you find the right and a righteous parole lawyer.**

**PAROLE MATTERS.**
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This publication may be considered as a legal advertisement. It is intended as an educational and instructional resource for life inmates in California. Charles Carbone, Esq. is responsible for its content.

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