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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JULIAN HILL, Defendant and Appellant.	B279966 (Los Angeles County Super. Ct. No. BA280415)

APPEAL from an order of the Superior Court of Los Angeles County, David V. Herriford, Judge. Affirmed.

Arielle Bases, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Julian Gerard Hill was convicted in 2005 of false imprisonment by violence. (Pen. Code,[1] § 236.) Because he had three prior strike convictions, he was sentenced to 25 years to life in state prison. This court affirmed the judgment on appeal. (*People v. Hill* (June 6, 2007, B188141) [nonpub. opn.].) In 2012, defendant filed a section 1170.126 petition to recall his sentence. Following a September 2016 suitability hearing, the trial court denied the petition on the ground defendant posed an unreasonable risk of danger to public safety. We affirm.

DISCUSSION

A. *There Is No Presumption of Suitability for Resentencing Nor Due Process Liberty Interest in Resentencing Under Section 1170.126*

Defendant claims there is a presumption that inmates eligible for section 1170.126 resentencing will be found suitable for such relief absent "exceptional circumstances." Defendant further asserts there is a due process liberty interest in resentencing under the federal and state Constitutions. We conclude section 1170.126 creates no presumption in favor of a reduced sentence absent "exceptional circumstances" and no due process liberty interest.

Defendant relies on the use of the words "shall" and "unless" in subdivision (f) of section 1170.126: "[T]he petitioner

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[1] Further statutory references are to the Penal Code unless otherwise noted.

shall be resentenced . . . *unless* the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." Defendant cites *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex* (1979) 442 U.S. 1 (*Greenholtz*), and *Board of Pardons v. Allen* (1987) 482 U.S. 369 (*Allen*), both of which concerned release on parole.

It is true that in both *Greenholtz* and *Allen* the United States Supreme Court held mandatory statutory language similar to that in section 1170.126, subdivision (f) created a presumption in favor of parole release. (*Greenholtz, supra,* 442 U.S. at pp. 11-12; *Allen, supra*, 482 U.S. at pp. 377-378.)[2] That

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[2] The Nebraska parole statute at issue in *Greenholtz* provided: "'Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it *shall* order his release *unless* it is of the opinion that his release should be deferred because: [¶] (a) There is a substantial risk that he will not conform to the conditions of parole; [¶] (b) His release would depreciate the seriousness of his crime or promote disrespect for the law; [¶] (c) His release would have a substantially adverse effect on institutional discipline; or [¶] (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.'" (*Greenholtz, supra,* 442 U.S. at p. 11, quoting Neb.Rev.Stat. § 83-1,114(1) (1976), italics added.) The statute at issue in *Allen* stated, "'Prisoners eligible for parole. (1) Subject to the following restrictions, the board *shall* release on parole . . . any person confined in the Montana state prison or the women's correction center . . . when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or

presumption gave rise to a due process liberty interest entitled to some measure of constitutional protection. To that extent, *Greenholtz* and *Allen* appear to support defendant's position. Our Supreme Court has also recognized a due process liberty interest in parole decisions under the California Constitution. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 660-661, 664.)

The language of section 1170.126, subdivision (f) does require that if, for example, the trial court somehow had no evidence at all bearing on an eligible defendant's dangerousness, it would be required to resentence the defendant. However, this is a far cry from the language creating a meaningful presumption—such as the "absent exceptional circumstances" presumption that defendant seeks. The language of the subdivision does not clearly create such a presumption.

Section 1170.126, subdivision (f) states, "If the petitioner satisfies the [eligibility] criteria . . . the petitioner shall be resentenced . . . *unless the court, in its discretion, determines* that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (Italics added.) This language means that if a court is evaluating both choices in how to sentence a defendant, it has discretion to select either choice, with no presumption in favor of one or the other. As another court has held, this reading "accords with common usage." (*People v. Buford* (2016) 4 Cal.App.5th 886, 902; *People v. Esparza* (2015) 242 Cal.App.4th 726, 738; cf. *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1371 [interpreting § 190.5, subd. (b); "if a teacher informed her students that 'you must take a final exam or, at

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to the community[.]'" (*Allen, supra*, 482 U.S. at p. 376, quoting Mont. Code Ann. § 46-23-201 (1985).)

your discretion, write a term paper,' it would be reasonable for the students to believe they were equally free to pursue either option."].) The statutory language thus "does not plainly indicate that a second-strike sentence is the presumptive sentence." (*People v. Esparza, supra*, 242 Cal.App.4th at p. 738.)

We are persuaded that the better reading is that section 1170.126, subdivision (f) creates no presumption but leaves the risk-of-danger determination within the court's broad discretion. If the voters had intended to create a presumption in favor of resentencing absent "exceptional circumstances," Proposition 36 could have said so, instead of granting the trial court discretion to find dangerousness. (*People v. Buford, supra,* 4 Cal.App.5th at p. 903; *People v. Esparza, supra,* 242 Cal.App.4th at p. 739; cf. *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010 ["Had the authors of Proposition 8 intended to include . . . it is fair to assume that they would have expressed that intention . . ."].) Further, the trial court is given broad discretion under section 1170.126, subdivision (g), to consider the petitioner's history, disciplinary and rehabilitative record, and "any other evidence" it, in its discretion, determines to be relevant to deciding whether a new sentence would result in an unreasonable risk of danger to public safety. This expansive grant of authority indicates that section 1170.126 relies on the trial court's experience and expertise in making a case-specific determination of dangerousness, rather than guides the court toward a particular result in general. Imposing an "exceptional circumstances" requirement would place a constraint on courts that is nowhere found in the enacted statute.

In supporting this reading as well, we note that parole release and section 1170.126 resentencing occur in circumstances

that differ in an important way. To become eligible for parole, an inmate serving an indeterminate potential life sentence such as defendant's 25-year-to-life sentence must first serve the determinate part of the sentence. (§ 3046, subd. (a)(2); *People v. Franklin* (2016) 63 Cal.4th 261, 273.) In contrast, section 1170.126 may come into play at any time, even relatively early in the service of a determinate sentence. And although an indeterminate life sentence creates an expectation of a parole grant (*In re Rosenkrantz, supra*, 29 Cal.4th at pp. 660-661, 664), defendant's sentence created no expectation of a sentence reduction.

Even if we assume section 1170.126's language gives rise to a presumption in favor of resentencing and a due process liberty interest, defendant has not shown any due process deprivation. Defendant asserts the trial court deprived him of due process by reaching an arbitrary or capricious decision. As discussed below, we conclude the trial court did not abuse its discretion in denying defendant's section 1170.126 petition. The trial court's decision was neither arbitrary nor capricious.[3]

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[3] In his opening brief, defendant argues Proposition 47's definition of "unreasonable risk of danger to public safety" (§ 1170.18, subd. (c)) applies to section 1170.126. After defendant filed his opening brief, however, our Supreme Court held to the contrary. (*People v. Valencia* (2017) 3 Cal.5th 347, 351-352.)

B. *The Trial Court did not Abuse its Discretion under Section 1170.126*

The trial court issued a lengthy memorandum of decision explaining its denial of defendant's petition. The court considered defendant's criminal history, prison disciplinary record, rehabilitation record, the California Department of Corrections and Rehabilitation (CDCR) classification score, California Static Risk Assessment (CSRA) score, age and post-release plans as well as two psychologists' opinions. (§ 1170.126, subd. (g).) The trial court concluded: "Petitioner's record of rehabilitation and post-release plans are supportive of release. The court finds, however, that these positive factors are outweighed by Petitioner's criminal history, record of prison disciplinary misconduct, CDCR classification score, CSRA score, and elevated risk assessments. In sum, the totality of the record, including consideration of all the statutory factors, demonstrates that resentencing Petitioner would pose an unreasonable risk of danger to public safety at this time."

Defendant challenges the trial court's dangerousness finding as an abuse of discretion. A trial court's dangerousness finding must rest on a preponderance of the evidence. (Evid. Code, § 115; *People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1305.) The statute vests broad discretion in the trial court. (§ 1170.126, subd. (subds. (f) & (g).) "In exercising its discretion . . . the court may consider: [¶] (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of

rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1170.126, subd. (g).)

Our review is for an abuse of discretion. "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. [Citations.]" (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478-479.) We find no abuse of discretion.

1. The Evidence Evaluated by the Trial Court

We consider the evidence with respect to the factors on which the trial court relied in finding current dangerousness.

a. criminal history

Defendant was an admitted gang member with a long criminal history.[4] His law enforcement encounters began in 1980, when he was 13 years old; this was 23 years before he committed the present offense. Defendant was not free from incarceration or some form of law enforcement supervision for most of the 23 intervening years. He repeatedly violated the conditions of his probation and parole. As the trial court observed, defendant's incarcerations and supervision failed to deter him from continuing to engage in criminal conduct.

Defendant had four sustained juvenile petitions for grand theft person (1980), driving without owner's consent (1981), burglary (1982) and controlled substance possession (1984). He spent nearly five years in the California Youth Authority, from February 10, 1984 to October 6, 1988.

Defendant had three prior felony convictions, for robbery in 1989 and 1993 and for attempted robbery in 1997. He spent a year in state prison, from March 6, 1990 to July 5, 1991, after violating his probation in the 1989 case. In 1993, he was sentenced to three years in state prison for the attempted robbery. In 1997, defendant was convicted of kidnapping with special circumstances and attempted robbery. He was sentenced to three years in state prison. He was paroled on September 9, 2001 and discharged from parole on October 17, 2002. He did not perform well on probation and parole. His probation was revoked

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[4] Defendant told Dr. Carolyn Murphy he had "debriefed" from the gang. Dr. Murphy found no confirmation of defendant's debriefing in the records she reviewed.

in 1989 and again in 1990. He repeatedly violated his parole—in 1991, 1993, 1995, 1999, 2000, 2001 and 2002. Controlled substance use led to a misdemeanor under the influence conviction in 1989 and a probation revocation for PCP possession for sale in 1990. Defendant was twice convicted of misdemeanor spousal abuse, in 1996 and 2004. Defendant incurred his most recent conviction after, on April 2, 2004, he locked himself in a bathroom with an 11-year-old girl. When the child attempted to leave, defendant closed the bathroom door, which hit her in the head and face.[5] Defendant was 36 years old at the time.

Defendant repeatedly exhibited violent behavior. In 1981, defendant forcibly removed a necklace from an elementary school student's neck and subsequently stuck the victim several times. Also in 1981, defendant demanded a watch from a 12-year-old. Defendant struck the victim after he or she handed over the watch. In 1989, defendant grabbed a woman by the throat, punched her in the stomach and yanked two gold chains from her neck. In 1993, defendant attempted to rob a clerk at a Jack-in-the-Box restaurant. He walked up to the drive-through window and attempted to hit the clerk with a stick. During the current offense, defendant forcibly detained an 11-year-old girl. He closed a door as she attempted to leave. The door hit her in the head and face.

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[5] The child reported defendant sexually assaulted her. He was charged with, but not convicted of, aggravated sexual assault of a child and committing lewd and lascivious acts upon a child under the age of 14. The jury hung 11 to 1 as to those charges. In reaching its suitability decision, the trial court gave no weight to the conduct underlying the charges for which defendant was not convicted.

The trial court could reasonably conclude that defendant's criminal history indicated that he presented a risk of danger to public safety. During the 23 years before committing this offense, defendant was nearly continuously incarcerated or under supervision, demonstrating an inability to refrain from criminal conduct, even while on probation and parole.

b. prison disciplinary record

During his current commitment, defendant incurred seven serious rules violations, including four for fighting with other inmates. All four fights occurred in 2012 or later—January 18, 2012, January 26, 2014, February 6, 2014 and June 17, 2015. Three of the four fights took place while defendant's present petition to recall his sentence was pending. The fights were defendant's most serious rules violations since his incarceration began in late 2005.

The trial court could reasonably conclude the increasing seriousness of defendant's misconduct, his willingness to break prison rules, and his fighting with other inmates indicated a lack of sufficient rehabilitation and thus current dangerousness.

c. classification score

Defendant's classification score indicated a security risk that had increased substantially during the pendency of the instant petition. As our Supreme Court has explained: "California prison inmates are classified pursuant to a scoring system that determines their prison custody level. . . . A higher score means the inmate is considered a higher security risk . . . ;

a lower score means the inmate is considered a lower security risk . . . ." (*In re Jenkins* (2010) 50 Cal.4th 1167, 1171; see Cal. Code Regs. Tit. 15, § 3375 et seq.) The lowest score an inmate subject to a life sentence can receive is 19. (California Department of Corrections and Rehabilitation (CDCR), Department Operations Manual (January 1, 2017), Ch. 6: Adult Classification, § 61010.11.5, p. 516.)[6] Inmates can reduce their classification scores by avoiding conduct leading to disciplinary action and performing satisfactorily or better in work, school or vocational training. Scores are increased for serious rules violations. (CDCR, Department Operations Manual, *supra*, Ch. 6: Adult Classification, § 61020.19.3, 61020.19.4 pp. 526-528.)

Defendant's initial classification score, upon entering state prison, was 71. It declined over the years. As of January 2014, defendant's score was at a low of 39. When the trial court held the suitability hearing, in September 2016, defendant's classification score had risen to 53, indicating he was considered a higher security risk. The trial court found, "A score of [53] is moderately elevated compared to other inmates seeking resentencing through the Reform Act who have successfully reduced their scores to 19 over the course of their incarceration."

d. California static risk assessment score

State regulations explain: "(a) The California Static Risk Assessment Score (CSRA) . . . is a validated risk assessment tool that utilizes a set of risk factors which are most predictive of

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6 <http://www.cdcr.ca.gov/Regulations/Adult_Operations /docs/DOM _TOC.html> [as of Oct. 5, 2017].

recidivism. The tool produces a risk number value that will predict the likelihood that an offender will incur a felony arrest within a three-year period after release to parole.

Risk factors include, but are not limited to, age, gender, criminal misdemeanor and felony convictions, and sentence/supervision violations. [¶] (b) CSRA risk number values fall in one of the following five categories: [¶] (1) Low Risk, with a risk number value of '1'. [¶] (2) Moderate Risk, with a risk number value of '2'. [¶] (3) High Risk Drug, with a risk number value of '3'. High Risk Drug means that the offender has a greater risk of reoffending with a drug offense. [¶] (4) High Risk Property, with a risk number value of '4'. High Risk Property means that the offender has a greater risk of reoffending with a property offense. [¶] (5) High Risk Violence, with a risk number value of '5'. High Risk Violence means that the offender has a greater risk of reoffending with a violent offense. [¶] (c) For the purposes of this section, the CSRA is defined as an actuarial tool that computes the likelihood to re-offend (incur a felony arrest within a three-year period after release to parole), and uses static indicators that do not change. These indicators include gender, age and offense history of the offender." (Cal. Code Regs., tit. 15, § 3768.1.)

As of February 2, 2011, defendant's risk assessment score was "moderate." The trial court noted, "Most inmates who have petitioned for resentencing have a CSRA of 1." The trial court found, "[A] moderate risk is an unreasonable risk." The trial court could reasonably conclude defendant's CSRA moderate risk assessment contributed to a conclusion of current dangerousness.

e. age

The trial court observed, "Studies show that criminality declines drastically after age 40. Citing a Stanford University study, the Court of Appeal has concluded that 'due to their age, the recidivism rate of lifers is dramatically lower than that of all other state prisoners, indeed infinitesimal.' (*In re Stoneroad* (2013) 215 Cal.App.4th 596, 634.)"[7] The trial court reasonably concluded that although defendant was 49 years old, due to his recent disciplinary history, he had not demonstrated he was aging out of a significant risk of serious criminal conduct.

f. expert opinions

Two psychologists, Dr. Hy Malinek (appointed by the court at defense counsel's request) and Dr. Murphy (retained by the People) interviewed defendant. Dr. Malinek met with defendant

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[7] The Stanford Criminal Justice Center study states: "Some non-lifer studies demonstrate that as a general matter, people age out of crime. For most offenses—and in most societies—crime rates rise in the early teenage years, peak during the mid-to-late teens, and subsequently decline dramatically. Not only are most violent crimes committed by people under 30, but even the criminality that continues after that declines drastically after age 40 and even more so after age 50." (Weisberg, et al., Stanford Criminal Justice Center, *Life in Limbo: An Examination of Parole Release for Prisoners Serving Life Sentences with the Possibility of Parole in California* (Sept. 2011) 1, 17.) The Stanford study has been cited in *In re Stoneroad, supra,* 215 Cal.App.4th at pages 633-634 and footnote 21 and in *In re Morganti* (2012) 204 Cal.App.4th 904, 930.)

on October 15, 2014. Dr. Murphy interviewed defendant on February 4, 2016. Dr. Malinek also performed diagnostic tests.[8] Both experts agreed defendant suffered from antisocial personality disorder, but the condition had waned over time and continued to diminish. Both also agreed defendant's substance abuse had been a significant factor in his criminal conduct in the past. It appeared he had been substance-free since entering state prison.

Dr. Malinek found defendant posed a "probably no more than" moderate risk of reoffending. Dr. Malinek concluded: "Overall, and considering the totality of the information and Mr. Hill's current age (47), his risk is probably no more than moderate. The risk will decrease should Mr. Hill be closely monitored and receive assistance in reintegrating into the community after nearly a decade of incarceration. Risk management is closely associated with risk assessment, and in that sense, one cannot underestimate the importance of tight monitoring, continued substance abuse treatment, and rehabilitative efforts in decreasing his risk of future violence."

Before she interviewed defendant, Dr. Murphy viewed him as "'right on the fence'" between posing a moderate or a

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[8] Dr. Malinek administered the following psychological tests and forensic measures: "1. Clinical interview and mental status examination. [¶] 2. Millon Clinical Multiaxial Inventory III (MCMI-III), a comprehensive personality test. [¶] 3. Psychopathy Checklist-Revised (PCL-R), a measure of psychopathy. [¶] 4. Static-99R, an actuarial measure of sexual and violent recidivism. [¶] 5. HCR-20 (Version 3), a research-supported measure of violent recidivism. [¶] 6. LS/CMI, Level of Service/Case Management Inventory—actuarial test of risk and need assessment."

significant risk for recidivism. After evaluating defendant face-to-face, however, Dr. Murphy agreed with Dr. Malinek's moderate risk assessment. Defendant had scored in the moderate range on multiple tests Dr. Malinek performed. Dr. Murphy concluded: "This examiner would agree with Dr. Malinek's conclusion that Mr. Hill is at moderate risk for re-offense, and that said re-offense is not necessarily for violent or hands-on offending, but that it could also be for substance use or property crimes as well. That said, moderate risk is still a reflection of 'some risk,' and with Mr. Hill's history it would be virtually impossible to ever state that he is at 'no' risk, given his history alone, although over time his risk will certainly continue to decline. [¶] . . . The primary risk factor or 'wild card' in this situation is in fact Mr. Hill's history of substance use . . . . [¶] . . . [¶] In closing, this examiner particularly concurs with Dr. Malinek's closing paragraph in which he emphasizes the need to have assistance in the form of monitoring upon release from custody, and that Mr. Hill will need to actively manage his risk, namely his substance use, if he is to successfully transition to the community."

As noted above, the trial court found that a moderate risk was an unreasonable risk. The trial court could reasonably conclude this factor weighed against defendant in evaluating his current dangerousness.

2. Analysis of the Totality of the Evidence

The trial court, in its discretion, reasonably concluded defendant's criminal history, his willingness to resort to violence, his failure to remain free of custody or supervision for 23 years

prior to his present incarceration, his inability to perform satisfactorily on probation and parole, his repeated recent fights with other inmates, his recently increased classification score, and his assessment as a moderate recidivism risk meant he currently posed an unreasonable risk of danger to public safety. There was no abuse of discretion.

Defendant argues there is no "rational nexus" between the trial court's findings—resting on static, immutable factors—and its ultimate conclusion that defendant currently poses an unreasonable risk of danger to the public. (*In re Lawrence* (2008) 44 Cal.4th 1181, 1227 [there must be a rational nexus between the circumstances of the commitment offense and current dangerousness]; *People v. Esparza, supra*, 242 Cal.App.4th at p. 746 ["a trial court may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history '*only* if those facts support the ultimate conclusion that an inmate *continues* to pose an unreasonable risk to public safety"].) Defendant asserts that according to Drs. Malinek and Murphy, consistent with his CSRA score of 2, he poses only a moderate risk of recidivism, which is not an unreasonable risk according to dictionary definitions of "moderate" and "unreasonable." What the trial court found, however, was that, in light of other factors including defendant's criminal history—demonstrating an inability to refrain from criminal conduct or to perform satisfactorily under supervision—and his recent fighting in prison, a moderate risk was not a reasonable risk. The trial court acted within its discretion in making this finding. The court noted that most inmates seeking resentencing under section 1170.126 had a CSRA score indicating a low risk of reoffending. That the CSRA score rests on static indicators—age, gender,

criminal history—does not foreclose the trial court from relying on it.

Defendant suggests the trial court gave insufficient weight to the connection between his past substance abuse and his criminality, and his commitment to remain sober and rehabilitate himself while in custody. The trial court acknowledged defendant's rehabilitation record supported resentencing. The trial court specifically referenced defendant's participation in Alcoholics Anonymous, Narcotics Anonymous, and other substance abuse related programs, his absence of drug-related rules violations, and his clean drug tests. The trial court concluded, however, that defendant's positive rehabilitation efforts were outweighed by his disciplinary misconduct, his classification score, and his elevated risk assessments. Both experts—Drs. Malinek and Murphy—considered defendant's substance abuse history and rehabilitation in reaching their conclusions that defendant nevertheless posed a moderate risk of reoffending. The trial court was not compelled to give any additional weight to defendant's rehabilitation efforts.

Defendant challenges the trial court's conclusion that he was not aging out of a significant risk of serious criminal conduct. The trial court relied on defendant's recent disciplinary record in concluding, "[Defendant's] age does not tend to mitigate any risk of danger to public safety; while his age does not weigh against release, the court finds that it is not supportive of release." Despite being in his late forties, defendant recently had engaged in multiple fights with other inmates. His misconduct had escalated, and the fights were his most serious misconduct during his lengthy current incarceration. Defendant's disciplinary record thereby supported the trial court's conclusion, and the

trial court could reasonably rely on that record in concluding defendant's age did not outweigh other factors in demonstrating his recidivism risk.

Defendant asserts that because his risk assessment rested on static factors it was not an accurate predictor of current dangerousness. As Dr. Murphy explained, however, defendant's moderate risk assessment was derived from both static and dynamic factors: "There's these static or fixed rating scales or assessment measures that are used that score as moderate, but then there's all of these other dynamic factors—a plan for treatment, a release plan, lack of [narcissism] and ownership of what he's done—those types of things."

Dr. Malinek similarly testified his assessment of defendant's risk was not based solely on immutable factors. Dr. Malinek's opinion rested on, among other things, a violence risk assessment, a forensic interview, personality testing, prison records, educational progress, a conversation with defendant about substance abuse, and his relapse prevention plan. Dr. Malinek administered tests that factored in dynamic considerations, including personality traits, age, "attempts to look at potential for violence," "insight, behavior, custody, recent symptoms of major mental illness" and future risk management, "future living situation, personal support, stress, future stress that the person may be facing," and "criminal history, re-education, employment, anti-social attitudes, [and] antisocial patterns." Both Drs. Malinek and Murphy considered Dr. Malinek's assessments in concluding that defendant had a moderate recidivism risk. Their risk assessments therefore did not rest on static factors alone.

DISPOSITION

The trial court's order denying defendant's petition for resentencing under Penal Code section 1170.126 is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.