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Morrissey v. Brewer

Lewis F. Powell Jr.

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Grant

MOTION

No. 71-5103 OT 1971
Morrissey v. Brewer, Warden

Discuss

APPLICATION FOR APPOINTMENT OF COUNSEL

Certiorari was granted in this case on December 20, 1971. The case will be argued later this Spring. Petr has filed this application for appointment of counsel noting that Don W./Britton, Jr. of Des Moines, Iowa represented Petr before the CA 8 (he was appointed to represent Petr by that court). He argued and briefed the case before the Eight Circuit and handled the successful petition for cert in this Court. He has filed his application for admission to the Supreme Court.

Unless the CJ has other counsel in mind, I would grant this application to appoint Mr. Britton.

GRANT APPLICATION LAH

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 71-5103

Submitted ....., *19*... *Announced* ....., *19*...

MORRISSEY

vs.

BREWER

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
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Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

9.

2/23/72--LAH

This Brief Court + help us, but & ive no great objection to it being filed.

Request by party in a pending case (parol revocation) to file amicus brief — not printed.

MOTION DISCUSS

No. 71-5103 OT 1971
Morrissey v. Brewer
Cert to CA 8

This is an application to be allowed to file an amicus brief in the above entitled case. The Morrissey case was granted earlier this Term and will be argued either late this Term or next Term. It raises the question of right to a parole revocation hearing. This amicus, James Russell, is a defendant in a case in the CA 7; he has raised the same claim in that Circuit and the CJ of that Circuit has ordered that no further action be taken in his case until the Supreme Court decides this case. Russell has received the approval of all the parties, except one of the Petitioners. His consent has not been secured only because an attorney has not yet been appointed to represent him in his ####### hearing on the merits in this Court. Russell's attorneys appear to have done a competent job of #### writing this brief. I would grant the motion to file.

It should also be noted that, unlike most amicus briefs,

this one is not printed. Russell has filed a motion to dispense with printing. Ordinarily I wonder about the propriety of putting this Court to the expense of reproducing 9 copies of an amicus brief. The expense and effort hardly seem warranted in view of the little value such briefs serve. But, at least in this case, the brief has already been duplicated by the clerk's office in order that each Justice could pass on the motion. At this point, it appears fruitless to question whether this brief should have been printed. Maybe the Court has a policy of allowing the filing of unprinted amicus briefs.

GRANT LAH

Conf. 2/25/72

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 71-5103

MORRISSEY

vs.

BREWER

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
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Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

lfp/ss 1cc 4/5/72

BENCH MEMO

No. 71-5103 MORRISSEY v. BREWER, WARDEN

This case (cert from 8th Circuit 4 to 3 decision) involves as its sole issue whether a parolee is entitled to due process rights before his parole may be revoked. The extent of rights claimed – Pet's Brief 26-28. These relate to determining the fact of violation – not to what action is taken by Parol Bd – 27.

Majority Opinion (Chief Judge Matthes)

The Iowa procedure with respect to paroles is as follows: There is a three-member parole board, with power to grant and revoke parole. Once an inmate is placed on parole, he is under the supervision of the director of corrections, but "remains in the legal custody of the warden." The Iowa Code provides that "all paroled prisoners are subject at any time to be taken into custody and returned to the institution from which they were paroled." There is no requirement for notice or hearing.

The Iowa Supreme Court has construed its statutes as follows:

> "The Iowa statutes do not provide for such a hearing before the parole board. The board is given no power to issue subpoenas nor swear witnesses. . . . It is an administrative

function rather than judicial." (A. 123)

In 1965 the 8th Circuit approved the procedure followed in Iowa, and expressly held as follows:

> "A parole is a matter of grace, not a vested right. A large discretion is left to the states as to the manner and terms upon which paroles may be granted and revoked. Federal due process does not require that a parole revocation be predicated upon notice and opportunity to be heard." (A 124).

Conflict with 7th Circuit. In Han v. Burke, 430 F. 2d 100, (1970), the 7th Circuit - following Goldberg v. Kelly, 397 U. S. 254, held that due process applies at least to the extent of a Goldberg type hearing. (In Goldberg the Court held that notice and hearing are necessary, but that the hearing need not take the form of a judicial or quasi judicial trial. The welfare recipient must have an opportunity to confront adverse witnesses and to present his own arguments and evidence orally before an impartial decision maker, with counsel if he so desires - although the state need not provide counsel.)

But the majority in this case (Morrissey v. Brewer) did not think Goldberg to be controlling - a welfare recipient being entitled to specified rights under a statute, as contrasted with a parolee who is still serving a prison sentence.

The Court's analysis of the status of parole is as follows:

> "Parole relates to an administrative action taken after the convict has served a portion of his sentence behind prison

> walls It is not a suspension of sentence, but a 'substitution during the continuance of the parole, of a lower grade of punishment, by confinement in the legal custody and under the control of the warden within specified prison ~~bounds~~ bounds outside the prison, for the confinement within the prison adjudged by the court.' . . . Parole does not end or in any way affect a prisoner's sentence, but is a correctional device authorizing service of sentence outside the penitentiary." (A. 126-27)

The Court distinguished Mempa v. Rhay, 389 U. S. 128 (1967) on the ground that "probation" is presentencing, and revocation of probation is "a stage in the criminal proceedings." Such proceedings had ended, however, when one is sentenced to prison. Thereafter, no criminal proceedings is involved.

Dissenting Opinion:

A strong dissent by Judge Lay (joined by Heaney and Bright) argues in favor of certain limited due process rights, relying primarily on Goldberg. The minority opinion takes up each one of the majority's arguments and answers it fairly well.

I was also impressed by the minority's argument that several states do prescribe hearings on revocation of parole, and that no great problems have resulted. (A. 142)

The minority reasons that this Court has held that prisoners have constitutional rights. See Cooper v. Pate, 370 U. S. 546; Johnson v. ~~Avery~~ Avery, 393 U. S. 483. The minority also cites the recent Second Circuit

opinion by Judge Kaufman in ~~Sixx~~ Sostre v. McGinnis, ____ F. 2d ____ (February 24, 1971), where certain "minimal" due process rights were accorded a prisoner with respect to solitary confinement. It is not difficult, as a matter of logic, to reason that if confined prisoners have some due process rights, those on parole also have such rights. The difficult question relates to when and under what circumstances do a prisoner's rights reach the point of requiring notice, hearing, confrontation with witnesses and the like.

No. 71-5103 MORRISSEY v. BREWER, WARDEN — Argued 4/11/72

(Parol Revocation)

This case does not involve right to counsel — see Petr. Brief, but counsel says this right would follow.

See Brief filed by ABA. I am inclined to reverse.

Brittin (for Petr.)

Once Petr. is entitled to ~~counsel~~ ~~once right to hearing — counsel~~ hearing, he should have rt. to counsel.

Makes no contention that hearing is required as to whether parol should be granted initially.

Petr. brief p 26-28 summarizes his position.

Senneret (ast A/G Iowa)

There were certain limited hearings here* — see A56. Language is inconsistent — but it is conceded that there was a "closed-door" admin. hearing. This is not required by Iowa law, but a hearing is customary.

Iowa Bd may act without a meeting — by 'phone or correspondence.

~~Also~~ The alleged violation of Parol has rarely been denied by the parolee in Iowa.

* But this hearing was granted after revocation & return of parolee to custody

Morrissey - 71-5103

Sanford (Cont)

Three Prisons in State — & Bd. sits in these three.

The revocation does return the Δ to custody but this starts "time" running again under Iowa statute. Thus, if a due process hearing is required it might follow revocation. (But this does it appeal to me. Once a decision has been made even tentatively, there may be prejudice to Δ's position)

No denial by either Petr. in this case that there were parole violations.

Conf. 4/11/72

Court .... Voted on.................., 19...

Argued .. April 11, ..., 1972 Assigned ...., 19... No. 71-5103

Submitted ...., 19... Announced ...., 19...

MORRISSEY

vs.

BREWER

On the merits record in this case, I was uncertain about whether to reverse or affirm but I agree with my notes on what Potter says as to the type of hearing we should prescribe.

4 to 3 to ~~Affirm~~ Reverse with C/J reserving decision.
(Several votes tentative)

6 to 2 to Reverse with C/J reserving

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

My notes on 4/11 were in pencil. Today - on reconsideration (4/18) - my notes are in pen.

DOUGLAS, J. ~~Affirm~~ Reverse with an opinion with guidance

Does not approve of a full due process hearing but before parolee is locked - up.

Perhaps we should write an "advisory opinion"

4/18 - Now thinks there must be some procedural due process hearing but uncertain as to how far to go. This is new & troublesome field.

MARSHALL, J. Reverse

Wants probable cause & warrant from a judicial officer (magistrate) - & wants full rights to counsel.

Absent on 4/11/72

(But present on 4/18/72 when we reconsidered)

BRENNAN, J. Reverse

In Goldberg we said there must be a neutral officer. Parole officer is not neutral as he is investigative officer.

We should face up to problem & lay down Goldberg standards.

Bill thinks it OK for a parol officer to revoke pending hearing before Board or a Hearing Officer of Bd - & may keep parolee locked up temporarily pending hearing

attributes: a neutral officer - hearing officer; must be on site; evidence

BLACKMUN, J. Affirm

Must give states elbow room. This is largely administrative.

Cites 295 U.S. 490. If we open door, we'll have "all the trappings" Morrissey confessed violation.

STEWART, J.

Reverse *

Record is totally inadequate. We can't accept statements in brief. Here the Board had revoked parol before there was a hearing. If parolee denies he has violated parol, there must be a hearing. He may be locked up pending hearing. Prior hearing

Cited Mullane v. Bank 339 U.S. 306, 311

POWELL, J. Reverse

I agree substantially with Stewart.

Should allow parol officer to have parolee arrested on probable cause of violation, with a hearing to be held prior to the Parol Bd's decision to revoke.

But must remember this administration & ~~as~~ involves discretion. Our due process formulation should be general.

WHITE, J. Affirm or Reverse in what's important either way depending upon how written

In this case parolee is claiming denial of D/P. & this record does not show denial. ~~But Byron~~

There may be admissions by these parolees (esp. Morrissey) which justifies affirming - but in either case he agrees with Potter's views. But hearing should not be full judicial one

Byron asked whether Mullane v. Bank would apply; Potter replied not.

REHNQUIST, J. Affirm

Agrees with Blackmun

~~MEMO.~~ The Chief Justice Reserved Decision

Should be some kind of hearing - but many problems. ~~Th~~ Who holds hearing? May Parol officer in the field? Parol Bd

* As to "second step" (see briefs) Board may decide what to do privately. Need not address counsel issue.

Supreme Court of the United States
Washington, D. C. 20543

June 12, 1972

CHAMBERS OF
THE CHIEF JUSTICE

No. 71-5103 -- Morrissey v. Brewer

MEMORANDUM TO THE CONFERENCE:

Enclosed is proposed opinion.

Please note that the "tentative" idea I mentioned at Conference has now "ripened" into a procedural step in terms of the "preliminary hearing." The experience under Hyser v. Reed for the Federal system, with a prompt hearing after arrest, has not been found administratively unmanageable.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 14, 1972

Re: No. 71-5103 - Morrissey v. Brewer

Dear Chief:

Subject to what others may have in mind, I join your opinion in this case, with the suggestion, however, that you eliminate or modify the last sentence of footnote 17 in view of the fact that the circuits are in conflict on the question and we once granted a case to decide the issue.

Sincerely,

Byron

The Chief Justice

Copies to Conference

6/15/72 CEP

Sally - Join
Sally + Who has joined who?
I may discuss a point or two with Chief J. Should there be a right to X-exam witness?

MEMORANDUM TO MR. JUSTICE POWELL

I agree that no absolute right to counsel should be granted.

Re: No. 71-5103, Morrissey v. Brewer

This is the case which presents the question what due process requires prior to parole revocation.

The CJ has circulated an opinion for the Court, which holds that due process requires:

(1) a minimal hearing before an independent officer at or reasonably near the place of the alleged parole violation, as promptly as convenient after arrest. The object of this "minimal" hearing is to determine whether there are reasonable grounds to believe that the parolee has committed acts which would constitute a violation of parole conditions.

(2) a plenary hearing, if desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing is the final evaluation of any contested relevant facts. The parolee must have an opportunity to be heard, although he need not have an opportunity to confront and cross-examine adverse witnesses.

WOD has circulated an opinion which goes farther in several respects. WOD would require, in addition:

? (1) the right to the assistance of counsel

(2) the right to confront adverse witnesses

NO (3) a parolee cannot be arrested unless the alleged violation of parole is either a new criminal offense or attempted flight. That is, for mere "technical" violations

(e.g., drinking, etc.), there should be notice and a hearing before arrest.

It appears that several other members of the Court may join WOD. I also understand that several members of the Court have made suggestions to the CJ regarding changes in his opinion, which is not (as I understand and gather from his memo) exactly what the Conference decided.

I would wait a few days before joining anyone.

CEP

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 15, 1972

No. 71-5103 -- Morrissey v. Brewer

Dear Byron:

I have deleted the last sentence -- note page 17.

Regards,

WEB

Mr. Justice White

Copies to Conference

June 17, 1972

Re: No. 71-5103 Morrissey v. Brewer

Dear Chief:

Please join me.

Sincerely,

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1972

Re: No. 71-5103 - Morrissey v. Brewer

Dear Chief:

Please join me.

Sincerely,

H.A.B.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1972

Re: No. 71-5103 - Morrissey and Booher v. Brewer

Dear Chief:

Please join me.

Sincerely,

WHR

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 22, 1972

71-5103 - Morrissey v. Warden

Dear Chief,

I am glad to join your opinion as recirculated today, with the understanding reached at our Conference that the last full paragraph on page 18 and its footnotes will be deleted or substantially modified.

Sincerely yours,

P.S.

The Chief Justice

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
5/8/72								
		Concurring in part 6/23/72	join CJ 6/22/72	maybe 6/14/72		join CJ 6/19/72	join CJ 6/18/72	join CJ 6/21/72
					71-5103 Morrissey v. Brewer			

To: Mr. Justice Douglas
Mr. Justice Brennan ✓
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: The Chief Justice

Circulated: JUN 12 1972

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 71-5103

John J. Morrissey and G. Donald Booher, Petitioners, *v.* Lou B. Brewer, Warden, et al.	On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case to determine whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole.

Petitioner Morrissey was convicted of false drawing or uttering of checks in 1967 pursuant to his guilty plea, and was sentenced to not more than seven years' confinement. He was paroled from the Iowa State Penitentiary in June 1968. Seven months later, at the direction of his parole officer, he was arrested in his home town as a parole violator and incarcerated in the county jail. One week later, after review of the parole officer's written report, the Iowa Board of Parole revoked Morrissey's parole and he was returned to the penitentiary located about 100 miles from his home. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report on which the Board of Parole acted shows that petitioner's parole was revoked on the basis of information that he had violated the conditions of parole by buying a car under an assumed name and operating it without permission, giving false statements to police concerning his address and insur-

Renewed 6/16/72
Does seem a reasonable accommodation of the various interests.

ance company after a minor accident, and obtaining credit under an assumed name and failing to report his place of residence to his parole officer. The report states that the officer interviewed Morrissey, and that he could not explain why he did not contact his parole officer despite his effort to excuse this on the ground that he had been sick. Further, the report asserts that Morrissey admitted buying the car and obtaining credit under an assumed name and also admitted being involved in the accident. The parole officer recommended that his parole be revoked because of "his continual violating of his parole rules."

The situation as to petitioner Booher is much the same. Pursuant to his guilty plea, Booher was convicted of forgery in 1966 and sentenced to a maximum term of 10 years. He was paroled November 14, 1968. In August 1969, at his parole officer's direction, he was arrested in his home town for a violation of his parole and confined in the county jail several miles away. On September 13, 1969, on the basis of a written report by his parole officer, the Iowa Board of Parole revoked Booher's parole and Booher was recommitted to the state penitentiary, located about 250 miles from his home, to complete service of his sentence. Petitioner asserts he received no hearing prior to revocation of his parole.

The parole officer's report with respect to Booher recommended that his parole be revoked because he had violated the territorial restrictions of his parole without consent, had obtained a driver's license under an assumed name and operated a motor vehicle without permission, and had violated the employment condition of his parole by failing to keep himself in gainful employment. The report stated that the officer had interviewed Booher and that he had acknowledged to the parole officer that he had left the specified territorial limits and had oper-

ated the car and had obtained a license under an assumed name "knowing that it was wrong." The report further noted that Booher had stated that he had not found employment because he could not find work that would pay him what he wanted—he stated he would not work for $2.25 to $2.75 per hour—and that he had left the area to get work in another city.

After exhausting state remedies, both petitioners filed habeas corpus petitions in the United States District Court for the Southern District of Iowa alleging that they had been denied due process because their paroles had been revoked without a hearing. The State responded by arguing that no hearing was required. The District Court held on the basis of controlling authority that the State's failure to accord a hearing prior to parole revocation did not violate due process.

The Court of Appeals, dividing 4 to 3, held that due process does not require a hearing. The majority recognized that the traditional view of parole as a privilege rather than a vested right is no longer dispositive as to whether due process is applicable; however, on a balancing of the competing interests involved, it concluded that no hearing is required. The court reasoned that parole is only "a correctional device authorizing service of sentence outside the penitentiary"; the parolee is still "in custody." Accordingly, the Court of Appeals was of the view that prison officials must have large discretion in making revocation determinations, and that courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities. The majority expressed the view that "non-legal, non-adversary considerations" were often the determinative factor in making a parole revocation decision. It expressed the fear that if adversary hearings were required for parole revocation, "with the full panoply of rights accorded in

criminal proceedings," the function of the parole board as "an administrative body acting in the role of *parens patriae* would be aborted" and the board would be more reluctant to grant parole in the first instance. Additionally, the majority reasoned that the parolee has no statutory right to remain on parole. Iowa law provides he is subject to being returned to the institution at any time. Our holding in *Mempa* v. *Rhay*, 389 U. S. 128 (1967), was distinguished on the ground that in involved deferred sentencing upon probation revocation, and thus involved a stage of the criminal proceeding, whereas parole revocation was not a stage in the criminal proceedings.

In its brief in this Court, the State asserts for the first time that petitioners were in fact granted hearings after they were returned to the penitentiary. More generally, the State says that within two months after the Board revokes an individual's parole and orders him returned to the penitentiary, on the basis of the parole officer's written report, it grants the individual a hearing before the Board. At that time the Board goes over "each of the alleged parole violations with the returnee, and he is given an opportunity to orally present his side of the story to the Board." If the returnee denies the report, it is the practice of the Board to conduct a further investigation before making a final determination either affirming the initial revocation, modifying it, or reversing it.[1] The State asserts that Morrissey, whose parole was revoked on January 31, 1969, was granted a hearing before the Board on February 12, 1969. Booher's

[1] The hearing required by due process, as defined herein, must be accorded *before* the effective decision. See *Armstrong* v. *Monza*, 380 U. S. 545 (1965). Petitioner asserts here that only one of the 540 revocations ordered most recently by the Iowa Parole Board was reversed after hearing, Petitioner's Reply Brief, at 7, suggesting that the hearing may not objectively evaluate the revocation decision.

parole was revoked on September 13, 1969, and he was granted a hearing on October 14, 1969. At these hearings, the State tells us—in the briefs—both Morrissey and Booher admitted the violations alleged in the parole violation reports.

Nothing in the record supplied to this Court indicates that the State claimed, either in the District Court or the Court of Appeals, that petitioners had received hearings promptly after their paroles were revoked, or that in such hearing they admitted the violations; that information comes to us only in the State's brief here. Further, even the assertions that the State makes here are not based on any public record but on interviews with two of the members of the parole board. The interview relied on to show that petitioners admitted their violations did not indicate that the member could remember that in fact both Morrissey and Booher admitted the parole violations with which they were charged. He stated only that, according to his memory, in the previous several years all but three returnees had admitted commission of the parole infractions alleged and that neither of the petitioners was among the three who denied them.

We must therefore treat this case in the posture and on the record the State elected to rely on in the District Court and the Court of Appeals. If the facts are otherwise, the State may make a showing in the District Court that petitioners in fact have admitted the violations charged before a neutral officer.

I

Before reaching the issue of what is required by due process, it is important to have in mind a picture of the role of parole in this country.

During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences

has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705 (1968). Rather than being an *ad hoc* exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able to and without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.[2] The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. Under some systems parole is granted automatically after the service of a certain portion of a prison term. Under others, parole is granted by the discretionary action of a board which evaluates an array of information about a prisoner and undertakes a prediction whether he is ready to reintegrate into society. To accomplish the purpose of parole, those who are allowed to leave prison early are subjected to specified conditions for the duration of their terms. These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen. Typically parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community and incurring substantial indebtedness. Additionally, parolees must regularly re-

[2] See Warren, Probation in the Federal System of Criminal Justice, 20 Fed. Prob. 3 (1955); Annual Report, Ohio Adult Parole Authority 1964/65, at 13–14, Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N. Y. U. L. Rev. 702, 706 (1963).

port to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities. Arluke, A Summary of Parole Rules, 15 Crime and Delinquency 267, 272–273 (1969).

The parole officers are part of the administrative system designed to assist parolees and to offer them guidance. The conditions of parole serve a dual purpose; they prohibit, either absolutely or conditionally, behavior which is deemed dangerous to the restoration of the individual into normal society. And through the requirement of reporting to the parole officer and seeking guidance and permission before doing many things, the officer is provided with information about the parolee and an opportunity to advise him. The combination puts the parole officer into the position in which he can try to guide the parolee into constructive development.[3]

The enforcement leverage which supports the parole conditions derives from the authority to return the parolee to prison to serve out the balance of his sentence if he fails to abide by the rules. In practice not every violation of the conditions of parole automatically leads to revocation. Typically a parolee will be counseled to abide by the conditions of parole, and the parole officer ordinarily does not take steps to have parole revoked unless he thinks that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity.[4] The broad discretion accorded the parole officer is also inherent in some of the quite vague conditions, such as the typical requirement that the parolee avoid "undesirable" associations or correspondence. Cf. *Arciniega* v. *Freeman,* 404 U. S. 4

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[3] Note, Observations on the Administration of Parole, 79 Yale L. J. 698, 699–700 (1970).

[4] *Ibid.*

(1970). Yet revocation of parole is not an unusual phenomenon, affecting only a few parolees. It has been estimated that 35–45% of all parolees are subjected to revocation and return to prison.[5] Sometimes revocation occurs when the parolee is accused of another crime; it is often preferred to a new prosecution because of the procedural case of recommitting the individual on the basis of a lesser showing by the State.[6]

Implicit in the system of policing parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole. The first part of a decision to revoke parole is thus a wholly retrospective factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation. The second question involves the application of expertise by the parole authority in making a prediction as to the ability of the individual to live in society without committing antisocial acts. This part of the decision too depends on facts, and therefore it is important for the Board to know not only that some violation was committed but also to know accurately how many and how serious the violations were. The decision of what to do with the parolee is not purely factual but also predictive and discretionary.

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[5] President's Commission on Law Enforcement and Administration of Justice, Corrections 62. The substantial revocation rate indicates that parole administrators often deliberately err on the side of granting parole in borderline cases.

[6] See *Morrissey* v. *Brewer*, 443 F. 2d 942, at 953–954, n. 5 (CA8 1971) (Lay, J., dissenting); *Rose* v. *Haskins*, 388 F. 2d 91, 104 (CA6 1968) (Celebrezze, J., dissenting).

If a parolee is returned to prison, he often receives no credit for the time "served" on parole.[7]

II

We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations. Cf. *Mempa* v. *Rhay,* 389 U. S. 128 (1967). Parole arises after the end of the criminal prosecution, including imposition of sentence. Supervision is not directly by the court but an administrative agency, which is sometimes an arm of the court and sometimes of the executive. Revocation deprives an individual not of the absolute liberty every citizen is entitled to, but only of the conditional liberty properly dependent on observance of special parole restrictions.

We turn therefore to the question whether the requirements of due process in general apply to parole revocations. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands. As MR. JUSTICE BLACKMUN has written recently, "This Court has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Graham* v. *Richardson,* 403 U. S. 365, 374. Whether any procedural protections are due depends on the extent to which an individual will be "condemned to suffer grievous loss." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in *Gold-*

[7] Arluke, A Summary of Parole Rules—Thirteen Years Later, 15 Crime and Delinquency 267, 271 (1969); Note, Parole Revocation in the Federal System, 56 Geo. L. J. 705, 733 (1968).

berg v. *Kelly*, 397 U. S. 154, 163 (1970). "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U. S. 886, 895 (1961). The question is not merely the "weight" of the individual's interest, but whether the nature of the interest is one within the contemplation of the "liberty or property" language of the Fourteenth Amendment.

Applying these standards to the revocation of parole, we conclude that revocation of an individual's parole status calls for certain procedures, the general nature of which are hereafter described.

The State's interests are several. The State has found the parolee guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual's liberty. Release of the parolee before the end of his prison sentence is made with the recognition that with many prisoners there is a risk that they will not be able to live in society without committing additional antisocial acts. Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole.

Most of the States have recognized that there is no interest on the part of the State in revoking parole without some procedural guarantees.[8]

Although the parolee is often formally described as being "in custody," the argument cannot even be made

[8] See n. 16, *infra*.

here that summary treatment is necessary as it may be with respect to controlling a large group of potentially disruptive prisoners in actual custody. Nor are we persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable. The discretionary aspect of revocation should never be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole. A simple factual hearing will not interfere with the exercise of discretion. Serious studies have suggested that fair treatment on parole revocation will contribute to the rehabilitative prospects and not result in fewer grants of parole.[9]

The parolee, of course, has a great interest involved in his potential revocation. He is at liberty. Though the State properly subjects him to many restrictions not applicable to other citizens, his liberty is very different from the condition of confinement in a prison.[10] The parolee probably has reestablished some of his ties on the outside of prison and at least has begun to reintegrate himself into normal life. He may have been enjoying this conditional liberty for a number of years and may be living a relatively normal life at the time

[9] See President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83, 88 (1967); Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. Crim. L., and P. S. 175, 194 (1964) (no decrease in Michigan, which grants extensive rights); *Rose* v. *Haskins*, 388 F. 2d 91, 102 n. 16 (CA6 1968) (Celebrezze, J., dissenting) (cost of imprisonment so much greater than cost of parole system that procedural requirements will not change economic motivation).

[10] "It is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." *Bey* v. *Connecticut Bd. of Parole*, 443 F. 2d 1079, 1086 (CA2 1971).

he is faced with revocation.[11] Release on parole must be seen as including at least an implicit promise that parole will not be revoked unless the parolee fails to live up to these conditions. In many cases the parolee faces lengthy incarceration if his parole is revoked. Additionally, the revocation of parole puts an additional and serious blot on a man's record. The parolee's interest must be seen as included within the scope of the "liberty" protected by the Fourteenth Amendment.

III

The question remains what process is due. Not every proceeding need be attended by some rigid abstract procedural formula. Due process is not an all-or-nothing concept.[12]

There are two stages in the process of parole revocation that are important. The first occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second is when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state prison, to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require some minimal hearing to be conducted at or reasonably near the place of the alleged parole violation and as promptly as convenient after arrest while information is fresh and sources are available. Cf. *Hyser* v. *Reed,* 318 F. 2d 225 (CADC

[11] See, *e. g., Murray* v. *Page,* 429 F. 2d 1359 (CA7 1970) (parole revoked after eight years; 15 years remaining on original term).

[12] See K. Davis, Administrative Law Treatise § 7.16, at 356–359 (1970 Supp.) ("Fact-finding processes can be summary or quick without being basically unfair.").

1963). Such an inquiry should be seen as in the nature of a "preliminary hearing" to determine whether there is probable cause or reasonable grounds to belive that the arrested parolee has committed acts which would constitute a violation of parole conditions.

The determination of reasonable grounds should be made by someone not directly involved in the case. It would be unfair to assume that an individual parole officer does not conduct an interview with the parolee to confront him with the reasons for revocation before he recommends an arrest. It would also be unfair to assume that the parole officer bears hostility against the parolee which destroys his neutrality; realistically the failure of the parolee is in a sense a failure for his supervising officer.[13] However, we need make no assumptions one way or the other to conclude that there should be an uninvolved person to make this preliminary evaluation of the basis for believing the conditions of parole have been violated. The officer directly involved in making recommendations cannot always have complete objectivity in evaluating them.[14] *Goldberg* v. *Kelly* found it unnecessary to impugn the motives of the caseworker to find a need for an independent decisionmaker.

This independent officer need not be a judicial officer. Parole and parole revocation are matters properly handled by nonjudicial administrative officers. In *Goldberg,* the Court pointedly did not require that the hearing

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[13] Note, Observations on the Admin. of Parole, 79 Yale L. J. 698, 704–706 (1970) (parole officers in Connecticut adopt role model of social worker rather than an adjunct of police, and exhibit a lack of punitive orientation).

[14] This is not an issue limited to bad motivation. "Parole agents are human, and it is possible that friction between the agent and the parolee may have influenced the agent's judgment." 4 Attorney General's Survey on Release Procedures 246–247 (1939).

on termination of benefits be before a judicial officer or even before the traditional "neutral and detached" officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. It will be sufficient, therefore, in the parole revocation context if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by a parole officer other than the one who has made the report of parole violations or has recommended revocation. A State could certainly choose some other independent decisionmaker to to perform this preliminary function.

With respect to the preliminary hearing before this officer, the parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice must state what parole violations have been alleged. At the hearing the parolee may appear and speak in his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer.

The hearing officer shall have the duty of making a summary, or digest, of what transpires at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of the parolee's position. Based on the information before him, the officer should determine whether there is probable cause to hold the parolee for the final decision of the parole board on revocation. Such a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision. As in *Goldberg*, "the decision-maker should state the reasons for his determination and indicate the evidence he relied on . . ." but it should be remembered that this is not a final

determination calling for "formal findings of fact or conclusions of law." 397 U. S., at 271. No interest would be served by formalism in this process.

There must also be an opportunity for a hearing, if it is desired by the parolee, prior to the final decision on revocation by the parole authority. This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest the violation does not warrant revocation.

We cannot write a code of procedure; that is the responsibility of each State. Most States have done so by legislation; others by judicial decision usually on due process grounds.[15] Our task is limited to deciding the

counsel? witnesses? X-exam?

[15] Very few States provide no hearing at all in parole revocations. Thirty States provide in their statutes that a parolee shall receive some type of hearing. See Ala. Code Tit. 42, § 12 (1958); Alaska Stats. § 33.15.220 (1962); Ariz. Rev. Stats. Ann. § 31–417 (1939); Ark. Stats. Ann. § 43–2810 (1968); Del. Code Ann. Tit. 11, § 4352 (1964); Fla. Stats. Ann. § 947.23 (1) (1955); Ga. Code Ann. § 77–519 (1965); Hawaii Rev. Stats. § 353–66 (1967); Idaho Code §§ 20–229, 20–229A (1970); Ill. Ann. Stats. c. 108, § 205 (1970); Ind. Stats. Ann. § 13–1611 (1961); Kan. Stat. Ann. § 22–3721 (1970); Ky. Rev. Stats. Ann. §§ 439.330 (1)(e) (1956), 439.430 (1) (1966); 439.440 (1956); La. Rev. Stats. § 15:574.9 (1968); Me. Rev. Stats. Ann. c. 34, § 1675 (1969); Md. Ann. Code, Art. 41, § 117 (1957); Mich. Comp. Laws Ann. § 791.140 (a) (1968); Miss. Code Ann. § 4004–13 (1956); Mo. Ann. Stats. § 549.165 (1967); Mont. Rev. Code §§ 94–9838, 94–9835 (1955); N. H. Rev. Stats. Ann. § 607:46 (1939); N. M. Stats. Ann. § 41–17–28 (1963); Cons. Laws of N. Y. Correction Law § 212 (1970); N. D. Cent. Code 12–59–15 (1963); Pa. Stats. Ann. Tit. 61, § 331.21 (1951), Tit. 61, § 331.2a (1957); Tenn. Code § 40–3619 (1955); Texas Code of Crim. Proc., Art. 41–12, § 22 (1965); Vermont Stats. Ann. Tit. 28, § 1081

minimum requirements of due process. In our view, they include (a) notice of the claimed violations of parole; (b) disclosure of the information against the parolee except when some unusual circumstance calls for confidentiality; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (e) a statement by the factfinders as to the evidence relied on and reasons for revoking parole. Whether in a particular case fairness requires that the parolee be allowed to confront and cross-examine adverse witnesses is a question to be determined by the hearing officer in the particular case. See Davis, Administrative Law Treatise § 7.16, at 356–357 (1970 Supp.). We emphasize there is no thought to equate this process to a criminal prosecution; it is a narrow factfinding inquiry; the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.

Notice
Hearing
Witnesses -
Neutral
Hearing Officer

But no
right to
counsel or
to X-Exam

(1968); Wash. Rev. Code §§ 9.95.120 through 9.95.126 (1969); W. Va. Code § 62–12–19 (1959). Decisions of state and federal courts have required a number of other States to provide hearings. See *Hutchinson* v. *Patterson,* 267 F. Supp. 433 (Colo. 1967); *United States ex rel. Bey* v. *Conn. Bd. Parole,* 443 F. 2d 1079 (CA2 1971); *Brown* v. *Sigler,* 186 Neb. 800, 186 N. W. 2d 735 (1971); *State* v. *Holmes,* 109 N. J. Super. 180, 262 A. 2d 725 (1970); *People ex rel. Menechino* v. *Warden,* 27 N. Y. 2d 376, 267 N. E. 2d 238, 318 N. Y. S. 2d 449 (1971); *Murray* v. *Page,* 429 F. 2d 1359 (CA10 1970) (Oklahoma) (10th Cir. also includes Wyoming); *Beardon* v. *South Carolina,* 443 F. 2d 1090 (CA4 1971) (4th Cir. also includes North Carolina and Virginia); *Beal* v. *Truner,* 22 Utah 2d 418, 454 P. 2d 624 (1969); *Goolsby* v. *Gagnon,* 322 F. Supp. 460 (ED Wis. 1971). Nine States are affected by no legal requirement to grant any kind of hearing.

Counsel or the help of a friend or a staff counselor or case workers should be permitted,[16] but we do not decide that the State is required to furnish such assistance.[17] The issues in a parole revocation are not complex; no significant legal questions normally arise.

We have no thought to create an inflexible structure for parole revocation procedures. The few basic requirements set out above should not impose a great burden on any State's parole system. Control over the required proceedings by the hearing officers can assure that delaying tactics and other abuses sometimes present in the traditional adversary trial situation do not occur. Obviously a parolee cannot relitigate issues determined against him in other forums, such as is presented when the revocation is based on conviction of another crime.

In the peculiar posture of this case, given the absence of an adequate record, we conclude the ends of justice will be best served by remanding the cases to the Court of Appeals for their return to the District Court with directions to make findings on the procedures actually followed by the Parole Board in these two revocations. If it is determined that petitioners admitted parole violations to the Parole Board, as Iowa contends, and if

[16] The Model Penal Code § 305.16 (Proposed Official Draft 1962) provides that "The institutional parole staff shall render reasonable aid to the parolee in preparation for the hearing and he shall be permitted to advise with his own legal counsel.

[17] From time to time it is suggested that every institution have a "legal aid" or "prisoner aide" staff member qualified to assist prisoners in these situations. In all likelihood, the experimental projects in this field will lead States to try providing such assistance, and perhaps they will find that this solves some problems that plague correctional institutions. At this stage there is insufficient empirical data to guide a conclusion whether due process requires counsel or other assistance in all such cases.

those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter. If the procedures followed by the Parole Board are found to meet the standards laid down in this opinion that, too, would dispose of the due process claims for these cases.

We remand to the Court of Appeals for further proceedings consistent with this opinion.

Remanded.