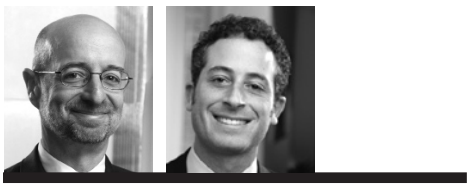
ESSENTIAL CALIFORNIA LEGAL CONTENT | WEEK OF MARCH 12, 2012 | VOL. 136, NO. 11 An ALM Publication

THE RECORDER

IN PRACTICE

A new group faces disenfranchisement

California secretary of state puts criminal justice reform and voting rights on a collision course



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As the nation prepares for the upcoming 2012 presidential elections, most Californians are focused on who will be the Republican nominee, and who will take the presidential oath next January. Thousands of Californians may not get to vote in that election as a result of a recent decision by the California secretary of state. The stage now appears to be set for a rematch of a voting rights battle the secretary of state lost in *League of Women Voters of California v. McPherson*, 145 Cal. App.4th 1469 (2006).

During the 20th century, California, along with almost all other states, moved away from lifetime disenfranchisement of ex-convicts. California's development was fitful, twisting and turning through ballot initiatives and Supreme Court decisions. But by 2006, with the *McPherson* decision, the matter seemed to be settled — and the only persons denied the right to vote on criminal justice grounds were those imprisoned in a state prison and those on parole as a result of a felony conviction. In *McPherson*, the secretary of state and the attorney general had tried to reverse the course on restoration of ex-felon voting rights, by extending disenfranchisement to persons on felony probation who had been sent to jail for violating their terms of probation. The *McPherson* court rejected this argument and restored the voting rights of felony probationers.

Fast-forward to 2012 and California's historic Criminal Justice Realignment Act. Among many other changes, the CJRA abolishes state parole for certain ex-felons. Prior to the CJRA, all individuals sentenced to state prison served at least a three-year period of parole upon their discharge from prison. When on parole, an individual remains under the supervision of the California Department of Corrections and Rehabilitation, and can be returned to confinement by a state hearing officer for violations of parole. Now, under the CJRA, individuals who serve either jail or prison terms for most nonserious, nonviolent felonies do not go on state parole. Instead, they are released to county supervision, and have the newly created status of Post-Release Community Supervision. PRCS releasees may have their release revoked only with court approval. Parolees can have their release revoked through an administrative procedure. The state estimates that once the relevant provisions of the CJRA are in full effect, which should occur by approximately October 2012, 29,500 of the state's 60,500 offenders released from prison (49 percent) will be released to PRCS instead of parole.

Because of the discretion granted to localities over PRCS programs and the short time period provided for implementing the CJRA, many issues related to PRCS remain unresolved. The California secretary of state, however, quickly moved ahead to decide the question of PRCS voting rights, and in a December 2011 memorandum, instructed county clerks and registrars of voters to refuse to register persons under this new form of county supervision.

The secretary of state issued a detailed legal memorandum justifying the decision to disenfranchise PRCS releasees. The secretary's arguments are eerily similar to the argument that the *McPherson* court rejected the last time the secretary tried to stretch felon disenfranchisement law to cover a group not actually named in the law. The operative law is Article II, §4 of the California Constitution, which states that "[t]he legislature ... shall provide for the disqualification of electors while ... imprisoned or on parole for the conviction of a felony."

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The core of the secretary's PRCS disenfranchisement argument is the secretary's conclusion that PRCS and parole are "functionally equivalent," and therefore, when the state Constitution says "parole" it also means this new classification, county PRCS. The secretary tried this sort of functional equivalence argument in *McPherson*, when it resorted to Webster's Dictionary to argue that "imprisonment" can include confinement in a county jail. The court rejected such dictionary-based stretching then because it is inconsistent with the fundamental importance of the right to suffrage.

Courts have long held that election law should not be construed to disenfranchise any voter if the law is reasonably susceptible of any other meaning. When loose terms like "functionally equivalent" are being thrown around, you can be certain that you are talking about a legal term with more than one possible meaning.

The secretary's best argument for PRCS disenfranchisement is to point to its own policy of disenfranchising federal "supervised releasees." Since federal parole was abolished in the 1980s, released federal prisoners have been known as "supervised releasees." The secretary of state disenfranchises the federal releasees, even though they are not on "parole," and thus not technically subject to disenfranchisement under Article II, §4. Leaving aside whether disenfranchising federal releasees is proper, the analogy does not lend support to PRCS disenfranchisement because it ignores the importance of court supervision. The *McPherson* court considered it a "critical distinction" that felony probationers remain under court supervision, as opposed to parolees, who remain under state correctional supervision. County PRCS releasees are far closer to being court-supervised probationers than they are to either state parolees or persons being supervised by the Federal Bureau of Prisons. PRCS supervision is entirely the responsibility of county probation departments, which are closely tied to the superior courts. Any violations of PRCS terms are heard and decided not by the state corrections department, but by the superior courts.

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The secretary's disenfranchisement of tens of thousands of PRCS releasees appears to put it on a collision course with the plain language of California's constitution. The reappearance of some of the same arguments that were rejected in *McPherson* seems to signal a desire to refight the legal battle over just how far the secretary of state can stretch the felon disenfranchisement provision of the California Constitution. Reopening this battle is inconsistent with the broader purposes of the Criminal Justice Realignment Act, which include improving California's dismal record on the re-entry of ex-felons into society as productive citizens.

For too long, California's parole and re-entry policies have failed. Each year for decades, California has filled its prisons to bursting with recent releasees who were failing to re-establish work and family ties. Too many ex-felons serve what is known as "life on the installment plan," cycling between prison and homelessness every few months, in a hopeless downward spiral that costs the state billions, and breeds more crime and victimization. Moving responsibility for some ex-felons to the counties is meant to break this cycle, because it is believed that county probation officers have better connections to local service providers and employers. The message to all participants in prisoner re-entry is that we need to do more to help ex-felons pick up the mantle of responsible citizenship. Participation in voting as a key act of civil life should form part of an overall reintegration plan for ex-felons. Realignment should not be an occasion to resume old legal battles about limiting the franchise, or to turn back the clock on voting rights.

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