FLORES (ANTHONY) ON H.C.

No. S273785

Supreme Court of California

June 15, 2022

C089974 Third Appellate District.

Petition for review denied

The petition for review is denied.

Liu, J., is of the opinion the petition should be granted.

Dissenting Statement

Liu, Justice

In 2016, California voters passed Proposition 57, one of "several measures aimed [at] reduc[ing] the prison population" as required by federal court order. (*In re Gadlin* (2020) 10 Cal.5th 915, 923.) The text of the measure said it would, among other purposes, "[p]rotect and enhance public safety," "[s]ave money by reducing wasteful spending on prisons" and "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles." (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, § 2, p. 141.) Consistent with these goals, Proposition 57 added article I, section 32 to the California Constitution. It states, in relevant part: "Any person convicted of a nonviolent felony offense and sentenced to state prison shall be eligible for parole consideration after completing the full term for his or her primary offense." (*Id*., § 32, subd. (a)(1)).

Proposition 57 directed the Department of Corrections and Rehabilitation (Department) to "adopt regulations in furtherance of" the guarantee of early parole consideration. (Cal. Const., art. I, § 32, subd. (b).) The Department issued regulations governing early parole consideration for persons serving a determinate sentence for a nonviolent felony offense. (Cal. Code Regs. tit. 15, §§ 2449.1-2449.7, 3490-3493.) For this subset of inmates, the regulations limit parole consideration to a paper review of "[i]nformation contained in the inmate's central file and the inmate's documented criminal history," together with "[w]ritten statements submitted by the inmate, any victims . . ., and the [relevant] prosecuting agency or agencies." (*Id*., § 2449.4, subd. (b)(1) & (2).) Inmates are not entitled to an in-person hearing for the initial parole determination or the subsequent review of that decision. (*Id*., §§ 2449.4, 2449.7.)

Petitioner Anthony Flores is one of many inmates who have been denied parole under the paper review process. In 2011, after fleeing an attempted traffic stop, Flores was convicted of three evasion and assault charges and sentenced to a term of 16 years and four months. In July 2016, Flores was referred to the Board of Parole Hearings (Board) for nonviolent offender parole review. An officer of the Board reviewed his files and issued a two-page decision denying parole. The aggravating factors justifying the denial included the nature of Flores's commitment offenses, which demonstrated an "extremely high level of violence and recklessness," his prior criminal record, and three rules violations over approximately six years. The written order also acknowledged some mitigating circumstances, including the fact that his commitment offenses resulted in no physical injury to any victim and that he had completed some "positive programming" while in prison. Flores appealed this decision, arguing that his files did not adequately reflect the positive things he had done in prison. Another officer issued a one-page order upholding Flores's parole denial.

On a petition for writ of habeas corpus, Flores argued that the Department's failure to afford him an opportunity to appear personally before the officers considering his parole application violated the terms of Proposition 57 and the constitutional guarantee of due process of law. The superior court agreed, ordering the Department to provide Flores with an in-person parole hearing and also ordering it to

"promulgate new regulations reflecting the right of Proposition 57 parole-eligible inmates to request and appear at a live hearing on parole suitability."

The Court of Appeal vacated the superior court's order. In rejecting Flores's due process claim, the panel relied on *In re Kavanaugh*(2021) 61 Cal.App.5th 320 (*Kavanaugh*), which had denied a similar claim. Since then, two other appellate courts, also relying on *Kavanaugh*, have rejected similar due process claims asserting the right to an in-person hearing. (*In re Bailey*(2022) 76 Cal.App.5th 837; *In re Ernst*(May, 5, 2022, F081386) [nonpub. opn.].)

As explained below, I am doubtful that the denial of in-person parole hearings to eligible inmates comports with due process. Given the statewide importance of this issue, I would grant review. Although Flores has been paroled since filing his habeas corpus petition, thousands of Proposition 57-eligible inmates remain in prison. The fact that Flores has been released during the pendency of this matter, despite not having been afforded an in-person hearing, demonstrates that this is an issue capable of recurring yet evading review.

The due process analysis here requires consideration of four factors:" '(1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'" (*Kavanaugh, supra*, 61 Cal.App.5th at pp. 352-353, quoting *People v. Ramirez* (1979) 25 Cal.3d 260, 269 (Ramirez).)

1. As to the private interest, Kavanaugh said a Proposition 57-eligible inmate possesses a" 'mere *anticipation* or *hope* of freedom'" - an interest it described as less weighty than the" 'absolute liberty to which every citizen is entitled'" and less weighty than the" 'conditional liberty'" available to those already granted parole. (*Kavanaugh, supra*, 61 Cal.App.5th at p. 355.) But this description of a parole applicant's interest was derived from case law that precedes Proposition 57. (See *Kavanaugh*, at pp. 354-355, citing *In re J.G.*(2008) 159 Cal.App.4th 1056, 1064, *In re Sturm* (1974) 11 Cal.3d 258, 266 (Sturm), and *Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, 10.) As the trial court here recognized, Proposition 57 "[p]lainly . . . created a state constitutional right to early parole consideration for inmates currently serving a prison sentence for nonviolent felonies." This right lends gravity to the applicant's interest. (See *Wolff v. McDonnell*(1974) 418 U.S. 539, 557 ["the State having created [a state law right], the prisoner's interest has real substance and is sufficiently embraced [by the due process guarantee] to insure that the state-created right is not arbitrarily abrogated"].)

Specifically, a parole applicant possesses not only a subjectively held hope for release, but also the justified expectation that release will be granted upon the satisfaction of enumerated criteria. As the high court has explained, a state may "create[] a constitutionally protected liberty interest" if state law employs "mandatory language" stating that parole" 'shall'" be granted once certain findings are made. (*Board of Pardons v. Allen*(1987) 482 U.S. 369, 374.) In these circumstances, individuals have an" 'expectation of parole'" protected by due process. (*Id*. at p. 373.) California law employs such mandatory language. The Department's regulations state that a "hearing officer shall approve release" if he or she "finds the inmate does not pose a current, unreasonable risk of violence or a current, unreasonable risk of significant criminal activity." (Cal. Code Regs. tit. 15, § 2449.4, subd. (f); see Pen. Code, § 3041, subd. (b)(1)) [the Board "shall grant parole to an inmate unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that the

consideration of the public safety requires a more lengthy period of incarceration for this individual"].)

Our cases have long held that where state law makes an inmate eligible for parole consideration, the inmate "not only has a right to apply for parole, but is entitled to have his application 'duly considered.'" (*Sturm, supra*, 11 Cal.3d at p. 268, citing *In re Prewitt*(1972) 8 Cal.3d 470, *In re Minnis* (1972) 7 Cal.3d 639, and *In re Schoengarth* (1967) 66 Cal.2d 295.) The "right to due consideration of parole applications" includes a right to "be free from an arbitrary parole decision, to secure information necessary to prepare for interviews with the [parole authorities], and to something more than mere pro forma consideration." (*Sturm*, at p. 268; see also *In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 ["our past decisions also make clear that the requirement of procedural due process embodied in the California Constitution (Cal. Const., art. I, § 7, subd. (a)) places some limitations upon the broad discretionary authority of the Board"].) We have found due process violations when procedures have failed to satisfy these basic guarantees. (See *In re Lawrence* (2008) 44 Cal.4th 1181, 1227 (*Lawrence*) [petitioner's due process rights were violated by the Governor's reliance upon the immutable circumstances of her commitment offense in reversing the parole board's decision to grant parole]; *Sturm*, at p. 272 [finding due process violation when parole authorities failed to provide a definitive written statement of reasons for a parole denial].)

2. The court in *Kavanaugh* also did not give appropriate weight to the second due process consideration: "the risk of an erroneous deprivation of such interest through the procedures used." (*Ramirez, supra*, 25 Cal.3d at p. 269.) Of course, the opportunity to submit written statements goes some way toward "minimiz[ing] the risk of an arbitrary or capricious parole denial." (*Kavanaugh, supra*, 61 Cal.App.5th at p. 356.) But, as *Kavanaugh* acknowledged, in- person hearings" 'may be useful in resolving conflicting information and in the introduction of subjective factors into the decision making process that might otherwise not be considered.'" (*Id*. at pp. 357-358.) Indeed, we have emphasized the inherent subjectivity of the parole determination and have recognized that "disadvantages . . . may follow from an inmate's decision not to testify at a parole hearing or otherwise cooperate in the development of current information . . . ." (*In re Shaputis* (2011) 53 Cal.4th 192, 219, 220.) The categorical deprivation of an in-person hearing would likely work the same or even greater disadvantages to inmates like Flores.

The Department's own data on inmates eligible for early parole consideration under Proposition 57 show that whereas 4,419 of 27,415 determinately sentenced inmates (16 percent) who received paper review have been granted parole, 512 of 1,855 indeterminately sentenced inmates (28 percent) who received a hearing have been granted parole. (Dept. of Corrections and Rehabilitation, Three-Judge Quarterly Update (Mar. 15, 2022) [as of June 15, 2022].) This is despite the Department's representations that, when it comes to assessing “public safety,” “indeterminately sentenced nonviolent offenders are treated differently given the increased length of potential incarceration and the severity of their criminal histories” - factors “requiring greater scrutiny in parole consideration proceedings . . . as compared to determinately sentenced nonviolent offenders.” (In re Bailey, supra, 76 Cal.App.5th at p. 856.)

Moreover, in reviewing parole determinations, we have considered the applicant's ability to "consistently, repeatedly, and articulately . . . express[] deep remorse for her crime as reflected in a decade's worth of psychological assessments and transcripts of suitability hearings that were before the Board." (*Lawrence, supra*, 44 Cal.4th at pp. 1222-1223, italics added.) If the applicant has no opportunity to appear before the Board, the accuracy of the Board's determination and courts' ability to review it may be compromised.

The experience of parole authorities in other jurisdictions confirms the importance of in-person hearings. A former member of the Rhode

Island Parole Board described the importance of in- person interviews this way: "It was not unusual for me to have a tentative opinion in mind - based on my review of the copious records - when the inmate entered the hearing room and then shift my position based on the in-person interview. An inmate who had what appeared to be slim chances of getting my vote for parole would overwhelm me with her insight and sincerity, so much so that I changed my mind." (Reamer, On The Parole Board: Reflections on Crime, Punishment, Redemption, and Justice (2017) p. 62.) Similarly, one of the first members of the Florida Parole Commission has described how "[p]ersonal contact between the prisoner and members of the releasing agency is essential to a good parole decision." "[F]rom experience I know that there is a great deal one can find out about a person's attitude towards his fellow man through a conscientiously conducted interview." (Bridges, *The Personal Interview* in Reappraising Crime Treatment: 1953 Yearbook of the National Probation and Parole Association (Matlin edit., 1953) p. 34, some capitalization omitted.) A 2015 survey of 40 states' parole authorities found" 'near unanimity'" in the belief that boards should be required to evaluate an inmate's demeanor during the parole hearing. (*Bronnimann*, *Remorse in Parole Hearings: An Elusive Concept with Concrete Consequences* (2020) 85 Mo. L.Rev. 321, 337.)

3. As to the third due process consideration - the dignitary interest of parole applicants - *Kavanaugh* said the opportunity to submit written statements sufficiently "promote the dignitary values of the persons seeking parole release." (*Kavanaugh, supra*, 61 Cal.App.5th at p. 359.) But this consideration requires us to examine not only whether the opportunity to be heard has been provided, but also to" 'ensure that the method of interaction itself is fair.'" (*Ramirez, supra*, 25 Cal.3d at p. 268.) Accordingly, we have held that due process is violated when a patient-inmate is not given an opportunity to respond orally in proceedings that determine whether he or she will be committed to a rehabilitation facility or prison. (*Id*. at p. 275.) In that context, we said that" '[o]nly through [oral] participation can the individual gain a meaningful understanding of what is happening to her, and why it is happening. Moreover, providing the opportunity to react to register concern, dissatisfaction, and even frustration and despair is the best method to promote the feeling that, notwithstanding the substantive result, one has been treated humanely and with dignity by one's government.'" (*Ibid*.)

Flores's own words illustrate the point. In seeking review of his parole denial, he said: "I just feel the Board should have let me be able to sit down in front of you when you guys are talking about the things I did in the past, so I can defend and explain myself. And just get to see face to face and know a little about me as a person." He further stated: "I just wish I could have been there for this Hearing. So you guys could know what I am still going through in prison and take the time to know a little about me and my life" instead of "just reading what a person wrote down about me."

4. As to the fourth due process consideration - the government interest - *Kavanaugh* said the "weighty fiscal and administrative burdens that in-person parole hearings would impose" outweigh any "potential benefits" to Proposition 57-eligible inmates. (*Kavanaugh, supra*, 61 Cal.App.5th at p. 358.) In *Kavanaugh*, the Attorney General said "it would cost the Board tens of millions of dollars annually to conduct in-person parole hearings for all eligible determinately sentenced nonviolent prisoners." (*Id*. at p. 357.) But even if accurate, this singular focus on the fiscal cost of providing hearings misses two additional considerations.

The first is the savings that might come from the release of individuals who otherwise would have been denied parole. Proposition 57 expanded access to parole consideration in order to "[s]ave money by reducing wasteful spending on prisons." (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 57, § 2, p. 141.) The initiative was enacted in response to a federal court order finding that prison overcrowding had burdened the Department's systems and

was the "primary cause of the unconstitutional denial of adequate medical and mental health care to California's prisoners." (*Coleman v. Schwarzenegger* (E.D.Cal. 2009) 922 F.Supp.2d 882, 920.) Since then, the annual cost of housing an inmate in California prisons has more than doubled, to $106,131 per inmate. (Legislative Analyst's Office, How much does it cost to incarcerate an inmate? (Jan. 2022) [as of June 15, 2022].) An accurate assessment of the fiscal impact of providing in-person parole hearings must account for both costs and savings.

Second, when considering government interests under the due process analysis, we have not confined the analysis to money alone. (*Ramirez, supra*, 25 Cal.3d at p. 269 [describing the relevant government interest as "including the function involved and the fiscal and administrative burdens" to the state].) Besides saving money, Proposition 57 aims to "[s]top the revolving door of crime by emphasizing rehabilitation, especially for juveniles." (Voter Information Guide, Gen. Elec., *supra*, text of Prop. 57, § 2, p. 141.) As the high court has said in the context of parole revocation hearings, "[t]he parolee is not the only one who has a stake in his conditional liberty.

Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 484.) Likewise, accurate parole determinations may reduce the number of incarcerated persons and increase the number who can build useful and productive lives outside of prison. This is part and parcel of the government interest here.

In a future case, this court may decide to address the issue presented in this petition. In the meantime, the Legislature may wish to consider ways to increase the accuracy and reliability of Proposition 57 parole determinations. The Legislature is well positioned to assess the fiscal impact of greater procedural protections, and it may consider a range of options (not just one-size- fits-all policies) for handling the significant number and variety of applications filed by Proposition 57-eligible inmates.