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Federal Probation

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This Issue in Brief

The Development of a Juvenile Electronic Monitoring Program.—Author Michael T. Charles reports on a research project concerning the juvenile electronic monitoring program undertaken by the Allen Superior Court Family Relations Division, Fort Wayne, Indiana. Reviewing the planning and implementation phase of the program, the author discusses (1) the preplanning and organization of the program; (2) the importance of administrative support; (3) the politics and managerial issues faced during program development, implementation, and management; and (4) the role and function of surveillance officers.

Morrissey *Revisited: The Probation and Parole Officer as Hearing Officer.*—Author Paul W. Brown discusses the Federal probation officer's role as hearing officer in the preliminary hearing stage of the parole revocation process. This role was largely created by the landmark Supreme Court case of *Morrissey* v. *Brewer* in which the Court indicated a parole officer could conduct the preliminary hearing of a two-step hearing process possibly leading to a parole revocation and return to prison. How this role was created in *Morrissey* and how it has been carried out by the Federal probation officer are examined.

Defense Advocacy Under the Federal Sentencing Guidelines.—This article sets forth the duties and responsibilities of defense counsel in effectively representing clients in all phases of the criminal process under Federal sentencing guidelines. Author Benson B. Weintraub offers practice-oriented tips on arguing for downward departures, avoiding upward departures, and negotiating plea agreements under the guidelines and discusses procedures to employ in connection with the presentence and sentencing stages of a Federal criminal case.

Federal Bureau of Prisons Programming for Older Inmates.—The "graying" of our society is creating a change in our prison populations. More sentenced offenders will be older when they enter the institutions, and longer sentences will result in more geriatric inmates "behind the walls." Balancing the needs and costs of geriatric care is a critical issue to be addressed. In this article, authors Peter C. Kratcoski and George A. Pownall discuss various attributes of criminal behavior of older persons and the distribution of older offenders within the Federal Bureau of Prisons. They also discuss the complete health care programming that correctional systems must provide to meet legal mandates already established in case law. According to the authors, significant programming adaptations have taken place in the past several years at the Federal level; more are anticipated in the near future.

Privatization of Corrections and the Constitutional Rights of Prisoners.—Many in the legal and corrections community have presumed that "private" correctional facilities will be held to the same constitutional standards as those directly administered by the state itself. Author Harold J. Sullivan

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Morrissey Revisited: The Probation and Parole Officer as Hearing Officer

BY PAUL W. BROWN
United States Probation Officer, McAllen, Texas

THE PROBATION and parole officer wears many hats, a fact well documented in the professional literature. There are the better known roles such as the counselor, the surveillance agent, the community resource broker, the caseworker, and the officer who is a generalist, a combination of roles which might include control and service (Abadinsky, 1987, pp. 285-296). There are also less known and recognized sub-roles such as jail monitors (Nielsen, 1984) and the "quasi-judicial role" (Czajkoski, 1973, p. 9). One important sub-role that apparently has been neglected in the professional literature is that of parole hearing officer.

A search of several sources was conducted to determine if this role had been addressed in the criminal justice literature. *The Criminal Justice Periodical Index* for the years from 1975 until May 1988, and the indexes of *Federal Probation* from 1970 until December 1988 were examined for any articles that focused on the hearing officer role, and none were found. One article (Fisher, 1974) did compare and contrast probation and parole revocation but did not narrow its attention to the hearing officer role. Another article (Czajkoski, 1973) examined the "quasi-judicial role" of the probation officer in probation revocation but did not address parole violations.

Aside from the indexes, two well-known probation and parole texts (Abadinsky, 1987 and Cromwell et al., 1985) were reviewed with only minimal, oblique references encountered as to this neglected role. Abadinsky (pp. 206–208) indicated that the preliminary hearing officer is usually an agency attorney employed for that purpose but can be any employee not directly connected to the parolee, including a parole officer. In Cromwell (p. 252), the role was only touched upon in covering the American Correctional Association parole guidelines which stated that the hearing officer should not be a parole officer who either supervised or authorized the parolee's arrest. Finally, an article by the American Bar Association (1975, p. 138) on the impact of *Morrissey* v. *Brewer* was examined for any reference to the parole officer in the hearing process. The only mention of it was that the Court required the hearing to be held by a neutral board in order to prevent the "accusing parole officer from setting as judge and jury over the parole" (sic).

Pre-Morrissey

Newman (1975) examined legal issues in parole and concluded that challenges to the revocation process were the most frequent area of litigation (p. 47). As neither *Morrissey* (1972) nor *Gagnon* (1973) was discussed, it is assumed that Newman's chapter was written before these landmark decisions were made. The leading case on due process rights of Federal parolees according to Newman was *Hyser* v. *Reed* which was decided in 1963 and was applicable to the D.C. Circuit. It is interesting to note that Warren Burger wrote the majority opinion in *Hyser*, in which parolees' due process rights were very limited, as a Circuit Court of Appeals judge in 1963, and then he delivered the majority opinion in *Morrissey* in 1972 in which their rights were greatly expanded. Among due process rights discussed but rejected in *Hyser*, the circuit court did hold that a preliminary hearing must be held in a timely fashion near the place of the alleged violation. The hearing could be informal and could be conducted by a "District Probation Officer." If the parole board found satisfactory evidence of a parole violation based on the hearing results, then the violator could be returned to prison for a revocation hearing. According to Newman, the preliminary hearing was already an established procedure of Federal parole; however, the circuit court supplemented it with more concrete due process rights. He further observed that the significant aspect of the court's decision "was not the denial of constitutional due process at revocation, for this effected no change," but the right to a preliminary hearing as required due process before possible return to prison (pp. 50-52). A national survey conducted prior to *Morrissey* confirmed that most state parole boards were not conducting preliminary hearings (ABA, p. 131). A survey conducted a year after *Hyser* revealed that approximately seven parole jurisdictions did not even provide revocation hearings (Newman, p. 52).

The Significance of Morrissey

The role of a hearing officer in the parole violation process nationally was largely created in the landmark U.S. Supreme Court case of *Morrissey* v. *Brewer* (1972), a case involving state parole. Those who were working in the parole field in the early seventies are

well aware of the radical change brought on by *Morrissey* in most jurisdictions. One source (Singer, 1972, p. 728) referred to the case as "by far the most significant decision thus far in correctional law." Both the U.S. District Court and the Court of Appeals, whose holdings were overturned in *Morrissey*, had agreed that the parolees were not entitled to a hearing before their parole was revoked. The appellate court reasoned that parole is a "privilege" that simply allows an inmate to serve part of his sentence outside of the prison walls. As a result, the "prison official must have large discretion in making revocation determinations, and . . . courts should retain their traditional reluctance to interfere with disciplinary matters properly under the control of state prison authorities" (*Morrissey*, p. 474-475).

The Supreme Court said that the parolee is not entitled to the "full panoply of rights due a defendant in a criminal prosecution" (p. 480), yet the possible loss of liberty is a "grievous loss" that calls for an "orderly process" (p. 482). Because release on parole had become a regular procedure during the previous 60 years, the court decided that parole could no longer simply be considered a privilege but an "established variation on imprisonment of convicted criminals" (p. 477).

The circumstances facing petitioner Morrissey were probably the norm in many parole jurisdictions at that time. If the supervising parole officer determined that there was sufficient information that a parolee had seriously violated the conditions of parole, then the officer submitted a violation report to a parole board with a recommendation that the parolee be returned to prison. At the institution where the parolee frequently would be summarily returned, the parolee had a revocation hearing which was almost entirely based on the information provided by the parole officer in the violation report. The due process rights of the parolee were very limited. In a *Morrissey* footnote, the Court observed that in the state of Iowa, out of 540 revocations ordered, only one was reversed after an institutional hearing (p. 476). Prior to *Morrissey*, the courts had largely maintained a hands off policy when it came to corrections (*Pocunier* v. *Martinez*, 1974, p. 235).

Due Process

Morrissey radically changed the violation procedure by adding specific and substantial due process rights. The Court was clear that an administrative hearing was called for rather than a mini-trial. The Supreme Court outlined a bifurcated hearing with required steps at each. These rights included the parolee being given notice of the hearing which was to be timely, notice of the charges, the right to appear and present evidence, a limited right to confront adverse witnesses, a neutral hearing body, and a written statement justifying revocation (pp. 486-489). The due process step which most concerns this article is in the preliminary hearing stage which is designed to determine if there is probable cause to believe that the parolee violated the conditions of release. The second stage, or the revocation hearing, is conducted in order to determine guilt and to make a decision with respect to revoking parole.

The Supreme Court deliberately avoided the question of counsel for indigent parolees (p. 489), however, it was later addressed in *Gagnon* v. *Scarpelli* (1973). In *Gagnon*, it was up to the parole agency to determine the need for appointment of counsel for indigent parolees on a "case by case basis" with limited guidance from the Court. In fact the Court indicated "the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings" (p. 790). *Gagnon* additionally, in effect, applied those due process rights in *Morrissey* to probation violators and the limited right to counsel outlined in *Gagnon* to parole violators.

Neutral Party

In discussing the preliminary hearing in *Morrissey*, the Court said that it should be conducted "by someone not directly involved in the case" (p. 485) and that it "need not be a judicial officer" (p. 486). The hearing officer could be "someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation" (p. 486). Justice Douglas in his dissent argued, among other things, that the parole officer, at least in Iowa where the case originated, should not be a hearing officer because he or she performs law enforcement and prosecutorial functions (pp. 497-98).

In addressing the preliminary hearing, the court (*Morrissey*, pp. 486-87) said that

> . . . 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 should 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. On request of the parolee, a person who has given adverse information on which the revocation is to be based is to be made available for questioning in his presence. However, if

the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.

'The hearing officer shall have the duty of making a summary, or digest, of what occurs at the hearing in terms of the responses of the parolee and the substance of the documents or evidence given in support of the parole revocation and 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 relied upon. . . ."

Morrissey established a legal foundation nationally for the hearing officer role of parole officer. The remainder of this article will examine how the role is fulfilled in the Federal jurisdiction. The U.S. probation officer is, as in many states, both a probation and parole officer. Section 3655 of Title 18, U.S. Code (1988, p. 792) outlines the duties of a U.S. probation officer. With respect to parole, it states that "[e]ach probation officer shall perform such duties with respect to persons on parole as the United States Parole Commission [the Commission] shall request." One of those duties has been to conduct the preliminary hearing which the Commission refers to as the preliminary interview. The U.S. Parole Commission has a *Rules and Procedures Manual* (1987) which generally outlines the duties of the hearing officer.

The Role of the Hearing Officer

According to the Commission's manual, when there has not been a new conviction, the parolee is entitled to a preliminary hearing to help the Commission determine if (1) there is probable cause to believe that there was a violation and (2) a revocation hearing is necessary (p. 199). Once the probation office is notified that a parolee is in custody, a probation officer is to be designated to conduct the preliminary interview, and the interview is to be conducted promptly. The rules state that the designated probation officer "must not have supervised the parolee at any time." If no probation officer is available who has not supervised the parolee, then the Commission is to be contacted so that an alternative individual might be designated (p. 200).

In discussing the role of the hearing officer, the manual requires that the officer be "an impartial fact finder" and restricts the officer from discussing the circumstances of the case with the supervising officer prior to the preliminary hearing. At the hearing, the officer "should question all witnesses present, including the parolee and his probation officer if necessary to clear up any unexplained matters that bear upon the alleged violations." A summary report is submitted to the Commission which outlines the steps of the hearing and the probable cause determination as well as a summary of the parolee's adjustment under supervision and resources available if continued under supervision (p. 200).

The Hearing

Perhaps the Commission's "Preliminary Interview and Revocation Hearing Form" known as form F-2 provides the most comprehensive explanation of the actual hearing process. The F-2 is used by the hearing officer at the time of the preliminary hearing. During the initial visit with the alleged violator, the officer explains from the form the procedures to be followed and the parolee's rights. The parolee is to read the form or have it read by the officer. The parolee is advised that the hearing can be postponed for up to 30 days to obtain an attorney and/or the presence of adverse or voluntary witnesses and that an attorney will be appointed if the parolee cannot afford one. In case of indigence, a brief financial form must be completed to request appointment of counsel, and the form is submitted by the hearing officer to the U.S. magistrate for consideration. Contrary to the restricted right to an appointed attorney in *Gagnon*, the Federal parolee is automatically appointed counsel if he or she requests it and cannot afford to retain an attorney.

The process is basically the same at either the initial hearing or a postponed one. A copy of the charges or allegations will be provided to the parolee and then read to the parolee, and the supporting documentation will be disclosed and explained. The parolee is to admit or deny each allegation and initial on the charge sheet (the warrant application) that admission or denial. An explanation can be provided to the hearing officer as to each of the allegations. The supervising probation officer is usually present at the postponed hearing along with the parolee's attorney and any appropriate witnesses.

If the parolee did not have any new convictions (convictions normally would eliminate the need for the preliminary hearing), and if the parolee denied all allegations, then there is a right to a community revocation hearing rather than an institutional revocation hearing which usually would be held at the prison if the parolee were subsequently ordered returned by the Commission. A copy of the F-2 is provided the parolee at the end of this first stage.

On the warrant application (1987) which is the document of the actual written allegations, there is

a capsule summary of the preliminary interview process:

> You shall, unless you have been convicted of a new offense, be given a preliminary interview by an official designated by a Regional Commissioner to determine if there is probable cause to believe that you have violated the conditions of your release, and if so, whether to release you or hold you for a revocation hearing.
>
> At your preliminary interview and any subsequent revocation hearing you may present documentary evidence and voluntary witnesses on your behalf, and, if you deny the charge(s) against you, you may request the presence of those who have given information upon which charge(s) are based. Such witnesses will be made available for questioning unless good cause is found for their non-appearance.
>
> You may be represented by an attorney or other representative of your choice, or, if you are unable to pay for counsel, an attorney will be provided by the U.S. District Court if you fill out and promptly return a Form CJA-22 to a U.S. Probation Officer.

Once the hearing has been completed, the officer must make a determination as to probable cause on each charge. A report is submitted to the Commission with a copy to the parolee which has the findings and other information noted above. It is emphasized that the officer's findings are only that and that the Commission makes an independent determination as to probable cause.

The Economic Advantage

The economic advantages of having the probation officer conduct the preliminary hearings are obvious. Most parole boards have relatively small, centralized staffs who would be greatly taxed to conduct frequent hearings throughout their jurisdictions. Not only can the probation officer perform the function more economically, but also in most cases in a more timely fashion due to the close proximity of the officer to the violator.

In its cases, the Supreme Court frequently addresses the consequences, including economic ones, of its decisions. The court in *Morrissey* (p. 490) stated that the required due process steps "should not impose a great burden on any State's parole system." In declining to rule in *Gagnon* (p. 778) that counsel should be appointed in all violation cases, the court noted that "the financial cost to the State—for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review—will not be insubstantial." The Court noted that in the mid-1960's there were about 20,000 adult revocations. By 1986 (*Sourcebook*, 1987, p. 528), the number of parole and other conditional release violators had reached 71,184. The number of preliminary hearings conducted by U.S. probation officers from October 1, 1987 until September 30, 1988 was 1,965 (Wooten, 1988). Even at a very conservative travel cost to the Commission of $100 per hearing, the annual savings would be approximately $200,000 by having U.S. probation officers conduct the hearings.

Conclusions

The role of a hearing officer is one of substantial change for most parole and probation officers who are comfortable with the normal functions of supervision and presentence investigations. Traditionally the probation officer has been accustomed to working with guilty clients, whether during the presentence investigation or in the routine supervision of probationers and parolees. As a hearing officer, however, it is necessary to operate in a totally different context in which there is a presumption of innocence rather than of guilt.

One of the more challenging aspects of the role is to have to sit in judgment of colleagues' allegations and remain totally objective and fair to both sides. Another challenge is to diplomatically deal with attorneys who are used to the adversary forum of a court but not the more limited due process procedures of an administrative hearing. Not insignificant are the savings to the public as well as timely community hearings granted to the parolee. It appears that probation and parole officers have lived up to the challenges of *Morrissey* and *Gagnon* for more than 15 years without having the role of being the hearing officer ever successfully challenged in the Supreme Court. In spite of this apparent success in fulfilling the role of hearing officer, this responsibility is conspicuous in its absence from the literature describing probation officer functions.

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