UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JERRY VALDIVIA, ALFRED YANCY, and HOSSIE WELCH, on their own behalf and on behalf of the class of all persons similarly situated,

Plaintiffs,

v.

GRAY DAVIS, Governor of the State of California, et al.,

Defendants.

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NO. CIV. S-94-671 LKK/GGH

O R D E R

Plaintiffs are a class of California parolees who have sued the Governor and various correctional officials for maintaining parole revocation procedures which violate the Due Process Clause of the Fourteenth Amendment. This matter comes before the court on defendants' proposed remedial plan and plaintiffs' objections thereto.

On June 13, 2002, this court granted partial summary judgment in favor of plaintiffs on their claim that California's

unitary parole revocation hearing system violates their due process rights under Morrissey v. Brewer, 408 U.S. 481 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973). See Valdivia v. Davis, 206 F.Supp.2d 1068 (2002) ("June 13 Order").[1] On October 18, 2002, the court ordered defendants to either (1) propose a remedial plan addressing the violations identified in the June 13, 2002 Order by December 16, 2002 or (2) file, by December 2, 2002, a statement explaining in detail their reasons for failing to timely propose a plan. On December 5, 2002, defendants responded, explaining that they would be unable to comply with the court's order. After further delay caused both by defendants' difficulty in instituting new procedures and by stipulation of the parties to facilitate negotiations, on March 17, 2003, defendants provided plaintiffs with their proposed Valdivia Remedial Plan (VRP). On May 12, 2003, the plaintiffs filed their two objections to the proposed plan.

Since the June 13 Order, the delays between detention and hearing have apparently only increased. Plaintiffs have submitted a recent report by the Inspector General of California

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[1] On September 4, 2002, the court denied plaintiffs' Motion for an Order Directing Defendants to Develop a Remedial Plan ("Remedial Plan Motion") in order to give defendants an opportunity to appeal the June 13 Order. In a separate order, also entered on September 4, 2002, the court certified the June 13 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The court ordered plaintiffs to re-notice the Remedial Plan Motion for hearing if the Ninth Circuit chose not to take the appeal. Defendants, however, neglected to timely file a petition for permission to appeal pursuant to § 1292(b). The court therefore reset plaintiffs' Remedial Plan Motion for hearing on October 15, 2002.

entitled "Review of the Board of Prison Terms" and an attached memorandum from the Inspector General to the Chair of the Board of Prison Terms (Specter Declaration Relating to April 14, 2003 Status Conference, Exhibit A). That report indicates that there are "significant deficiencies in the state's parole revocation process." Memorandum at 1. It states that "the Office of the Inspector General found from reviewing a sample of cases that 81 percent had been incarcerated longer than 45 days [before hearing] and that 7 percent had been held more than 100 days. In many cases, by the time parolees are given a hearing to determine whether parole should be revoked, they have already served as much or more time than the parole revocation sentence they would have received." Id. Given these disturbing findings, the need for appropriate redress of the identified constitutional violations cannot be over-emphasized.

While the parties continue to engage in settlement negotiations over the remaining claims, both sides also request that the court rule on plaintiffs' objections to the VRP. Defendants have indicated that they would appreciate guidance from the court on precisely what the Constitution requires with respect to the timing and substance of the preliminary parole revocation hearing.[2] As the Ninth Circuit has just recently

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[2] At the most recent hearing, the following exchange took place between the court and counsel for defendants:

> THE COURT: I recognize how difficult it is [to develop an appropriate remedial plan]. And now that you have got fiscal restraints of the kind I read about in the newspapers, I

reiterated in the context of parole procedures, however, "due process is flexible and calls for such procedural protections as the particular situation demands." Biggs v. Terhune, — F.3d —, 2003 WL 21488242 (9th Cir. June 30, 2003) (quoting Morrissey, 408 U.S. at 481). Given that flexibility, the court is particularly reluctant to dictate rigid timelines and procedures that the state must follow. Nonetheless, having found a constitutional violation, I must now provide guidance as to whether the state's proposed remedy satisfies that violation. "To insure that a state-created parole scheme serves the public interest purposes of rehabilitation and deterrence, the Parole Board must be cognizant of . . . the concepts embodied in the Constitution requiring due process of law." Id.

The VRP's primary addition to the parole revocation process is a preliminary Probable Cause Hearing (PCH). See VRP at 9-12. The VRP proposes two changes to the process: (1) the PCH, where the parolee is given an opportunity to speak about defenses and mitigating circumstances after being held in custody for up to 21 days, at which time a BPT deputy commissioner makes a determination of cause and retention of the parole hold; and (2) a lengthening of the time in which a parolee may be held in custody awaiting his or her final revocation hearing from the

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expect it is going to be even more difficult.

MR. PATTERSON: With that being said, Your Honor, it may be helpful to have some additional direction from the Court.

Transcript of June 9, 2003 Hearing at 3:9-15.

deadlines currently in place.

Plaintiffs two objections to the defendants' proposed remedial plan both address the PCH.[3] Plaintiffs object to (1) the timing of the proposed PCH, and (2) the substance of the PCH. I now turn to those objections.

I.

TIMING OF THE PRELIMINARY PROBABLE CAUSE HEARING

Plaintiffs point out that the VRP, "in an apparent attempt to make the delays seem shorter," indicates all time periods in terms of "working days." See Pl.'s Objs. at 5, n.3. In their objections, "[p]laintiffs calculate the delays in the VRP using actual calendar days, not working days, as a parolee's liberty interest does not exist only on days when Defendants work." Id. Thus, the VRP states that "[t]he PCH shall be conducted within 15 working days of the date of the parole hold/discovery of the parole violation," VRP at 9, which amounts to a maximum of 21 calendar days.

Plaintiffs argue that the proposed 21-day period is too long, especially in conjunction with the 63 days that, under the VRP, a parolee can be held in custody awaiting his or her final

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[3] Plaintiffs' objections address only those aspects of the VRP that relate to the court's partial summary judgment order; to the extent that the plan has other deficiencies, plaintiffs have reserved their objections. While plaintiffs point out that defendants may be able to satisfy the requirements of due process by implementing a prompt unitary hearing, this order addresses only those issues presented by defendants' proposed dual system. As part of their ongoing negotiations, of course, the parties remain free to devise a workable unitary system that would satisfy constitutional requirements.

revocation hearing. As I explained in the June 13 Order, under Morrissey, parolees are entitled to a "prompt" preliminary hearing "at the time of arrest and detention." Gagnon, 411 U.S. at 781-82; see Morrissey v. Brewer, 408 U.S. at 485 (holding that preliminary hearing must involve "some minimal inquiry . . . at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest."). I explained that "[t]he effect of detention itself, in its disruption of the parolee's family relationship, job, and life, is sufficiently significant to require such a procedure." Valdivia, 206 F.Supp.2d at 1078.

As they did in opposing the motion for summary judgment, defendants rely primarily on Pierre v. Washington State Bd. of Prison Terms & Parolees, 699 F.2d 471 (9th Cir. 1983), where the Ninth Circuit held that a *unitary* hearing that qualified as the probable-cause determination was sufficiently prompt because it was held within 21-days of the arrest. The situation in Pierre, however, was entirely distinct from the situation here, and therefore provides little guidance. In Pierre, unlike here, an informal probable cause administrative review was conducted eight days after the parolee was arrested and a formal on-site revocation hearing was then conducted within 21-days of arrest. Moreover, in the June 13 Order, I noted Pierre's questionable precedential value on this point and explained that "[w]hatever else may be said for Pierre, it seems apparent it is dicta."

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206 F.Supp.2d at 1077.[4] See United States v. Stocks, 104 F.3d 308, 311 (9th Cir. 1997); White v. White, 925 F.2d 287, 291 (9th Cir. 1991).

Defendants also argue that many tasks must be completed before the hearing, such as investigation, review, referral, assembly of revocation packets, processing, screening and report writing, and that, given these tasks, the time period provided in the VRP is as promptly as the hearing can be held. Plaintiffs argue that such a bald assertion of administrative inconvenience alone cannot justify the delay and that defendants, in any event, fail to provide any statistics about the current average times to perform the required tasks or any other evidence showing why it is impossible to promptly complete the identified tasks. As I have already noted, "while administrative inconvenience is a proper Matthews consideration, the inconvenience occasioned by a prompt probable cause hearing would not appear to be, in and of itself, a sufficient justification for the potentially catastrophic consequences of delay." 206 F.Supp.2d at 1078.

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[4] Ellis v. District of Columbia, 84 F.3d 1413 (D.C. Cir. 1996), on which defendants also rely, provides scant support for their position and little guidance as to the question presented here. As plaintiffs ably point out, three facts in Ellis make clear that the situation there was quite different: (1) a probable cause warrant determination was required before the parolee was taken into custody, (2) the regulations mandated a prompt preliminary interview with the parolee as soon as reasonably possible, and (3) the final revocation hearing had to be held within 30 days of the board's notification of the execution of a warrant. Id. at 1420.

Deciding that a 21-day delay between custody and hearing fails to satisfy the requirement of a "prompt" hearing under Morrissey, however, is a far easier task than precisely determining the maximum number of days that would satisfy due process requirements. Indeed, it seems almost futile to attempt to divine a precise numerical requirement from the Constitution's majestic generalities. But see Grutter v. Bollinger, 123 S.Ct. 2325, 2347 (2003) (discerning, under the Equal Protection Clause, a 25-year aspirational limit on the continued use of racial preferences to further a compelling interest in diversity); State Farm Mutual Automobile Ins. v. Campbell, 123 S.Ct. 1513, 1524 (2003) ("few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"). Nonetheless, that is the task presented here.

The starting point of the analysis is Morrissey's requirement that parolees be given a preliminary hearing "at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest." Id. at 485. As the Court explained in Gagnon, Morrissey held that, "[e]ven though the revocation of parole is not a part of criminal prosecution . . . the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process." Gagnon, 411 U.S. at 781. Therefore, "a parolee is entitled to two hearings, one a preliminary hearing to determine whether there is probable cause to believe he has committed a violation

of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision." Id. at 781-82.

Although the Supreme Court has never defined "prompt" in terms of a specific number of days in the parole revocation context, in County of Riverside v. McLaughlin, 500 U.S. 44 (1991), the Court defined "prompt" to mean 48 hours in the context of *criminal* probable cause hearings; after 48 hours has passed, the "burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstances." Id. at 57. There, the Court noted the need for flexibility but declared that "[f]lexibility has its limits . . . A State has no legitimate interest in detaining for extended periods individuals who have been arrested without probable cause." Id. at 55. The County of Riverside Court was confronted with defining the meaning of "prompt" as set forth in Gerstein v. Pugh, 420 U.S. 103 (1975), a task that is remarkably similar to the essential task presented here, albeit in a different constitutional context. The Court explained:

> Unfortunately, as lower court decisions applying Gerstein have demonstrated, it is not enough to say that probable cause determinations must be "prompt." This vague standard simply has not provided sufficient guidance. Instead, it has led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations
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> Our task in this case is to articulate more clearly the boundaries of what is permissible under the

> Fourth Amendment. Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds. Taking into account the competing interests articulated in Gerstein, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of Gerstein.

County of Riverside, 520 U.S. at 55. In arriving at the 48-hour time period, the Court acknowledged that "some delays are inevitable. For example, where, as in Riverside County, the probable cause determination is combined with arraignment, there will be delays caused by paperwork and logistical problems. Records will have to be reviewed, charging documents drafted, appearance of counsel arranged, and appropriate bail determined. On weekends, when the number of arrests is often higher and available resources tend to be limited, arraignments may get pushed back even further." Id.

Similarly, here, some reasonable administrative delay between the time of detention and the time of hearing is inevitable. The state, however, has presented the court with no reason why the administrative obstacles in the parole revocation context would be considerably greater than in the criminal context. While there may, therefore, be little practical difference, at least in administrative or logistical terms, between the two contexts, there is a significant legal difference. As the Supreme Court has explained, "[r]evocation deprives an individual, not of the absolute liberty to which

every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions." Morrissey, 408 U.S. at 480. Thus, the County of Riverside decision does not resolve the question presented here.

In this precise context, the Seventh Circuit has suggested that a delay of ten days between initial detention and a preliminary hearing would be too long. See Luther v. Molina, 627 F.2d 71, 74 n.3 (7th Cir. 1980) ("Chief Justice Burger in [Morrissey] seemed to be contemplating an almost immediate hearing . . . It is possible that a ten day delay between detention and the preliminary hearing does not meet . . . constitutional . . . requirements."). As I have previously noted, a United States Senate report acknowledged, based on legislative hearings and findings on the issue, that "[t]he timing of the preliminary hearing is particularly crucial; even if probable cause is not found, if a parolee is held in jail awaiting his hearing for more than one or two days, his job will probably be lost and his reintergration efforts badly disrupted."). S. Rep. No. 369, 94th Cong., 1st Sess., 25-26 (1975), reprinted in 1976 U.S.C.C.A.N. 335, 347 (cited in Ellis v. District of Columbia, 84 F.3d 1413, 1430 (D.C. Cir. 1996)). While the Senate's views have no legal authority in a situation involving a constitutional challenge to the state's procedures, this legislative finding is nevertheless an important reminder of the significant consequences that even a two-day delay may have on a parolee's life and liberty.

Despite the state's complete failure to provide evidence regarding the administrative feasibility of holding a probable cause hearing within a prompt period of time, the court takes some guidance from the fact that the state is able to arrange preliminary probable cause hearings within ten days in an analogous non-criminal context. California is obligated to provide alleged sexually violent predators a probable cause hearing within ten days of detention under the state's civil detention scheme. See, e.g., People v. Cianco, 134 Cal.Rptr.2d 531, 535 (Cal. Ct. App. 2003) ("The probable cause hearing provided for [by statute] shall commence within 10 calendar days of the date of the [detention order]"). There is no reason to believe that a longer period of time is appropriate in the case of parolees.

It is notable that courts have suggested that the Due Process Clause requires hearings within less than ten days when the interests at stake are considerably less. See, e.g., David v. City of Los Angeles, 307 F.3d 1143, 1146 (9th Cir. 2002) ("A five-day delay in justifying detention of a private vehicle is too long. Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle."), rev'd, 123 S.Ct. 1895 (2003); Goichman v. Rheuban Motors, Inc., 682 F.2d 1320, 1322 (9th Cir. 1982) ("Balancing the governmental and private interests at stake, we hold that provision for a post-seizure hearing within forty-eight hours satisfies the requirements of due process.") (post-seizure hearing for owners

of impounded automobiles under California statute). Where what is at stake is personal liberty, rather than simply access to an automobile, a requirement of a hearing within ten days is certainly not unreasonable.

Absent any additional guidance in the case law, the court concludes that a period of ten days strikes a reasonable balance between inevitable administrative delays and the state's interest in conducting its parole system, on the one hand, and the liberty interests of parolees, on the other. I conclude that the Constitution simply does not tolerate the state's detaining parolees for over ten days, with all the attendant disruptions such detention entails, without affording a preliminary hearing to determine whether there is probable cause for the detention. I now turn to the question of the substance of such a hearing, a question on which, fortunately, the Supreme Court has provided considerably more guidance.

II.

THE SUBSTANCE OF THE PRELIMINARY PROBABLE CAUSE HEARING

With regard to the substance of the probable cause hearing, the VRP provides as follows:

> The DC [Deputy Commissioner] shall review the violation report and appropriate documentation along with any disability related documents. The purpose of the PCH is for the DC to review each charge and make a determination of cause and retention of the parole hold. The DC shall assess whether or not the parolee can effectively communicate and has the ability to speak for himself/herself. The parolee shall be provided an opportunity to speak in regards to defenses or mitigating circumstances for each charge. If the DC makes a determination of good

> cause and retention of the parole hold, a screening offer will be made. The DHA will complete the appropriate paperwork.

VRP at 9.

In the June 13 order, the court explained the requirements of the preliminary hearing, as set forth by the Supreme Court in Morrissey and Gagnon, and by the Ninth Circuit in United States v. Stocks, 104 F.3d 308, 311 (9th Cir. 1997). Consistent with those precedents, I held that, at the preliminary hearing, the parolee is entitled to "notice of the alleged violations, an opportunity to appear and present evidence on his own behalf, a conditional right to confront adverse witnesses, an independent decision-maker, and a written report of the hearing." Valdivia, 206 F.Supp.2d at 1075-77 (quoting Morrissey, 408 U.S. at 485-87; Gagnon, 411 U.S. at 781-82; and Stocks, 104 F.3d at 311). These are the "minimum requirements of due process." Morrissey, 408 U.S. at 488-89.

Plaintiffs object to the VRP because it does not provide the parolee with an opportunity to present (1) evidence, in the form of letters or documents or (2) witnesses who can give relevant information to the hearing officer, as Morrissey requires. Nor does the VRP provide the parolee with (3) an opportunity, at his request, to confront and cross-examine adverse witnesses, as Morrissey also requires.

While the VRP's addition of a preliminary hearing is an important improvement over previous procedures for which defendants ought to be commended, it is clear from Morrissey

that the three features identified by plaintiffs - the opportunity to present documentary evidence, the opportunity to present witnesses, and a conditional right to confront adverse witnesses - are constitutionally-required components of due process that are missing from the current draft plan. To comport with the requirements of due process, defendants must therefore include these features.

III.

ORDERS

Accordingly the court hereby ORDERS that defendants submit, no later than August 21, 2003, a revised remedial plan including a preliminary probable cause hearing which (1) occurs no more than ten calendar days after a parolee is taken into custody for an alleged parole violation, and (2) affords the parolee the rights provided by Morrissey, including notice of the alleged violations, the opportunity to appear and present evidence, a conditional right to confront adverse witnesses, an independent decision-maker, and a written report of the hearing.

Alternatively, defendants may decide to develop a plan that includes a unitary parole revocation hearing that (1) occurs promptly enough after a parolee is taken into custody to qualify as the preliminary probable cause hearing, and (2) otherwise

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meets the constitutional requirements for both a preliminary and final parole revocation hearing, as set forth in Morrissey.

IT IS SO ORDERED.

DATED: July 23, 2003.

LAWRENCE K. KARLTON
SENIOR JUDGE
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
July 23, 2003

* * CERTIFICATE OF SERVICE * *

2:94-cv-00671

Valdivias

v.

Wilson et al

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on July 23, 2003, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

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