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The Parole Revocation Process in Illinois

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Thomas J. Bamonte*
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I. **INTRODUCTION**

At any one time, approximately 14,000 Illinois citizens are in the process of completing their criminal sentences by spending one to three years on mandatory supervised release, commonly known as parole.\(^1\) Although parolees live in the free community and, as a practical matter, have few restraints on their day-to-day liberty, they must report to parole agents and conform their behavior to a

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\(^1\) *STATE OF ILLINOIS, ILLINOIS DEP'T OF CORRECTIONS, TRANSITION PAPER* 28 (November 1, 1990) [hereinafter TRANSITION PAPER]. The number of Illinois parolees is expected to surpass 19,000 by the end of 1992. *Id.* The parole population has grown by over 61% in the last decade. *Id.* In comparison, there are almost 39,000 felons on probation. *THE ILLINOIS TASK FORCE ON CRIME AND CORRECTIONS, INTERIM REPORT* 13 (June 1992) [hereinafter INTERIM REPORT]. The prison population in Illinois has likewise soared, growing from 14,000 in 1982 to over 30,000 in 1992. *Id.* at 5. Because the
set of parole conditions. In *Morrissey v. Brewer,* the Supreme Court recognized that, despite these restrictions, parolees share "many of the core values of unqualified liberty" and are thus entitled to substantial due process protections before their parole may be revoked.

Approximately half of the parolees in Illinois are charged with violating one or more conditions of their parole. In the typical case, the State of Illinois ("State") revokes parole and returns the parolee to prison. Despite the large number of parole revocation proceedings and the high stakes involved, few defense attorneys understand the parole revocation process or the strategic opportunities and risks encountered at each step of that process. As a result of neglect by the bar and the State's persistent failure to live up to its *Morrissey* due process obligations, the parole revocation process in Illinois has become an empty formality with a preordained result.

The purpose of this Article is to encourage more active and knowledgeable involvement by the bar in the parole revocation process. Section II examines the historical and constitutional underpinnings of the parole revocation process. Section III provides an overview of the statutes and administrative rules that govern the parole revocation process in Illinois and also describes the process as it actually operates. Section IV examines several of the due process issues pertaining to final parole revocation hearings that were addressed in the case of *Downie v. Klinicar.* Finally, Section V suggests improvements for the parole revocation process in Illinois.

prison population has increased, the number of parolees should also increase in the years ahead.

The key difference between parole and mandatory supervised release is that parole is granted at the discretion of an administrative agency, while mandatory supervised release is part of the sentence handed down at trial. We use the term parole to cover both parole and mandatory supervised release because during the period of parole supervision and mandatory supervised release, the legal rights and obligations of the "parolee" are alike.

4. *Id.* at 482.
5. TRANSITION PAPER, supra note 1, at 28.
6. Of the 4,212 hearings conducted in 1991, 3,341 resulted in revocation of parole and return to prison. In 324 cases, the Board found a violation but allowed the parolee to continue on parole. STATE OF ILLINOIS PRISONER REVIEW BD., 1991 ANN. REP. 15 [hereinafter 1991 PRISONER REVIEW REP.].
7. See infra notes 41-49 and accompanying text.
8. 759 F. Supp. 425 (N.D. Ill. 1991). Thomas Peters, one of the authors of this Arti-
II. THE FORCES THAT SHAPE THE PAROLE REVOCATION PROCESS

Two major factors have shaped the parole revocation process in Illinois and throughout the country: (1) the role of parole in the penological system and (2) the due process rights parceled out to parolees by the courts.

A. The Role of Parole in the Penological System

Parole originated in Europe in the mid-1800s and first came into use in the United States in 1876. By 1898 half of the states, including Illinois, had parole systems. The first federal parole law was enacted in 1910. Today most of the states and the federal government have systems of parole or mandatory supervised release.

The original rationale for parole was that it promoted the rehabilitation of the offender. Parole was designed to provide a structured transition from incarceration to life in free society. Historically, the rehabilitative thrust of parole was consistent with the rehabilitative principles underlying the penal system as a whole, and Gary Caplan, an attorney at Sachnoff & Weaver, Ltd., were the plaintiffs’ attorneys in Downie.

9. See Peters & Norris, supra note 2, for a general discussion of parole in Illinois.


12. Id.


14. In People ex rel. Johnson v. Pate, 265 N.E.2d 144 (Ill. 1970), the Illinois Supreme Court described parole as "a part of the rehabilitative process applicable to those whose history, conduct and prognosis . . . justify such action." Id. at 146; see also People v. Tipton, 430 N.E.2d 1023, 1028 (Ill. 1981) ("Probation . . . is more rehabilitative than punitive in nature.").

15. See Morrissey, 408 U.S. at 477-78. Parole, of course, serves other functions as well. It allows the state to continue monitoring the behavior of a convict through a network of parole supervisors at a cost far lower than imprisonment. Conditions placed on parolees have punitive as well as rehabilitative functions. The threat of recommitment for a parole violation acts as a deterrent to wrongful behavior. See Probation & Parole, supra note 13, § 1.06, at 16-20.
whole. Until relatively recently, prison sentences were indeterminate, purportedly to allow the courts and penal authorities to adjust punishments to the circumstances and rehabilitative prospects of each offender. Parole was also discretionary. Although parole terms were lengthy, parole officials had the discretion to discharge parolees before the parole term expired. Parole officers were expected not only to monitor parolees but also to actively guide them toward a law-abiding life.

The rehabilitative ideal has succumbed in the last two decades to public concern about rising crime rates and criminal recidivism as well as to criticism of the large disparities in punishments meted out under an indeterminate sentencing scheme. Research has shown that rehabilitation programs have had little success in curbing recidivism, and some argue that rehabilitative methods are either impediments to effective crime control or part of an illegitimate method of social control.

As the focus on rehabilitation has declined, fundamental changes in the penological system have occurred. In 1977, Illinois

17. See Peters & Norris, supra note 2, at 819-21.
18. Cf. People v. Griffin, 290 N.E.2d 620, 622 (Ill. App. Ct. 5th Dist. 1972) (noting that "the goal of rehabilitation can best be achieved by giving the parole authorities great discretion").
19. See People ex rel. Jefferson v. Brantley, 253 N.E.2d 378, 380 (Ill. 1969) (stating that unless the parolee has been discharged early, the State has custody over the parolee until the maximum term of the sentence has expired); see also ILL. REV. STAT. ch. 38, para. 123-4 (1971) (discharge provision) (repealed). The Prisoner Review Board may discharge persons from parole or mandatory supervised release. ILL. REV. STAT. ch. 38, para. 1003-8-8(b) (1991). One Illinois court has held that parolees petitioning for discharge are entitled to neither a hearing nor a description of the evidence upon which the Board’s denial of discharge is based. Blythe v. Lane, 551 N.E.2d 680, 685 (Ill. App. Ct. 5th Dist. 1990).
joined many other states and adopted a determinate sentencing system. Under determinate sentencing, persons are sentenced to a fixed term of imprisonment. Prisoners receive one day of good time credit for each day served. Prisoners are released to serve a fixed term of parole, mandatory supervised release, when their time served and good time credits are equal to the term of their sentence. Under the new system, the length of the parole term is fixed from one to three years according to the severity of the offense.

The decline of the rehabilitative ideal has also changed the role of parole: parole has become a law enforcement tool rather than a mechanism for rehabilitation. Few rehabilitative services are currently administered through the Illinois parole system. At the same time, the State's practice has been to (1) imprison every per-

25. See ILL. REV. STAT. ch. 38, paras. 1005-8-1 to -8-7 (1977). Persons sentenced before the switch to determinate sentencing are covered by the old system of parole. See ILL. REV. STAT. ch. 38, paras. 1003-3-2.1 to -3-5; see also Heirens v. Illinois Prisoner Review Bd., 516 N.E.2d 613 (Ill. App. Ct. 5th Dist. 1987) (holding that a prisoner serving consecutive life sentences imposed under pre-Code law did not have to be provided with a fixed release date). Because the number of persons covered by the old system is relatively small and ever-dwindling, this Article will focus primarily on the rights of parolees within a determinate sentencing system. See Peters & Norris, supra note 2, at 819-21 (discussing indeterminate sentencing and parole procedures in Illinois).

26. See ILL. REV. STAT. ch. 38, para. 1003-3-3 (1977). Under the indeterminate system, persons convicted of a crime received a sentence consisting of a minimum and maximum term. ILL. REV. STAT. ch. 38, para. 1005-8-1 (1977). A prisoner was eligible for parole upon serving the minimum term. Tiller v. Klincar, 561 N.E.2d 576, 577 (Ill. 1990). The decision whether to grant parole was vested in the parole board. A person was paroled for the remaining term of the maximum sentence, subject to early termination by the parole board. See People ex rel. Johnson v. Pate, 265 N.E.2d 144, 146-47 (Ill. 1970). In Faheem-El v. Klincar, 527 N.E.2d 307, 310-11 (Ill. 1988), however, the Illinois Supreme Court held that the parole term for persons sentenced prior to 1977, under the indeterminate sentencing system, includes both the unserved portion of the maximum term of the sentence and the fixed one to three year parole terms of ILL. REV. STAT. ch. 38, para. 1005-8-1(d).


30. See generally CAVENDER, supra note 24 (tracing the changes in the purposes behind the parole system).

31. TRANSITION PAPER, supra note 1, at 28.
son accused of a parole violation, and (2) rely uncritically on police reports to find a parole violation. These practices have made the parole revocation process a form of preventive detention that has few built-in due process safeguards.

The shift in the orientation of the parole system from rehabilitation to crime control has important implications for the due process rights accorded parolees by the legal system. When parole was viewed as serving a rehabilitative ideal, the parolee was close to being a free citizen. Currently, with parole viewed as an extension of the penitentiary, the parolee is more like a privileged prisoner. However, this shift in the purpose of parole and the status of the parolee is difficult to reconcile with Morrissey’s relatively expansive view of the due process rights of parolees.

B. The Due Process Rights of Parolees

Traditionally, the due process rights of parolees have been minimal. Courts have relied upon several interrelated theories to jus-

32. See Faheem-El v. Klincar, 620 F. Supp. 1308, 1314 (N.D. Ill. 1985), modified, 814 F.2d 461 (7th Cir. 1987), and rev’d, 841 F.2d 712 (7th Cir. 1988) (en banc).
33. Id. at 1323.
34. Some of the factors which lead the authors to this conclusion are based on their own personal observations. Both Mr. Peters and Mr. Bamonte have served as counsel in parole revocation hearings in Illinois. In addition, the authors served as counsel for parolee plaintiff classes in Pinzon v. Lane, 675 F. Supp. 429 (N.D. Ill. 1987), and in Faheem-El. Mr. Peters also served as plaintiff’s attorney in Downie v. Klincar, 759 F. Supp. 425 (N.D. Ill. 1991). Many of the propositions in this Article regarding the ordinary procedures at parole revocation hearings in Illinois, therefore, are based on the personal experiences of the authors. For additional information regarding the parole revocation process, see generally Peters & Norris, supra note 2; PROBATION AND PAROLE, supra note 13, §§ 9-15.
35. Morrissey embodies this view, describing parolees as sharing “the core values of unqualified liberty.” 408 U.S. at 482.
36. See infra notes 41-49 and accompanying text.
37. See generally William M. Cohen, Due Process, Equal Protection and State Parole Revocation Procedures, 42 U. COLO. L. REV. 197 (1970) (analyzing the lack of procedural due process safeguards for parolees); Michael Gottesman & Lewis J. Hecker, Note, Parole: A Critique of Its Legal Foundations and Conditions, 38 N.Y.U. L. REV. 702 (1963) (analyzing the lack of safeguards for the parolee). Traditionally, even though the courts did not require that parolees be provided due process guarantees in the parole revocation process, many states prior to Morrissey provided for notice and some form of hearing before revocation of parole. See Carter H. White, Some Legal Aspects of Parole, 32 J. CRIM. L. & CRIMINOLOGY 600 (1942). Just prior to the Morrissey decision, the Illinois Supreme Court observed that “the ... courts have surrounded the defendant at a revocation hearing with many of the same due process safeguards that are accorded to a defendant at a trial to determine his guilt.” People v. Pier, 281 N.E. 2d 289, 291 (Ill. 1972); see also Frank S. Merritt, Parole Revocation: A Primer, 11 U. TOL. L. REV. 893 (1980) [hereinafter Merritt] (describing the minimum procedural due process accorded to a parolee after Morrissey).
tify the limited protections. One theory was that parole was a discretionary alternative to prison, and thus prison authorities had as much of a right to reincarcerate a parolee as they did to shift a prisoner from one prison to another.38 Another theory was that parole was a mere privilege that could be revoked at any time.39 Some courts have also used contractual terminology to describe the relationship as a contract between the parolee and the State: a violation of the conditions of parole entitled the State to summary revocation as a remedy for the breach.40

In *Morrissey v. Brewer*,41 the Supreme Court repudiated these limits and mandated substantial due process protections for parolees in the parole revocation process.42 These procedures include a preliminary hearing "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions."43 The preliminary hearing must be held before an independent officer other than the parole officer who recommended revocation and after notice of the alleged violation has been given to the parolee.44 Moreover, the hearing should be held "at or reasonably near the place of the alleged parole violation or arrest, and

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39. See Haines v. Castle, 226 F.2d 591, 593-94 (7th Cir. 1955), cert. denied, 350 U.S. 1014 (1956); see also United States ex rel. Harris v. Ragen, 177 F.2d 303, 304 (7th Cir. 1949) (holding that the parole revocation process does not implicate due process protections).
40. See People ex rel. Richardson v. Ragen, 79 N.E.2d 479, 484-85 (Ill. 1948).
41. 408 U.S. 471 (1972).
42. Id. at 488-89. In Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973), the Court extended the *Morrissey* due process protections to the probation revocation process. The rights of parolees and probationers in the revocation context are largely, but not entirely, coextensive. See, e.g., People ex rel. Tucker v. Kotsos, 368 N.E.2d 903, 908 (Ill. 1977) (holding that the disparate treatment of parolees and probationers regarding bail while awaiting final revocation hearings did not offend the Equal Protection Clause).
43. 408 U.S. at 485. According to the Court:
   At the [preliminary] 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 parole revocation is to be based is to be made available for questioning in his presence. . . . The hearing officer shall . . . mak[e] 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 parole revocation and of the parolee's position.
   Id. at 487; *cf.* Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (holding that in a welfare predetermination hearing, though a complete record need not be provided, due process requires that recipients be permitted to appear personally to be heard).
44. 408 U.S. at 486-87.
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as promptly as convenient after arrest while information is fresh and sources are available.\textsuperscript{45} If the hearing officer at the preliminary revocation hearing finds probable cause to believe that the parolee committed a parole violation, "[s]uch a determination would be sufficient to warrant the parolee’s continued detention . . . pending the final decision."\textsuperscript{46}

In \textit{Morrissey}, the Court also mandated a final hearing to determine conclusively whether the parolee has violated a parole condition and whether revocation of parole is warranted.\textsuperscript{47} According to the Court, a lapse of 120 days between a preliminary and final parole revocation hearing is not unreasonable.\textsuperscript{48} The minimum due process requirements at the final parole hearing are as follows:

1. written notice of the alleged violation;
2. disclosure to the parolee of the evidence showing a parole violation;
3. the opportunity to appear and present witnesses and evidence;
4. the right to confront and cross-examine adverse witnesses except for cause;
5. a "neutral and detached" hearing body; and
6. a written statement as to the evidence relied upon and the reasons for revoking parole.\textsuperscript{49}

Although courts still rely on \textit{Morrissey}’s code of parole revocation procedures, some courts may construe the due process rights of parolees narrowly in light of later developments. First, courts that adopt the view that parole is little more than an alternative to imprisonment are likely to read \textit{Morrissey} narrowly.\textsuperscript{50} Second, the Supreme Court has rejected the notion that any "grievous loss"

\textsuperscript{45} \textit{Id.}
\textsuperscript{46} \textit{Id.} at 487.
\textsuperscript{47} \textit{Id.} at 487-88.
\textsuperscript{48} \textit{Id.}
\textsuperscript{49} 408 U.S. at 489.
\textsuperscript{50} There is ample evidence from Illinois decisions that such a judicial reassessment of the function of parole is occurring. See, e.g., People v. Williams, 361 N.E.2d 1110, 1114 (Ill. 1977) ("Parole alters only the method and degree of confinement during the period of commitment."); Blythe v. Lane, 551 N.E.2d 680, 683 (Ill. App. Ct. 5th Dist. 1990) (holding that "parole in Illinois is in the nature of a gift"); Harris v. Irving, 412 N.E.2d 976, 979 (Ill. App. Ct. 5th Dist. 1980) ("That a state has no duty to establish a parole system is well-established."); People v. Perry, 401 N.E.2d 1263, 1270 (Ill. App. Ct. 4th Dist. 1980) ("[T]hat early release and parole are the only means of rehabilitation . . . is a position we are not prepared to espouse."); Kindhart v. Mizell, 428 N.E.2d 551, 552 (Ill. App. Ct. 5th Dist. 1981) (holding that parole alters only the method and degree of confinement); \textit{cf.} People v. Allegri, 487 N.E.2d 606, 607 (Ill. 1985) (characterizing probation as a "privilege").
suffered by an imprisoned parolee is sufficient to confer due process rights.\textsuperscript{51} Third, in its due process jurisprudence since \textit{Morrissey}, the Court has given much more weight to the purported state interest in restricting due process guarantees.\textsuperscript{52} Fourth, after \textit{Morrissey}, the Court has been parsimonious in its recognition of due process rights in a variety of parole-related cases.\textsuperscript{53} Finally, the Court’s increasingly tight restrictions on the rights of prisoners and criminal defendants certainly suggest that there is no reservoir of judicial sympathy for parolees.\textsuperscript{54} The need for skillful advocacy is


\textsuperscript{52} See Mathews v. Eldridge, 424 U.S. 319, 347-48 (1974); \textit{see also} Hewitt v. Helms, 459 U.S. 460, 467 (1983) (recognizing that “prison officials have broad... discretionary authority, and that lawfully incarcerated persons retain only a narrow range of protected liberty interests”).

\textsuperscript{53} See, \textit{e.g.}, Jago v. Van Curen, 454 U.S. 14, 15, 21 (1981) (holding that a prisoner’s procedural due process rights were not violated where the prisoner was notified that the parole board was ordering his release, and the parole board, based on a revelation that the prisoner had given them false information, subsequently revoked the parole without granting the prisoner a hearing); Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 459-60, 466-67 (1981) (holding that a prisoner’s procedural due process rights were not violated where a state statute gave the parole board the power to commute sentences, and, although the parole board commuted the life sentences of 75% of the prisoners who had applied for commutation, the board rejected without comment several of the prisoners’ applications for commutation); Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1, 4-5, 15-16 (1979) (holding that prisoners’ procedural due process rights are not violated where prisoners eligible for parole are not allowed to cross-examine witnesses at a parole hearing, and, if parole is denied, are not entitled to a summary of the evidence on which the parole board relied); Moody v. Daggett, 429 U.S. 78, 86-89 (1976) (holding that a parolee’s procedural due process rights were not violated when the parolee was imprisoned for a crime committed while on parole, and the parolee was not given a hearing before a parole violation warrant on the first offense was issued as a “detainer”); \textit{see also} Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (holding that a probationer’s home may be searched without a warrant when the search is conducted pursuant to a valid state regulation governing probationers).

\textsuperscript{54} See, \textit{e.g.}, Thornburgh v. Abbott, 490 U.S. 401, 404, 419 (1989) (holding that Federal Bureau of Prisons regulations authorizing prison wardens to prohibit inmates from receiving publications that the warden deemed to be “detrimental to the security, good order, or discipline of the institution” was reasonable and thus did not violate inmates’ First Amendment rights); O’Lone v. Estate of Shabazz, 482 U.S. 342, 347, 353 (1987) (holding that prison regulations that prevented inmates from attending religious services did not violate the inmates’ First Amendment rights where the regulations were adopted for security reasons); Hudson v. Palmer, 468 U.S. 517, 526 (1984) (holding that inmates have no reasonable expectation of privacy in their prison cells and thus that the Fourth Amendment does not protect them against unreasonable searches of their prison cells); Olim v. Wakinekona, 461 U.S. 238, 245-46, 249 (1983) (holding that the transfer of a prisoner from a prison in Hawaii to one in California did not violate the prisoner’s procedural due process rights, even though the parole board recommended the transfer comprised the same persons as the committee that had initially identified the prisoner as a discipline problem); Bell v. Wolfish, 441 U.S. 520, 538-40 (1979) (holding that prison regulations, such as those prohibiting inmates from receiving hard-cover books from any source other than book clubs, book stores, or publishers, or from receiv-
thus apparent.

III. THE PAROLE REVOCATION PROCESS IN ILLINOIS

A. Parole Revocation on Paper: The Illinois Statutes and Regulations Applicable to the Revocation Process

1. Jurisdiction

The administration of the Illinois parole system is divided between the Prisoner Review Board ("Board") and the Department of Corrections ("Department"). The Board sets the conditions of parole for each parolee. There are two mandatory conditions: (1) the parolee may not violate any criminal statute, and (2) the parolee may not possess a firearm or other dangerous weapon. The Board may also require the parolee to undergo drug treatment, attend school, and support dependents. Recently, receiving packages from outside the facility containing food or personal property, do not violate inmates' constitutional rights as long as they are reasonably related to a legitimate governmental objective in managing the prison. For a critical overview of the Supreme Court's due process jurisprudence in the correctional area since Morrissey, see Susan N. Herman, The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court, 59 N.Y.U. L. REV. 482 (1984).

55. The Board, which currently consists of twelve members, is the successor to the Parole and Pardon Board. ILL. REV. STAT. ch. 38, paras. 1003-3-1 to 1003-3-2 (1991). The Board is independent of the Department of Corrections. Para. 1003-3-1(a). It has the power to grant parole to prisoners with indeterminate sentences, para. 1003-3-1(a)(1); to review cases involving revocation of good conduct credits, para. 1003-3-1(a)(2); to establish the rules of supervision for parolees, and to revoke the parole of persons found to have violated their parole conditions, para. 1003-3-1(a)(5). The members of the Board are appointed by the Governor with the advice and consent of the Senate. Para. 1003-3-1(b). Members must have at least five years experience in penology, corrections work, social work, medicine, law, education, psychology, other behavioral sciences or a combination thereof. Id. At least six of the twelve members must have three years experience in "juvenile matters." Id. The Board members serve staggered terms of six years. Para. 1003-3-1(c).

56. ILL. REV. STAT. ch. 38, para. 1003-2-2 (1991). The Board is statutorily required to "cooperate with the Department in promoting an effective system of parole and mandatory supervised release." Para. 1003-3-2(c). For those prisoners sentenced before 1977 and still subject to indeterminate sentences, the Board also makes the decision to release the person on parole. See ILL. ADMIN. CODE tit. 20, §§ 1610.10-70 (1992). The statutory guidelines for the parole of persons serving indeterminate sentences are set out in paras. 1003-3-3 to -3-5.

57. ILL. REV. STAT. ch. 38, para. 1003-3-2(a)(3); see also ILL. ADMIN. CODE tit. 20, § 1610.80 (1992) (stating that persons released under several different forms are subject to rules of conduct prescribed by the Board and any special conditions deemed appropriate by the Board in individual cases).

58. ILL. REV. STAT. ch. 38, para. 1003-3-7(a)(1) (1991). The types of parole violations are divided between those which stem from an alleged new criminal offense and those which stem from a "technical" violation, which involves a violation of one of the non-mandatory parole conditions listed in para. 1003-3-7(b).

59. ILL. REV. STAT. ch. 38, para. 1003-3-7(b) (1991).
Electronic monitoring was added as one of the conditions that the Board may impose.\textsuperscript{60} The Board must put in writing the parole conditions it has imposed.\textsuperscript{61}

The Department supervises parolees through a network of parole officers\textsuperscript{62} who are each responsible for supervising approximately 140 parolees.\textsuperscript{63} Despite the high ratio of parolees to parole officers, the legislature requires a parole officer to "regularly advise and consult with the parolee . . . , assist him in adjusting to community life, [and] inform him of the restoration of his rights on successful completion of sentence."\textsuperscript{64} The legislature has also mandated that "the Department shall provide employment counseling and job placement services."\textsuperscript{65} In reality, however, there are too many parolees and too few parole officers for meaningful supervision and rehabilitation to occur.\textsuperscript{66}

Parole officers "have the full power of peace officers in the arrest and retaking of any parolees."\textsuperscript{67} Parole officers who are aware of a suspected parole violation may "request the Department to issue a warrant for the arrest of any parolee . . . who [has] allegedly violated his parole . . . conditions."\textsuperscript{68} The parole officer typically initiates the parole revocation process when a parolee has allegedly violated one of the technical parole conditions. When the parolee has been arrested and charged with a new criminal offense, the parole officer's role is limited to issuing a parole violation warrant

\textsuperscript{61} ILL. REV. STAT. ch. 38, paras. 1003-3-7(c), 1003-14-2(c) (1991).
\textsuperscript{63} See William Recktenwald & Rob Karwath, Parole System a Bad Joke that May get Worse, CHI. TRIB., April 7, 1991, at C1. Having the Department supervise parolees reflects the persistent notion that parolees are merely in a different form of custody than imprisonment. See also ILL. REV. STAT. ch. 38, para. 1003-14-2(a) (1991) ("The Department shall retain custody of all persons placed on parole . . . ."); ILL. ADMIN. CODE tit. 20, § 1610.120 (1992) ("Until final discharge, the [parolee] shall at all times be under the legal custody of the Department . . . .").
\textsuperscript{64} ILL. REV. STAT. ch. 38, para. 1003-14-2(d) (1991).
\textsuperscript{65} ILL. REV. STAT. ch. 38, para. 1003-14-3 (1991) (emphasis added). The Department "may" provide other social services such as counseling. Id.
\textsuperscript{66} See Peters & Norris, supra note 2, at 835-39. The Transition Paper graphically describes the situation: "[W]ith only 44 field agents to supervise nearly 12,000 parolees, 85% of the releasees were being seen by an agent less than once every three months; 70% were being seen twice a year." TRANSITION PAPER, supra note 1, at 28. Even though the restoration of funding has allowed the State to hire more agents, the current average caseload is 136 parolees per agent, a level three times higher then that recommended by the American Correctional Association. Id.
\textsuperscript{67} ILL. REV. STAT. ch. 38, para. 1003-14-2(c) (1991).
\textsuperscript{68} Id.
that extinguishes the parolee’s right to bail.69 Once a parolee is accused of a parole violation, jurisdiction shifts back to the Board, which handles the parole revocation process.70 If the Board revokes parole, the parolee is usually reincarcerated in the custody of the Department.71

2. Statutory and Administrative Guidelines for the Parole Revocation Process

a. Preliminary Parole Revocation Hearings

In Illinois, parolees are guaranteed on paper that their parole “shall not be revoked without written notice to the offender setting forth the violation of parole . . . charged against him.”72 Preliminary parole revocation hearings are mandated by statute: “A person charged with violating a condition of parole . . . shall have a preliminary hearing . . . .”73 The Board’s regulations provide that “[t]he preliminary hearing shall be held within 10 days of the parolee’s apprehension unless continued by the hearing officer for up to an additional two weeks to permit the production of witnesses or materials relevant to the hearing.”74 However, when a court has found probable cause at a preliminary hearing on a new criminal charge, no preliminary hearing need be held if the new charge is the basis for the revocation or if the parolee has been convicted of the new charge.75

The purpose of the preliminary parole revocation hearing is to “determine if there is cause to hold the person for a [final] revocation hearing.”76 At the preliminary hearing, the parolee may be represented by counsel.77 The parolee may speak on his own be-

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70. ILL. REV. STAT. ch. 38, para. 1003-3-9(a) (1991).
71. The Department is already overpopulated and does not need or want additional inmates, particularly those accused of minor offenses. But the Board is criticized if a parolee who is charged with a parole violation is returned to freedom. Although the Board is under pressure, real or imagined, to reincarcerate, the Department would rather have fewer parolees returned to its already overcrowded prisons.
72. ILL. REV. STAT. ch. 38, para. 1003-3-9(d) (1991). Regulations promulgated by the Board require the State to give the parolee written notice “of the conditions of parole which have allegedly been violated and the manner in which they have been violated.” ILL. ADMIN. CODE tit. 20, § 1610.140(a) (1992).
73. ILL. REV. STAT. ch. 38, para. 1003-3-9(c) (1991) (emphasis added).
76. ILL. REV. STAT. ch. 38, para. 1003-3-9(c) (1991).
half and "bring letters, documents, or individuals who can give relevant information to the hearing officer." The regulations allow the parolee to confront and cross-examine adverse witnesses unless "the hearing officer determines that the informant would be subjected to risk or harm if his identity were disclosed."

b. Final Parole Revocation Hearings: Statutes and Regulations

Final parole revocation hearings are conducted before a minimum of one member of the Board. At the final hearing, the parolee is entitled to discover the evidence of the parole violation, to appear and answer the charges, and to introduce witnesses and other evidence. The parolee has the right to confront and cross-examine adverse witnesses, unless the Board member conducting the hearing "specifically finds good cause for not allowing confrontation." The parolee has a right to be represented by counsel. If the Board finds that the parolee has committed a parole violation, it may (1) revoke parole and reincarcerate the parolee; (2) continue the parolee on parole but with enlarged parole conditions; (3) continue the parolee on parole with no additional conditions; or (4) parole the parolee to a halfway house.

In practice, the parole revocation process in Illinois falls well
short of the Board’s regulations, the applicable statutes, and Morrissey’s due process requirements. For many years the Board has followed an inflexible policy of jailing, without bail, every person accused of a parole violation. The Board has also tolerated long delays in holding preliminary and final parole revocation hearings. The revocation hearings have atrophied into little more than a ritualized exchange between the Board and the parolee. The results of the hearings are all but predetermined: hearings last less than ten minutes; parolees are unrepresented; they do not have access to adverse evidence before the hearing; and witnesses are rarely called to testify. In almost eighty percent of the cases, the Board finds a violation and orders reimprisonment of the parolee. 86

B. The Initiation of the Parole Revocation Process and Bail Eligibility

When a parolee is arrested on a new criminal charge, there is usually a time lapse between the parolee’s arrest and the point at which the parole officer is informed of the arrest. During this period, the parolee is treated like every other arrestee. The parolee is booked and taken to court for a Gerstein 87 hearing, where bond is set.

1. The Extinguishment of the Parolee’s Bail Rights

Once the parole officer is informed that the parolee has been arrested, the parole officer initiates the revocation process by filing a parole violation warrant. 88 Under Illinois law, the execution of a parole violation warrant extinguishes the parolee’s right to be released on bail. 89 If the parolee has already posted bond, the parolee is re-arrested. If bond has not been posted, the parolee is held

87. In Gerstein v. Pugh, the Supreme Court held that a suspect taken into custody in a warrantless arrest is entitled to a prompt hearing by an impartial magistrate to determine whether there is probable cause to detain him. 420 U.S. 103, 113-14 (1975).
89. See Kotsos, 368 N.E.2d at 905; see also Johnson v. United States Parole Comm’n, 696 F. Supp. 395, 398 (N.D. Ill. 1988) (holding that a parolee has no constitutional right to release or bail before a revocation hearing); People ex rel. Johnson v. Pate, 265 N.E.2d 144 (Ill. 1970) (pre-Morrissey decision in which a parolee who was retaken in the status of a convicted prisoner under authority of a lawful conviction and sentence that remained unserved was not entitled to bail on a warden’s warrant). It is noteworthy, however, that the Kotsos court upheld the practice of denying bail to accused parole violators against an equal protection challenge and did not uphold the practice against due process challenge. Kotsos, 368 N.E.2d at 908.
as a "no bond" detainee until disposition of the new criminal charge or until release of the parole warrant.

When the Board issues a parole violation warrant, with virtually no information about the new charges or the parolee’s personal circumstances, the judge’s bond determination is effectively overruled. Until recently, every parolee was detained without bail until a final revocation hearing, regardless of the nature of the new alleged offense or the timing of the final revocation hearing.

This practice was challenged in Faheem-El v. Klinic. In Faheem, the district court held that the State violated the Eighth Amendment’s prohibition against “unreasonable and excessive bail” and the Due Process Clause when it denied bail to all parolees awaiting a final parole revocation hearing without making a particularized determination of the need to imprison the parolee. The district court also concluded that the State violated the Equal Protection Clause when it denied all parolees bail, while giving probationers an opportunity for release on bail.

The Seventh Circuit, sitting en banc, rejected the district court’s analysis under the Eighth Amendment and the Equal Protection Clause. The court cautioned, however, that the State’s blanket denial of bail deprived parolees of a valuable liberty interest and that this policy carried a substantial risk of erroneous deprivation of liberty. The court remanded the case to the district court to determine, under Mathews v. Eldridge, whether the cost to the

90. When a parolee is charged with a new criminal offense, bail is set on that charge. Ill. Rev. Stat. ch. 38, paras. 110-1 to 110-18 (1991). Generally, the judge who sets the bond is aware of the parolee’s criminal history and of his parolee status. The judge sets bond on the basis of the seriousness of the offense, the likelihood of flight, the amount of cash necessary to ensure the parolee’s presence at trial, and the need to protect society. Para. 110-5(a). Presumably this decision provides a significant measure of protection to society as well as to the parolee.

91. 620 F. Supp. 1308, 1314 (N.D. Ill. 1985), modified, 814 F.2d 461 (7th Cir. 1987), and rev’d, 841 F.2d 712 (7th Cir. 1988) (en banc). Mr. Peters was lead counsel in the Faheem litigation, and Mr. Bamonte assisted during several portions of the case.

92. Id. at 1317-18.

93. Id. at 1322. Another district court in United States ex rel. Taylor v. Brierton, 458 F. Supp. 1171, 1174 (N.D.Ill. 1978), reached the opposite conclusion on this equal protection issue.

94. 841 F.2d 712, 719 (7th Cir. 1988).

95. Id. at 726.

96. 424 U.S. 319 (1976). In Mathews, the Court developed a three prong test to determine whether certain administrative procedures violated due process. Id. at 335. First, a court should consider the private interest that would be affected by the official action. Id. Next, the court should measure the risk of erroneous deprivation of the interest considering the procedure used and any procedural safeguards relied upon. Id. Finally, the court should consider the government’s interest in employing that procedure as
State of holding bail eligibility hearings outweighed the parolees' liberty interest.  

2. The *Faheem* Consent Decree

After remand, but before a decision on the merits was reached in the district court, the parties to the *Faheem* litigation settled the case. They agreed on a procedure which guarantees Illinois parolees an opportunity for release from jail while the parole violation charge is pending. Under this procedure, the hearing officer first conducts the preliminary parole revocation hearing. If probable cause is found or if the hearing officer takes the case under advisement, the parolee may ask the hearing officer to recommend withdrawal of the parole violation warrant.

At this point, the alleged violation is no longer the principal issue. The question is whether the parolee will abide by parole conditions pending the final revocation hearing. The parolee can present evidence about his family situation, employment prospects, prior history on parole and any other information which, in the parolee's eyes, proves that he is a good risk to comply with the parole terms.

The hearing officer must weigh the mitigating circumstances presented by the parolee against the nature of the alleged violation and any aggravating circumstances. Next, the officer must make a recommendation to the Board. The Board reviews this recommendation, and within ten business days, decides whether to lift

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well as the fiscal and administrative burden that additional procedural requirements would cost. *Id.*

97. *Faheem-El*, 841 F.2d at 726-27. Parolees should be constitutionally entitled to a conditional right to bail pending a final parole revocation hearing. The cost of holding a conditional release hearing for parolees charged with a parole violation would be minimal, especially if this hearing was merged with the bail hearing on the criminal charge underlying the parole revocation proceeding.


99. *Faheem consent decree, infra* app. A. This procedure, which has not been widely publicized, requires parolees and their counsel to take the initiative. It is a useful procedure to invoke when the parolee can assist directly in the preparation of his defense, the new offense is minor, the parolee poses no bona fide threat to society, or detention will severely damage family and employment relationships. Given the overcrowding in Illinois prisons, a resourceful attorney or parolee who makes a solid showing of suitability for conditional release may find the Board a receptive audience.

100. *Faheem consent decree, infra* app. A.

101. *Id.*

102. *Id.*

103. *Id.*
the parole violation warrant.\textsuperscript{104} If the Board orders the parole violation warrant to be withdrawn, the parolee is eligible to obtain release pending trial or a final parole revocation hearing by posting bond in the criminal case.\textsuperscript{105}

\textbf{C. The Relevant Policy Considerations Against the Reincarceration of Every Alleged Parole Violator}

Regardless of the bail rights of parolees or the \textit{Faheem} procedures, the Board need not and should not detain every accused parole violator while a final revocation hearing is pending.\textsuperscript{106} Practical considerations, such as the current level of prison overcrowding and the high cost of imprisonment, should influence the Board's policy. The Board would significantly reduce its workload by screening cases before issuing parole violation warrants.\textsuperscript{107}

By executing parole violation warrants, the Board is required to hold timely parole revocation hearings. This increases the Board's workload without providing any greater protection to society than the judge's bond order already provides.\textsuperscript{108} Moreover, when revocation hearings are held, the parolee is entitled to confront and cross-examine witnesses and review documents.\textsuperscript{109} Only the Board's ignorance or intransigence can explain its unflinching allegiance to a policy that has so many problems and no apparent benefits.

Board members are sensitive to the significant risk of political fallout that may occur when a parolee is charged with a new offense. The Board can avoid the occasional glare of bad publicity by issuing a warrant in every case and detaining every parolee. However, local jails are already overburdened and some, like in

\textsuperscript{104} Id.

\textsuperscript{105} The parole violation warrant is the instrument that extinguishes the parolee's right to release on bail. Once the warrant is withdrawn, the parolee may post the bond set for the new criminal charge and secure release.

\textsuperscript{106} Some states allow parolees to be released on bail pending a final revocation hearing. See, e.g., GA. CODE ANN. § 17-10-1 (Michie 1992); S.C. CODE ANN. § 24-21-680 (Law. Co-op. 1992); see also 18 U.S.C. § 4213 (parolees can be summoned to appear at preliminary or final revocation hearing rather than incarcerated).

\textsuperscript{107} Instead of routinely issuing parole violation warrants upon the arrest of every parolee, the Board and the Department should conduct at least a summary review of the relevant facts and circumstances. Some bonds are so high that the parolee is highly unlikely to have the funds necessary to secure his release. No purpose is served by filing parole violation warrants in these cases because the parolee will not be released anyway.

\textsuperscript{108} See Moody v. Daggett, 429 U.S. 78, 85-87 (1976) (holding that “parole custody” triggers the right to a prompt \textit{Morrissey} hearing). As long as the parolee is in custody because of the bond on the new criminal charges, he is not in parole custody.

\textsuperscript{109} \textit{Morrissey}, 408 U.S. at 489.
Cook County, are under court order to reduce overcrowding. Despite the system overload, the Board may easily and indiscriminately issue parole warrants because it does not pay the local jail bills. Those bills, however, must be paid by someone.

Instead of unilaterally issuing warrants for every alleged parole violation, the Board should issue them only in cases of violent crimes. As for other alleged parole violations, the bond assessment in the new criminal case provides adequate societal protection without unnecessarily increasing jail expenses.

D. The Preliminary Parole Revocation Hearing

1. The State’s Systematic Denial of Preliminary Parole Revocation Hearings

The “grievous loss” of liberty inflicted on a parolee begins as soon as the parolee is detained for a suspected parole violation. Because reimprisonment strains or severs whatever family and employment ties the parolee has established while on parole, the greatest loss occurs immediately following execution of the parole violation warrant. These considerations prompted the Supreme Court in Morrissey to hold that the preliminary parole revocation hearing must be held “as promptly as convenient after arrest.”

The Board’s regulations, promulgated shortly after the Morrissey decision, require preliminary parole revocation hearings to be held within ten days of the apprehension of the parolee. In practice, however, the State routinely detained parolees for weeks or months without parole revocation hearings until the parolee’s new criminal case was resolved. This, of course, meant lengthy de-

110. See Lane v. Sklodowski, 454 N.E. 2d 322 (Ill. 1983). “To the extent that Illinois prisons become so overcrowded that they violate the 8th Amendment’s prohibition against the infliction of cruel and unusual punishment, such concerns may . . . become a matter for the judiciary.” Id. at 325.

111. Presumably, if the State believed that the parolee’s release on bond was unwarranted, it could petition the trial court for an increase in the amount of the bond, tighter bail conditions, or even no bail at all. See ILL. REV. STAT. ch. 38, paras. 110-1 to 110-18 (1991).

112. Morrissey, 408 U.S. at 485.

113. Id. at 482.

114. Id. at 485.


116. See Kotsos, 368 N.E. 2d at 908-09 (holding that if the parole violation warrant is “used solely for the purpose of detaining persons without bail prior to trial, it contravenes the spirit of our constitution”). The Board’s practice of denying parolees revocation hearings until after trial on the underlying criminal charge was in blatant disregard of the Kotsos decision. The Kotsos court described the Board’s denial of prompt preliminary revocation hearings as an “abdication of its duties” that amounted to unlawful “preven-
lays and countless unnecessary and costly days of imprisonment.

2. The Pinzon Consent Decree

In Pinzon v. Lane, a class of parolees challenged the excessive delays of preliminary parole revocation hearings in Cook County. Since the evidence of systematic delays was undisputed, the district court entered a preliminary injunction ordering the State to hold preliminary parole revocation hearings within ten days of a parolee's arrest.

The Department and the Board subsequently entered into a consent decree. Under the consent decree, a parolee is entitled to a preliminary parole revocation hearing within ten business days of arrest on a parole violation warrant. Exceptions to the ten-day requirement include cases where:

a) the parolee waives the preliminary revocation hearing;

b) the parolee requests a continuance;

c) a court has found probable cause at a preliminary hearing in the criminal case pursuant to Ill. Rev. Stat., ch. 38, para. 109-

tive detention." Id. The State's practice no doubt stemmed from fear that its losses at the parole revocation stage would collaterally estop it from relitigating the new charge at a later trial. See People v. Kondo, 366 N.E.2d 990, 992-93 (Ill. App. Ct. 5th Dist. 1977). The State also sought to avoid the administrative expense of preliminary revocation hearings. Id.

117. Butler v. Lane, No. 87 C 4542 (N.D. Ill. Oct. 21, 1988) (order entering consent decree) (hereinafter Pinzon consent decree). The text of the Pinzon consent decree is reproduced in infra app. B.

118. Pinzon v. Lane, 675 F. Supp. 429 (N.D. Ill. 1987). The authors were co-counsel in the Pinzon litigation.

119. Id. at 429-30.

120. Id. at 431. The plaintiffs presented evidence that parole revocation hearings were delayed by as much as two years. Id. The court commented that "[w]ithout question that course of conduct on defendants' part flouts Morrissey." Id.

121. Id. at 435-36. The court ordered the Board to comply with its own regulation. Id. at 435. The ten-day time limit would be subject to a delay of up to 14 days if the state needed more time to obtain evidence or produce witnesses. Id.; see also ILL. ADMIN. CODE tit. 20, § 1610.140(b)(3) (1992).

122. See supra note 117.

123. Pinzon consent decree, infra app. B.

124. Id. Rarely, if ever, should a parolee waive the preliminary parole revocation hearing. Since the parolee is in custody once the parole violation warrant is issued, the preliminary revocation hearing is his first chance to regain his liberty. A waiver usually causes months of continued incarceration. If the parolee wins at the hearing, the parole violation warrant is lifted. Parolees facing new criminal charges can then post the bond set in the criminal case and be released. Parolees held on technical violations who win at their Morrissey preliminary hearing must be released.

125. Id. A delay may be necessary because the parolee has not retained counsel, talked to appointed counsel, or had enough time to notify his witnesses or assemble evidence.
d) the parolee has been convicted of a new criminal offense; 

e) the parolee is unavailable due to physical or mental health reasons;  

f) the hearing officer determines that additional time is needed to obtain evidence or to ensure the attendance of witnesses, or the hearing officer continues for other good cause shown.  

The scope of the Pinzon consent decree is limited to Cook County, but the legal principles embodied in the decree are equally valid throughout the state. Defense attorneys can probably challenge the same systematic delays in other parts of Illinois.

**E. Strategic Considerations in Preliminary Parole Revocation Hearings**

A parolee is prejudiced when his preliminary revocation hearing is delayed or denied; therefore, attorneys must act promptly to

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126. *Id.* It is reasonable to rely on the finding of probable cause in the criminal case because the procedural rights at the criminal case preliminary hearing are at least co-extensive with a parolee’s due process rights at the preliminary parole revocation hearing. In Cook County, however, most criminal case preliminary hearings are held more than 10 business days after arrest, making a preliminary parole revocation hearing necessary. Additionally, there may be circumstances in which a parolee should receive a preliminary parole revocation hearing even though a finding of probable cause was entered in the criminal case preliminary hearing. For example, if a key witness is unable to attend the criminal case preliminary hearing, a parolee should be allowed to demonstrate that this witness’ testimony is so favorable that it outweighs the prior finding of probable cause.

127. *Id.* A parolee who has been convicted after a criminal trial has no right to a preliminary parole revocation hearing. *Morrissey,* 408 U.S. at 490; see also ILL. REV. STAT. ch. 38, para. 1003-3-9(c) (1991). The constitutional and procedural rights afforded at trials, including the standard of proof, are substantially greater than those available to parolees at any stage of the parole revocation process.

128. Pinzon consent decree, infra app. B. Hospitalization is not necessary. As long as either the parolee or the hearing officer is convinced that a medical disability prevents the parolee from proceeding, the preliminary parole revocation hearing can be continued. Note, however, that the defense of insanity is not available in revocation proceedings. *See People v. Allegri,* 487 N.E.2d 606, 608-09 (Ill. 1985). It is unclear what impact *Allegri* has on earlier decisions such as *People v. Davis,* 468 N.E.2d 172, 180-81 (Ill. App. Ct. 2d Dist. 1984), which held that those faced with a revocation proceeding are entitled to a competency hearing when their fitness to stand trial is in question. *See also People v. Cooper,* 497 N.E.2d 157, 160 (Ill. App. Ct. 3d Dist. 1986) (holding that the intoxication defense is inapplicable in revocation proceeding).

129. Pinzon consent decree, infra app. B. Even if the parolee objects, this provision allows the preliminary hearing officer to continue the hearing, but the hearing officer must make a written record of the reason for the delay and the continuance cannot exceed 14 days. *Id.*

130. *Id.*

131. In *People v. DeWitt,* 397 N.E.2d 1385 (Ill. 1979), the court held that a probationer accused of only a “technical” violation is not entitled to full “criminal case” discovery pursuant to ILL. REV. STAT. ch. 110A, paras. 411-412 (1991). *Id.* at 1387.
limit any delays. Prior to the hearing, the attorney should carefully interview the parolee and any potential witnesses, as well as obtain any documentary evidence. The parolee's attorney should also obtain and bring to the hearing any documents that relate to the parolee's health or family situation or that may establish a defense to the new charge. Since these documents are seldom in the hearing officer's file, the attorney should contact the hearing officer before the hearing if he or she wants to call any witnesses or review Board documents.

A parolee will want a prompt preliminary hearing in order to terminate the parole revocation process before the parolee is convicted of a new criminal offense. Under Illinois law, time spent in jail pursuant to a parole violation warrant is credited against the remaining parole term unless the parolee is convicted of the new criminal offense before his parole is revoked. While in jail, the alleged parole violator in Illinois earns one additional day of credit against his parole term for each day served. This doubles the rate at which the parolee is serving his parole term: ordinarily parolees get only one day of credit for each day served on parole. It usually takes three months or more to complete the revocation process.

Applying the two-day credit for each day served rule, a parolee with six months left on the parole term will serve his parole term in three months, about the same time the revocation process ends.

132. Courts are reluctant to intervene, however, even if the delay of the preliminary revocation hearing is substantial. See Jenkins, 673 F. Supp. 928, 928 (N.D. Ill. 1987) (upholding a one-month delay); Trotter v. Klinca, 566 F. Supp. 1059, 1065 (N.D. Ill. 1983), aff'd, 748 F.2d 1177 (7th Cir. 1984) (upholding a three-month delay).

133. If the hearing officer determines that probable cause exists that the parolee committed a parole violation, counsel should also prepare to show the parolee's suitability for conditional release pending a final hearing pursuant to the Faheem consent decree. See supra notes 98-105 and accompanying text.

134. The only sure way to determine the time and location of the hearing is to contact the Board's Springfield office, which normally provides any information the parolee's counsel may need.

135. ILL. REV. STAT. ch. 38, para. 1003-3-9(a)(3)(ii) (1991). If convicted before the final revocation hearing, the time is credited against the new sentence pursuant to ILL. REV. STAT. ch. 38, para. 1003-3-9(e). See, e.g., People ex rel. Gibson v. Cannon, 357 N.E.2d 1180, 1184 (Ill. 1976) (holding that the sentence for an offense committed while a parolee was on parole does not have to run consecutively to sentence underlying parole); see also People v. Akers, 484 N.E.2d 1160, 1164 (Ill. App. Ct. 2d Dist. 1985) (holding that in accepting a guilty plea from a parolee awaiting parole revocation hearing, the court must inform the parolee of the possibility that new sentences will run consecutively to the sentence that the parolee must serve if parole is revoked).


138. Under these circumstances, even revocation of parole turns into a benefit. Pa-
Since there is no parole term left to serve, the parole violation warrant that previously held the parolee without bond must be lifted. The parolee can then post the bond set on the pending criminal case and secure release.\textsuperscript{139}

Because they can be returned to prison to serve out the balance of their sentence,\textsuperscript{140} parolees with long unserved parole terms have a more difficult tactical decision to make. For a parolee subject to an indeterminate sentence, a parole violation could mean a very lengthy return to prison.\textsuperscript{141}

For a parolee serving an indeterminate sentence, the key consideration is the strength of the new criminal case. A prosecutor who has a weak criminal case can use the lower burden of proof and the relaxed rules of evidence in a parole revocation proceeding to secure a lengthy reincarceration. By pursuing the parole revocation case rather than the new criminal case, the prosecutor is more likely to win a weak case. Thus, a parolee serving an indeterminate sentence should delay parole revocation proceedings only if the prosecution’s case regarding the new criminal charge is weak.\textsuperscript{142}

On the other hand, a parolee serving a determinate sentence with more than six months left on his parole term should demand a prompt preliminary revocation hearing.\textsuperscript{143} First, the odds of win-

\textsuperscript{139} A parolee who has less than six months to serve on his parole term is in a virtually winning position. By demanding a prompt parole revocation proceeding, the parolee will win the hearing or serve out the remainder of his parole term while the revocation charge is pending. Either way he is eligible for release; he may be released on bond if the new criminal charges are pending or discharged from his sentence if the parole term has expired.

\textsuperscript{140} ILL. REV. STAT. ch. 38, para. 1003-3-9(a)(3) (1991). The Board has options short of reincarceration, including ordering the parolee to continue on parole with or without more restrictive parole conditions or ordering the parolee to a halfway house. ILL. REV. STAT. ch. 38, paras. 1003-3-9(a)(1)-(2) (1991); see also ILL. ADMIN. CODE tit. 20, § 1610.160 (1992). In practice, the Board rarely exercises any option other than reincarceration.

\textsuperscript{141} Indeterminate sentences frequently have maximum terms in excess of 100 years. A parolee subject to an indeterminate sentence may be reincarcerated “for any portion of the imposed maximum term of imprisonment or confinement which had not been served at the time of parole” plus the remainder of the parole term. ILL. REV. STAT. ch. 38, para. 1003-3-9(a)(3)(i)(A) (1991).

However, very few parolees who are subject to indeterminate sentences remain in the system. For the most part, those remaining have been returned to prison on parole violations or have been given early discharge from their parole terms.

\textsuperscript{142} If the parole hearing commences after the new criminal case has concluded, the prosecutor will have to prove guilt beyond a reasonable doubt at trial, subject to the full force of the exclusionary and hearsay rules.

\textsuperscript{143} In this case, the parolee risks being recommitted to prison for the remainder of the parole term plus “up to one year of the sentence imposed by the court which was not
ning the parole hearing are good because the State rarely sends someone to prosecute the revocation charge against the parolee. Second, most parolees who are charged with new criminal violations will lose the criminal case and be returned to prison with a new sentence. By demanding their parole violation hearing, these parolees ensure that they receive credit for time spent in jail against their unserved parole term and against whatever new criminal sentence they receive. Third, parolees are sure to remain in custody since they are not eligible for bail unless the parole warrant is released.

Furthermore, the benefits to any parolee who prevails at a revocation hearing extend beyond the parole context. If it fails to prove the elements of the new charge, the State may be collaterally estopped from relitigating the issue at a later criminal trial.

Finally, all else being equal, a parolee should insist on a prompt preliminary parole revocation hearing because of the new conditional release procedures created by the Faheem consent decree. This procedure is triggered by a preliminary parole revocation hearing and gives the parolee an opportunity to petition the Board for release pending the final revocation hearing by withdrawing the parole violation warrant.

served due to accumulation of good conduct credit.” ILL. REV. STAT. ch. 38, para. 1003-3-9(a)(3)(i)(B) (1991). When the alleged violation is a nonviolent felony or when strong mitigating factors exist, the risk is usually worth taking.

144. Although the burden of proof at the preliminary hearing is only probable cause, that burden rests on the State and is seldom met. In most preliminary revocation hearings no “prosecutor” presents the case against the parolee and the evidence of a parole violation consists only of a police report. Unless the parolee admits the violation or has already been convicted of new criminal charges, the parolee should prevail at the preliminary revocation hearing if no one from the State appears to present the case.

In Illinois, hearing officers have taken the job of presenting the case against the parolee; this function is illegitimate and ill-advised. Hearing officers, after all, act in a quasi-judicial capacity and thus should not both present and judge the case. See ILL. REV. STAT. ch. 38, para. 1003-3-9(c) (1991); infra notes 185-88 and accompanying text.

145. A release of the parole violation warrant results only from a favorable finding at the revocation hearing. Release of the warrant pursuant to the Faheem consent decree’s release suitability hearing or completion of the parole term can result in the release of the parole violation warrant. See supra notes 98-105 and accompanying text.

146. See People v. Bone, 389 N.E.2d 575, 576 (Ill. App. Ct. 4th Dist. 1979); People v. Kondo, 366 N.E.2d 990, 992 (Ill. App. Ct. 5th Dist. 1977). However, if it fails to prove the elements of the new charge at trial, the State is not collaterally estopped from seeking parole revocation on the same charge under the more relaxed proof and evidentiary rules at the parole revocation hearing. But see People v. Grayson, 319 N.E.2d 43, 46 (Ill. 1974) (holding that if the parolee prevails at trial, the State is collaterally estopped from relitigating the same issue at a revocation hearing).

147. See supra notes 99-100 and accompanying text.
F. The Final Revocation Hearing

1. Timing of Final Revocation Hearings

In Morrissey, the Court stated that a delay of 120 days between the preliminary and final revocation hearings was not unreasonable. The Illinois statutes do not fix the exact time for the occurrence of the final revocation hearing. In practice, the delay between the preliminary and final revocation hearings has often been more than 120 days. These delays result from the State’s desire to put off the final revocation hearing until it has disposed of the underlying criminal charge.

Courts are reluctant to order the release of a parolee solely because the State has unduly delayed the final parole revocation hearing, even if the delay has stretched for months. Parolees, however, are not without remedies. They may seek a writ of mandamus ordering the Board to provide a timely final revocation hearing. Furthermore, the Seventh Circuit has signaled that it may be receptive to a class challenge to a system-wide pattern of excessive delays in holding final hearings.

2. Final Revocation Hearings in Illinois Fail to Meet the Morrissey Requirements

For years, final revocation hearings in Illinois have failed to live up to the procedures mandated by Morrissey. Typically, the hearing is before a single member of the Board and lasts a matter of minutes. Parolees are usually unrepresented by counsel. As with...
preliminary revocation hearings, the Board member reads the charges and summarizes the evidence against the parolee. If the parolee has not been tried on the underlying criminal charge, this evidence usually consists solely of the police report of the parolee’s arrest. After presenting this “evidence” against the parolee, the Board member asks the parolee to respond verbally to the charges. Once the parolee responds to the charges and answers any questions, the hearing is terminated and parole is usually revoked.

G. Strategic Considerations in Final Parole Revocation Hearings

The final revocation hearing rarely involves more than four parties: the parolee, his attorney, one Board member, and a prosecutor. Often only two parties are present—the parolee and one Board member. Usually the Board member will introduce himself or herself to the parolee and ask whether the parolee has a copy of the charges. If the parolee does not have a copy, one will be provided, and the parolee and counsel will be given time to review the charges. Once the charges have been read by the parolee and by counsel, the Board member generally reviews the file. If the parolee has not reviewed the Board’s file before the hearing, the Board member

155. See, e.g., Faheem-El, 620 F. Supp. at 1323 (noting that “[w]hen a final hearing is held before trial the Prisoner Review Board as a matter of practice adopts the contents of the police report in every instance, regardless of evidence to the contrary presented by the parolee”). Prosecutors rarely call witnesses or make their witnesses available for cross-examination by the parolee. See id. (noting that at final revocation hearings the Board as a matter of practice “does not take steps to ensure that reporting officers are available for cross-examination”).

156. The Board member who acts as the hearing officer presents a record of the hearing to the other two members of the panel which officially makes the revocation decision. ILL. REV. STAT. ch. 38, para. 1003–3–2(a)(4) (1991). There is no indication that the panel members who do not attend the revocation hearing give much scrutiny to the record of the hearing or to the recommendation by the Board Member who conducted the hearing. The Seventh Circuit has refused to mandate that all three Board Members on a panel attend the revocation hearing. See Newbury v. Prisoner Review Bd., 791 F.2d 81, 87 (7th Cir. 1986).

157. Next, the Board member will ask whether the parolee wishes to proceed with a hearing. When the parolee is not represented by counsel, some Board members will encourage the parolee to waive his right to a hearing. Most final revocation hearings are held without either defense counsel or prosecutor present. Personal observations lead the authors to believe that parolees who proceed without counsel fare very poorly, but there are no records that could identify the relative success rates of represented and unrepresented parolees.

158. This file seldom includes more than a summary arrest report relating to the new criminal charges, the charges themselves, and the parole agent’s summary of the charges. Witness statements, lab reports, and detailed descriptions of the pending criminal charges are not generally included in the Board member’s hearing file.
will allow the parolee or his counsel to view the police reports. Next, the Board member reads the relevant police reports aloud and asks the parolee for his response. At this point, the parolee or counsel should demand strict proof of the allegations contained in the police report. Because prosecutors rarely participate in final revocation hearings, no one is present to produce evidence of the alleged violation. By demanding proof, the parolee asserts his right, under *Morrissey*, to confront and cross-examine his accusers.

If a parolee refuses to respond to the Board's questions, the result of the refusal is uncertain. Assertion of the privilege against self-incrimination cannot be used against a defendant in a criminal proceeding. Although the Supreme Court has not definitively ruled on the issue, it is clear that a parolee does not have the same rights as a defendant in a criminal trial. Thus, it is possible that if a parolee asserts the Fifth Amendment privilege against self-incrimination in a parole revocation proceeding, his silence could be used as a basis for revoking parole.

159. When the file includes Department of Corrections reports predating the alleged violation, the Board member will limit disclosure to the documents relating to the violation and will not allow the parolee, or counsel, to see the Department's reports.

160. Most unrepresented parolees make the mistake of responding to this question. A denial or an admission with an explanation is usually offered. Either response dooms the parolee because the answers are commonly used as the factual basis for revoking parole.

161. *Morrissey*, 408 U.S. at 489. Hearsay evidence, however, is generally admitted at parole revocations hearings. See Egenstaffer v. Israel, 726 F.2d 1231, 1234 (7th Cir. 1984) (“[T]he use of hearsay as substantive evidence at a revocation hearing is not per se unconstitutional.”); Prellwitz v. Berg, 578 F.2d 190, 192 (7th Cir. 1978) (“Thus, in parole and probation revocation hearings, the process should be flexible enough to consider evidence . . . that would not be admissible in an adversary criminal trial.”).


163. See Griffin v. California, 380 U.S. 609, 615 (1965) (holding that any comment by the prosecutor on a criminal defendant's silence is unconstitutional).

164. Baxter v. Palmigiano, 425 U.S. 308, 316 (1976). Since parole revocation proceedings are not criminal trials, the full panoply of constitutional rights applicable at a criminal trial are not guaranteed to parolees. *Morrissey*, 408 U.S. at 480. For example, the exclusionary rule does not apply to parole revocation proceedings. For the most part, the exclusionary rule is limited to criminal trial proceedings. Mapp v. Ohio, 367 U.S. 643, 657-60 (1961). Since the evidence in criminal cases is putatively reliable, courts seldom apply the exclusionary rule to civil or quasi-criminal proceedings. See, e.g., United States v. Winsett, 518 F.2d 51, 54 (9th Cir. 1975) (refusing to apply the exclusionary rule in a parole revocation hearing); United States v. Farmer, 512 F.2d 160, 163 (6th Cir. 1975) (concluding that the exclusionary rule is inapplicable in a parole revocation hearing).
The closest Supreme Court case on this issue is Baxter v. Palmigiano.\textsuperscript{165} In Baxter, the plaintiffs were a class of prison inmates who had been subjected to punishment for violations of various prison rules.\textsuperscript{166} They had had prison disciplinary hearings at which they asserted their right to remain silent.\textsuperscript{167} The Court explained that the plaintiffs in Baxter had the right to assert a Fifth Amendment privilege, provided there was a valid fear that their answers could incriminate them in subsequent criminal proceedings.\textsuperscript{168}

Although the prison administrators could consider an inmate's assertion of the privilege against self-incrimination as some evidence of guilt, substantial evidence was required to find a violation of prison rules.\textsuperscript{169} "[T]hus it [was] undisputed that an inmate's silence in and of itself [was] insufficient to support an adverse decision by the Disciplinary Board."\textsuperscript{170} After Baxter, a prisoner's invocation of the Fifth Amendment privilege may give rise to an adverse inference, but the inference alone is not substantial evidence of a violation.\textsuperscript{171}

Parolees should receive at least as much Fifth Amendment protection as inmates facing prison disciplinary hearings.\textsuperscript{172} An adverse inference may be drawn when a parolee refuses to answer the Board's questions or the questions of the prosecution. If the State can support the adverse inference with other reliable evidence, the

\begin{itemize}
  \item 165. 425 U.S. 308 (1976).
  \item 166. Id. at 310.
  \item 167. Id. at 312-13.
  \item 168. Id. at 318.
  \item 169. Id. at 317.
  \item 171. In reaching its conclusion, the Court examined Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Wolff v. McDonnell, 418 U.S. 539 (1974). In Wolff, the Court held that revocation of good time credits in a prison disciplinary proceeding required fewer procedural due process protections than those accorded parolees in revocation hearings. Wolff, 418 U.S. at 560. Those protections include (a) a written notice of the charges, (b) a written statement of the evidence relied upon and reasons for the disciplinary committee's decision, and (c) an opportunity to call witnesses and present documentary evidence. Id. at 559. The Court further held that inmates do not have the right to confront and cross-examine their accusers. Id. at 568-69. In addition, the Court did not find a constitutional right to counsel at prison disciplinary hearings. Id. at 570. Inmates, however, are not afforded the same procedural protections as those set out in Morrissey because they do not have the same liberty interest that parolees and probationers possess. Id. at 560.
  \item 172. Actually, parolees should receive greater Fifth Amendment protection. See Baxter, 425 U.S. at 316-18.
\end{itemize}
Board may have grounds to revoke parole. Reports by police and parole agents, however, do not by themselves bear sufficient indicia of reliability. Therefore, a parolee’s silence coupled with a police report alleging a new criminal offense should not constitute evidence sufficiently reliable to revoke parole.

IV. DEFINING THE SCOPE OF DUE PROCESS RIGHTS AT PAROLE REVOCATION HEARINGS

Defense attorneys need to familiarize themselves with several due process issues that arise at parole revocation hearings: (1) the applicable burden of proof; (2) the provision of a neutral and detached hearing officer; (3) the scope of confrontation and cross-examination rights; and (4) the admissibility of hearsay evidence. In addition, defense attorneys need to be aware of the consent decree in Downie v. Klincar, which defines the scope of parolee due process rights in revocation hearings.

A. The Burden of Proof in Parole Revocation Hearings

Although seemingly basic to an orderly parole revocation procedure, the burden of proof is neither defined nor allocated by the Illinois statute or by the Board’s rules. If the burden of going forward is on the parolee, he will have to produce exculpatory evidence before having an opportunity to test the State’s case. If the burden of production is on the prosecutor and the prosecutor fails to produce evidence of a parole violation, the parolee can stand mute and still win.

Until recently, Illinois parolees were forced to bear both the burden of production and the ultimate burden of persuasion. At final revocation hearings, the presiding Board member read the charges to the parolee and asked the parolee to prove why he was innocent or, if guilty of a parole violation, why reimprisonment was not warranted.

The Board’s practice was contrary to the established law of other jurisdictions. The party who initiates a proceeding or

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175. This practice was challenged in Downie v. Klincar, 759 F. Supp. 425 (N.D. Ill. 1991).
176. Of course, in many cases the final revocation hearing was delayed by the Board until after disposition of the new criminal charge, making the finding of a parole violation a fait accompli. See supra notes 116, 148-51 and accompanying text.
177. See United States ex rel. Bey v. Connecticut Bd. of Parole, 443 F.2d 1079, 1086
seeks a change in the status quo generally has the burden of proof.\textsuperscript{178} The “customary common law rule that the moving party has the burden of proof—including not only the burden of going forward but also the burden of persuasion—is generally observed in administrative hearings.”\textsuperscript{179} When loss of liberty is at stake, our constitutional and judicial traditions demand proof by the party seeking to restrict liberty, not by the party whose liberty is threatened.\textsuperscript{180}

In Illinois, as in most other jurisdictions, the burden of proof at probation revocation proceedings, including the initial burden of production, is on the State.\textsuperscript{181} Since probation and parole revocation proceedings implicate the same conditional liberty interest, for which the Supreme Court has prescribed similar due process guarantees, the burden of proof at parole revocation hearings should similarly be on the State, not on the parolee.\textsuperscript{182}

There is more agreement about the quantity of evidence required of the prosecution to satisfy its burden of persuasion when establishing a parole violation. The standard most often applied in parole revocation hearings is preponderance of the evidence.\textsuperscript{183} This standard is consistent with the informal nature of the hearings. Moreover, the State must prove its case at probation revocation hearings by a preponderance of the evidence, and there is no reason\textsuperscript{184}.

\footnotesize{(2d Cir. 1971), vacated as moot, 404 U.S. 879 (1971); Rastelli v. Warden, Metropolitan Correctional Ctr., 610 F. Supp. 961, 973 (S.D.N.Y. 1985); see also PROBATION AND PAROLE, supra note 13, § 14.08, at 633 (“[I]t is agreed that the government shoulders both the burden of producing sufficient evidence of the violation . . . and the burden of persuading the decisionmaker that the alleged violation occurred.”).

178. See, e.g., Administrative Procedure Act § 7(c), 5 U.S.C.A. § 556(A) (1972); CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE 1023 (3d ed. 1984) [hereinafter MCCORMICK].

179. MCCORMICK, supra note 178, at 1023.

180. See Mullaney v. Wilbur, 421 U.S. 684, 699-700 (1975) (citing In re Winship, 397 U.S. 358, 364 (1970)). Placing the burden of going forward on the parolee is “tamount to creating a presumption of [a] violation.” Merritt, supra note 37, at 910. Furthermore, “[t]here is nothing explicit in the Morrissey and Gagnon opinions, or in the inherent nature of the parole revocation process, which would suggest a divergence from the traditional burden requirements.” Id. at 907.

181. ILL. REV. STAT. ch. 38, para. 1005-6-4(c) (1991); see, e.g., People v. Crowell, 292 N.E. 2d 721, 723 (Ill. 1973) (holding that the State has the burden of going forward with the evidence and proving the violation by a preponderance of the evidence).

182. See People v. Isringhaus, 347 N.E.2d 834, 836 (Ill. App. Ct. 5th Dist. 1976) (stating that a parolee has “essentially the same” due process rights at parole revocation hearing as a probationer has at a probation revocation hearing); Wright v. M.R. Lacy, 664 F. Supp. 1270, 1275 (D. Minn. 1987) (rejecting the State’s argument that a parolee has the burden of proof at a revocation hearing).

183. See PROBATION AND PAROLE, supra note 13, § 14.08, at 632 (citing People v. Wadelton, 402 N.E.2d 932 (Ill. App. Ct. 3d Dist. 1980)).}
to apply a different standard for parole revocation proceeding.\footnote{184}

\textbf{B. Securing a Neutral and Detached Hearing Officer}

The hearing officer at a parole revocation hearing must be "neutral and detached."\footnote{185} However, the general practice in Illinois has been for the Board member to present the evidence against the parolee, usually by reading from the police report describing the parolee's arrest on a new criminal charge. After the parolee responds to the charge, usually by an unsupported oral denial of wrongdoing, the same Board member rules on the existence of a parole violation.

Having a hearing officer function simultaneously as the prosecutor and the judge is contrary to the "neutral arbiter" requirement mandated by \textit{Morrissey}.\footnote{186} To comply with \textit{Morrissey} and to revitalize revocation hearings, the functions of presenting the case against the parolee and ruling on the parole violation charge should be split between the presiding Board Member and a prosecutor who presents the State's case.

The best candidate to present the State's case against an alleged parole violator is the prosecutor assigned to the new criminal case. The prosecutor is suited, by training and by knowledge of the underlying criminal charge, to present the case against the parolee. Unlike the Board member, who must rule on the merits of the revocation case, or the parole officer, who must act as the parolee's watchdog and counselor, the prosecutor does not have divided allegiances.\footnote{187} Prosecutors are also best suited to make strategic decisions concerning which, if any, witnesses to call and what evidence to present.\footnote{188}

\footnote{184. See \textsc{Ill. Rev. Stat.} ch. 38, para. 1005-6-4(c) (1991).}
\footnote{185. \textit{Morrissey}, 408 U.S. at 489.}
\footnote{186. See \textit{supra} text accompanying note 44.}
\footnote{187. As \textit{Morrissey} recognized, enlisting parole agents to serve as prosecutors undermines any chance the parole agent has of developing and continuing a relationship of trust with the parolee. \textit{Morrissey}, 408 U.S. at 485-86; see also \textsc{David T. Stanley, Prisoners Among Us: The Problem of Parole} 104-34 (1976) (describing the options available to a parole officer in dealing with a parolee in violation of his parole). Though the massive caseloads currently managed by parole officers in Illinois make it practically impossible for them to have more than cursory contact with most of the parolees under their supervision, these same caseloads argue against imposition of additional duties. Moreover, in those cases involving an alleged technical violation, the parole officer will likely be the State's witness.}
\footnote{188. In the case of alleged technical violations, the case against the parolee could be presented by a designated prosecutor or, more likely, a parole officer other than the one supervising the parolee.}
C. The Parolee's Confrontation and Cross-Examination Rights

1. The Board's Reliance on Police Reports to Revoke Parole

In *Morrissey*, the Court stated, "On request of the parolee, persons who have given adverse information on which the parole revocation is to be based are to be made available for questioning in his presence." Given this directive from the Supreme Court, one would expect to see cross-examination of adverse witnesses by parolees or their counsel at most parole revocation hearings in Illinois.

The opposite has been true. Most Illinois parolees are not represented by counsel at their revocation hearings and either do not know of their confrontation and cross-examination rights or are unable to exercise them effectively. Board members who conduct revocation hearings have also routinely denied parolee requests for an opportunity to cross-examine adverse witnesses.

The Seventh Circuit decision in *McCollum v. Miller* is persuasive precedent for allowing parolees accused of a parole violation an opportunity to confront and cross-examine adverse witnesses. In *McCollum*, a prison disciplinary committee placed the plaintiffs in disciplinary confinement and revoked one plaintiff's good time credits. The committee relied on a written report prepared by an investigator that contained information from confidential informants. Neither the prison investigator nor any of the inmates he interviewed were called to testify.

Judge Posner, writing for a unanimous court, observed that "[t]he report of the investigator is persuasive in its detail, but an investigative report, however vivid and apparently true, is not, as

189. *Morrissey*, 408 U.S. at 487; see also White v. White, 925 F.2d 287, 291 (9th Cir. 1991) (stating that a parolee has the right to confront and cross-examine witnesses).

190. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 316 (1974). It helps assure the "accuracy of the truth-determining process." Chambers v. Mississippi, 410 U.S. 284, 295 (1973); Dutton v. Evans, 400 U.S. 74, 89 (1970). Any policy which lessens the opportunity to confront and cross-examine adverse witnesses calls into question the very "integrity of the fact finding process." Berger v. California, 393 U.S. 314, 315 (1969); see also United States ex rel. Sims v. Siclaff, 563 F.2d 821, 823 (7th Cir. 1977) (denial of opportunity to cross-examine adverse witness denies parolee due process).


192. 695 F.2d 1044 (7th Cir. 1982).

193. *Id.* at 1046.

194. *Id*.

195. *Id.*
the magistrate thought, self-validating." The committee's reliance on the investigator's report carried with it a "significant risk of error" because, for example, not all inmate informants "are telling the truth; some are enacting their own schemes of revenge." The court believed it "perfectly feasible to insist that the Institution Discipline Committee require that its investigative reports be under oath and that the investigator appear in person and be available for cross-examination."

The ordinary parole revocation hearing poses far fewer dangers from confrontation and cross-examination than were present in McCollum. First, the witnesses who will ordinarily be cross-examined are not incarcerated with the parolee, thus reducing the risk of reprisal. Second, confidential informants are rarely the source of the information leading to parole violation charges. Normally, the charges are made by citizens or police officers, the identity of whom the parolee already knows or will soon learn through discovery in the underlying criminal case. Third, prisoners have fewer due process rights than parolees, which means that the McCollum decision applies with even greater force in the parole revocation context.

However, a parolee's right to cross-examine adverse witnesses is not unlimited. For example, when a witness has been previously cross-examined about the same facts, a good case can be made for relying on a transcript of the prior cross-examination at the revocation hearing. What matters is whether the parolee had an ample opportunity in the earlier proceeding to cross-examine the witness about the issues that prompted the parole revocation charge. Nevertheless, if the parolee comes forward with new evidence that contradicts the testimony of a previously cross-examined witness, recalling the witness may be warranted.

2. The Admission of Hearsay Evidence at Parole Revocation Hearings

Until recently, in addition to denying parolees confrontation and...
cross-examination rights, the Board also placed great reliance on hearsay evidence as the basis for revoking parole. In most cases where the parolee had not been tried on the new criminal charge, the only evidence relied upon by the Board was a police report stating that the parolee was arrested and was suspected of committing a crime. Often, the police officer making the report was not even an eyewitness to the alleged crime. The reports were based on the statements of third parties, whose reliability and motives were unknown.

The Board’s reliance on untested police reports as the basis for revoking parole was at odds with Morrissey. Police reports or parole agent summaries of witness statements are not inherently reliable and are thus not an adequate substitute for confrontation and cross-examination at parole revocation hearings.

Police (or parole officer) reports, especially to the extent that they merely reiterate the observations of witnesses, are subject to a host of frailties. Eyewitness mistakes are probably responsible for more miscarriages of justice than any other factor. Witnesses may also have a personal motivation for falsely accusing a parolee. The Fifth Circuit, for example, called the Mississippi Parole Board’s reliance on the potentially self-serving statements of a witness summarized in a police report, “a classic example of when the use of hearsay impermissibly violates a right to confront and cross-examine the declarant.”

At parole revocation hearings, reliable information in police reports and unreliable hearsay must be distinguished and evaluated on a case-by-case basis. The results of scientific tests and rou-
tainly recorded biographical or historical facts have been held to be "inherently reliable."\footnote{206} Admissions by the parolee or live testimony which corroborates otherwise unreliable hearsay in a police report may make the hearsay contents of police reports admissible in a revocation hearing.\footnote{207} However, reliance by hearing officers on uncorroborated allegations by noneyewitnesses is impermissible.\footnote{208}

As the court stated in \textit{Morrissey}, the revocation hearing must be "structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior."\footnote{209} The risk of error is too great to allow blind reliance on police reports to take the place of informed decision-making based on live testimony and cross-examination.

\textbf{D. The Downie Consent Decree} \footnote{210}

In 1991, many of these cross-examination and confrontation issues were resolved by a consent decree entered by Chief Judge Moran in the case of \textit{Downie v. Klincar}.\footnote{211} That consent decree governs the way in which final parole revocation hearings must be conducted in Illinois.\footnote{212} The \textit{Downie} consent decree forced the Board to end its practice of denying parolees their confrontation and cross-examination rights by relying on police reports as the sole evidentiary basis for a parole revocation order. Under the consent decree, the Board may deny a parolee an opportunity to confront adverse witnesses only for "good cause,"\footnote{213} which in this context means that confrontation would result in the disclosure of

\footnote{206. Examples of routinely recorded facts include the date, time, and location of the arrest. \textit{See} Egenstaffer v. Israel, 726 F.2d 1231, 1234 (7th Cir. 1984); Prellwitz v. Berg, 578 F.2d 190, 192 (7th Cir. 1978). The case law of other jurisdictions is surveyed in \textit{Downie} v. Klincar, 759 F. Supp. 425, 427 (N.D. Ill. 1991).}

\footnote{207. \textit{United States} v. McCallum, 677 F.2d 1024, 1026 (4th Cir. 1982); \textit{United States} v. Burkhalter, 588 F.2d 604, 607 (7th Cir. 1978); \textit{see also} \textit{United States} v. Penn, 721 F.2d 762, 765 (11th Cir. 1983) (holding that lab reports and a letter from the parolee's job coordinator should have been admitted because they were demonstratively reliable).}

\footnote{208. \textit{Carson}, 540 F.2d at 1161; \textit{see also} \textit{United States} v. Barnes, 907 F.2d 693, 695 (7th Cir. 1990) (holding that a court cannot rely on hearsay statements of confidential information without affording the parolee the opportunity to cross-examine).}

\footnote{209. 408 U.S. at 484.}

\footnote{210. \textit{Downie} v. Klincar, No. 89 C 2937 (N.D. Ill. July 16, 1991) (order entering the consent decree) \textit{[hereinafter Downie consent decree]}. The text of the \textit{Downie} consent decree is reproduced in \textit{infra} app. C.}

\footnote{211. 759 F. Supp. 425 (N.D. Ill. 1991).}

\footnote{212. \textit{Downie} consent decree, \textit{infra} app. C.}

\footnote{213. \textit{Id.}}
a confidential informant. The Board can revoke parole without any witnesses testifying against the parolee, but only if the documentary or other evidence offered against the parolee bears sufficient indicia of reliability. If no witnesses testify against the parolee and if the other evidence offered against the parolee does not bear sufficient "indicia of reliability," the Board may not revoke parole.

Evidence that is known to carry sufficient "indicia of reliability" cannot be completely catalogued. The Downie consent decree, however, lists some types of evidence that are probably reliable: (1) police reports offered to prove only that an arrest occurred and when and where it occurred; (2) transcripts of prior testimony by witnesses under oath who were subject to cross-examination by the parolee; and (3) lab reports offered to prove the presence of a narcotic substance. An order finding the parolee guilty of a crime while on parole is also sufficiently reliable.

The Downie consent decree also addresses the question of who has the burden of production, and it defines the burden of proof at parole revocation hearings. It provides that the burden of proof at final revocation hearings shall be by a preponderance of the evidence. The decree also provides that the parole revocation charge is not itself evidence of a violation: unless the violation is admitted, the State has the burden of presenting evidence that the parolee committed a parole violation. Pursuant to the consent decree, therefore, in Illinois the State has the burden of coming forward with evidence showing that it is more probable than not that the parolee violated a parole condition.

214. Id.
215. Id.
216. Id.
217. Downie consent decree, infra app. C. The substance of the report, who did what to whom, is not inherently reliable and can no longer be used by the Board to circumvent the parolee's right to confront his accusers.
218. Id. The Board can use such transcripts to deny the parolee an opportunity to confront the person or persons whose testimony is included in the transcript. Typically these transcripts would be of criminal court proceedings involving the parolee's new criminal case; for example, a pretrial motion to suppress evidence or a preliminary hearing.
219. Id.; see also People v. Walker, 517 N.E.2d 679, 681 (Ill. App. Ct. 5th Dist. 1987) (holding that results from a double urinalysis test are admissible in a probation revocation proceeding). Of course, the parolee has the right to challenge the accuracy of particular lab reports. See Downie, 759 F. Supp. at 427 (summarizing case law).
220. Downie consent decree, infra app. C.
221. Id.
222. Id.
E. The Necessity of Explaining the Hearing Officer’s Basis for Evidentiary Rulings

Finally, if confrontation and cross-examination of adverse witnesses is disallowed or limited, or if hearsay is admitted, the Board should provide the reasons for its rulings. As a matter of sound public policy, decisions without explanations are difficult to defend.223 Although Morrissey does not explicitly require that the finding of good cause be stated in the record, such a requirement is consistent with the extensive procedural protections mandated in that decision.224 Moreover, in Gagnon v. Scarpelli,225 the Court held that when a request for legal representation is denied to a probationer accused of a probation violation, “the grounds for refusal should be stated succinctly in the record.”226 The same principle should apply to parole revocation proceedings since the liberty interest involved is substantially the same.

V. CONCLUSION: THE FUTURE OF THE PAROLE REVOCATION PROCESS IN ILLINOIS

For most parolees, the parole revocation process in Illinois has been little more than an empty formality. The purported hearings are untimely and most parolees are unrepresented by counsel. At the same time, inadequate State funding for the parole system reduces the effectiveness of parole as a supervisory tool, makes a mockery of its rehabilitative aspirations, contributes to the summary nature of the revocation process, and guarantees reincarceration if a parole violation is found.227

There have been suggestions that parole, or at least the supervisory aspects of parole that lead to revocation proceedings, be elimi-


224. See 408 U.S. at 489 (calling for confrontation “unless the hearing officer specifically finds good cause for not allowing confrontation”) (emphasis added).


226. Id. at 791; see also Baker v. Wainwright, 527 F.2d 372, 378 (5th Cir. 1976) (holding that a subsequent statement that cross-examination was not allowed because the prisoner was hysterical is insufficient); Lawrence v. Smith, 451 F. Supp. 179, 189 (W.D.N.Y. 1978) (holding that the Board must provide a statement of reasons which would enable a reviewing body to determine whether denial of parole was permissible). But see United States v. Bell, 785 F.2d 640, 643 n.3 (8th Cir. 1986) (stating that an implicit finding of good cause in a court’s overruling of an objection to admissibility of hearsay evidence is sufficient); accord Dawson v. Smith, 719 F.2d 896 (7th Cir. 1983).

227. It is noteworthy that the Board and “its officials” are absolutely immune from damage claims, arguably removing an incentive for the Board to improve the parole revocation process. See Trotter v. Klinkcar, 748 F.2d 1177, 1181 (7th Cir. 1984).
nated. This step is attractive, given a legal and political climate that is inhospitable to improving either the parole revocation process or the parole system as a whole. However, the State, with the support of the bar, may take steps to ameliorate the problems in the process. The recent consent decrees in *Faheem*, *Pinzon*, and *Downie* provide the foundation for a better system. However, without a much more substantial commitment by the bar and the State to revitalizing the parole revocation process, long-term improvement is unlikely.

The current practice calls for several reforms. First, the State should keep better public records. The State’s records contain little more than information regarding the number of parolees who have had revocation hearings and the number who have had their parole revoked. This information needs to be supplemented with data about the charges against the parolee, and the timing and disposition of the various hearings. With such information, improvements might be made to both the parole revocation process and the deployment of limited supervisory and rehabilitation resources.

Second, the State should abolish its practice of incarcerating every arrested parolee without bond pending a final revocation hearing. This practice has a debilitating effect on parolees and is extremely costly to the State. A better approach is for the State to implement a system under which the judge setting bail for a parolee in the underlying criminal case is informed of the accused’s status as a parolee. The judge could then set bail and bail conditions on the basis of both the nature of the new offense and the accused’s status as a parolee. If the parolee were able to post bond, the Board could then issue a summons for the parolee to appear at the parole revocation hearing.

Third, while preserving their informal character, the preliminary and final revocation proceedings should be transformed into true hearings. Although the procedural requirements of the *Downie* consent decree are a major step in the right direction, they are not enough. Before revocation hearings, parolees should receive notice of the charge against them and copies of the evidence that will be used to support the revocation charge. At the hearings, someone other than a Board member, most appropriately the prosecuting state’s attorney, should present the case against the parolee. The

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229. *Cf.* ILL. REV. STAT. ch. 38, para. 1003-3-2(e) (1991) (requiring the Board to keep records of “all of its official actions”).
Parolee must be allowed to present witnesses as well as to confront and cross-examine adverse witnesses. The hearing officer should state on the written record the reasons for all evidentiary rulings, as well as the grounds for the revocation decision.

Finally, there is a need for skillful and dedicated legal advocacy. The stakes are too high, typically months or years of imprisonment, to expect often illiterate parolees to conduct their own defense. Defense counsel should treat the parole revocation process as a significant opportunity to test and rebut the State’s case. The optional nature of reincarceration provides an opportunity for the skilled advocate to differentiate the parolee in the eyes of the Board and to show the appropriateness of continued parole. Furthermore, defense attorneys need to be aware of the due process rights afforded parolees under *Morrissey*. Although courts have been inclined to construe these due process rights narrowly, defense attorneys can still argue for improvements in accord with the due process rights articulated in *Morrissey* and codified in Illinois law.
APPENDIX A

FAHEEM CONSENT DECREE

Plaintiffs filed this action on March 27, 1984, pursuant to 42 U.S.C. Sec. 1983, alleging, among other things, that policies and practices of the Defendants denied Illinois parolees and mandatory supervised releasees (hereinafter parolees) individualized consideration for bail, in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

This Court has jurisdiction over Plaintiffs' claims under 28 U.S.C. Sec[s]. 1331 and 1343.

The Court on December 4, 1984, certified a plaintiff class consisting of all parolees of the Adult Division of the Illinois Department of Corrections who are or will be arrested on new criminal charges and imprisoned pursuant to a parole violation warrant issued and executed by the Defendants.

On October 25, 1985, this Court entered a preliminary injunction order that required Defendants to provide individualized bail consideration for arrested parolees by a judicial officer. That preliminary injunction order was reversed and remanded by the Seventh Circuit Court of Appeals on February 25, 1988.

In order to effect an amicable settlement of this action, the parties having agreed, and this Court having found that the interests of the class will be adequately protected:

IT IS HEREBY ORDERED that Defendants, Lane and Klinkcar, and their successors in office, shall cause procedures to be adopted, within sixty days of the entry of this Consent Decree, which shall reflect the following provisions.

1. Parolees shall be informed, when they receive a notice of charges alleging a parole violation, that they may request the withdrawal of the parole violation warrant pending a final parole revocation hearing, in the event probable cause is found at the preliminary parole revocation hearing.

2. If the hearing officer at a preliminary parole revocation hearing determines that there is probable cause to believe that the parolee has committed acts that constitute a violation of the terms of his parole or mandatory supervised release, the parolee may request that the hearing officer recommend to the Prisoner Review Board the withdrawal of the parole violation warrant pending a final parole revocation hearing.

3. The parolee shall be afforded an opportunity at the preliminary parole revocation hearing to provide reasons why withdrawal
of the parole violation warrant pending the final parole revocation hearing is appropriate.

4. The hearing office [sic] shall transmit a recommendation concerning the withdrawal of the parole violation warrant to the Prisoner Review Board. Within ten business days of the preliminary parole revocation hearing, the Chairman of the Prisoner Review Board, or one member thereof, shall review the hearing officer's recommendation and render a final decision, whether the parole violation warrant should be withdrawn.

5. In determining whether the parole violation warrant should be withdrawn pending a final revocation hearing, the hearing officer and the Chairman of the Prisoner Review Board, or a member thereof, shall consider, among other factors, whether the parolee appears to present a risk of danger to any person or the community, whether it appears likely that the parolee may flee, or such other reasonable factors as the Prisoner Review Board deems appropriate.

6. The Department of Corrections, upon receipt of an order of the Prisoner Review Board to withdraw the parole violation warrant, shall promptly take all action necessary to withdraw the warrant.

7. If the parole violation warrant is withdrawn pending the final parole revocation hearing, the parolee shall remain subject to the conditions of his parole or mandatory supervised release. In addition, the Board may impose additional conditions of parole, or mandatory supervised release, pursuant to ILL. REV. STAT. Ch. 38, Sections 110-10 and 1003-3-7. Nothing in this Agreement shall prevent the Department or Board from issuing or reissuing a parole violation warrant based upon new information or acts constituting a violation of parole conditions.

8. The terms of this decree are applicable to Adult Division parolees charged with the commission of a new criminal offense and detained in a jail or other penal institution in Illinois pursuant to a parole violation warrant issued and executed by the Defendants.

9. On October 25, 1985, this Court entered a summary judgment order with respect to parolees of the Adult Division who are or will be arrested on new criminal charges and imprisoned in Cook County pursuant to a parole violation warrant issued and executed by defendants. This summary judgment order required defendants, inter alia, to provide timely final parole revocation hearings at which the parolee would have the opportunity to call
witnesses and to cross examine adverse witnesses, who have testified or presented evidence against the parolee absent good cause. It is, therefore, agreed with respect to the class defined in paragraph 9, that:

A. At the preliminary parole revocation hearing parolees shall have the opportunity to call witnesses in accordance with *Morrissey v. Brewer*, 92 S.Ct. 2593 (1972).

B. At the preliminary parole revocation hearing parolees shall have the opportunity to confront and cross examine adverse witnesses who have testified or presented evidence against the parolee, unless the hearing officer specifically finds good cause for not allowing confrontation.

C. Parolees shall be provided with a final parole revocation hearing by at least one member of the Prisoner Review Board within 120 days of the parolee’s request for a final hearing.

10. The parties shall attempt to resolve informally any problems concerning compliance with the terms of this decree before bringing alleged violations to the attention of the Court. Isolated or inadvertent failures to comply with the terms of the decree shall not be deemed to be a violation of this Order.

11. This agreement shall not be construed as an admission of liability by the Defendants or their successors, liability having been expressly denied.

12. This agreement is contingent upon judicial approval of a proposed consent decree tendered by the parties in *Butler v. Lane*, #87 C 4542 (N.D. IL).

13. The named Plaintiffs, for themselves, their heirs, executors, administrators and assigns, hereby release and forever discharge the Defendants, the State of Illinois, Illinois Department of Corrections, Illinois Prisoner Review Board, their agents, employees and members in their individual and official capacities, their executors, administrators, successors and assigns, from any and all claims and demands, actions and causes of actions resulting or arising from the subject matter and allegations at issue in this case.
APPENDIX B

*PINZON CONSENT DECREE*

Plaintiffs filed this action on May 19, 1987, pursuant to 42 U.S.C. § 1983, alleging that policies and practices of the defendants denied them timely and meaningful preliminary parole revocation hearings in violation of the Fourteenth Amendment.

This Court has jurisdiction over plaintiffs' claims under 28 U.S.C. §§ 1331 and 1343.

On November 20, 1987 this Court certified a plaintiff class (the "Class") consisting of all parolees and mandatory supervised releasees of the Adult Division of the Illinois Department of Corrections who have been or will be arrested on a new criminal charge in Cook County, Illinois and who are or will be imprisoned in Cook County Jail pending a final parole revocation hearing pursuant to a parole violation warrant issued and executed by the defendants.

On December 23, 1987 this Court entered a preliminary injunction order which required defendants, *inter alia*, to provide preliminary parole revocation hearings to members of the Class within ten calendar days of imprisonment pursuant to a parole violation warrant. By this consent decree ("Decree") that preliminary injunction is vacated upon the adoption of the procedures described below.

In order to effect an amicable settlement of this action, the parties having agreed and this Court having found that the interests of the Class will be adequately protected:

IT IS HEREBY ORDERED that Defendants Lane and Klinicar and their successors in office shall cause procedures to be adopted within sixty days of the entry of this Decree, which shall reflect the following provisions:

1. Within ten business days of the imprisonment of a parolee/releasee pursuant to the execution of a parole violation warrant, hearing officers designated by the Prisoner Review Board pursuant to Ill. Rev. Stat. ch. 38, ¶1003-3-9(c) shall conduct a preliminary parole revocation hearing for that parolee/releasee, except as provided in Paragraph 2.

2. A preliminary parole revocation hearing need not be held within ten business days if:

   a. the parolee/releasee waives the preliminary parole revocation hearing; or
b. the parolee/releasee requests a continuance of the preliminary parole revocation hearing; or

c. a Court has found probable cause on the criminal charge that prompted the parole revocation charge at a preliminary examination conducted pursuant to Ill. Rev. Stat. ch. 38, ¶109-1 et seq.; or

d. the parole revocation charge is based upon a new criminal conviction; or

e. the parolee/releasee is unavailable due to physical or mental health reasons; or

f. the hearing officer continues the preliminary parole revocation hearing for up to fourteen days from the date the preliminary parole revocation hearing was originally scheduled in order to obtain evidence or to ensure the attendance of witnesses, or for other good cause shown.

The hearing officers shall enter on the written record the reason(s) for not holding the preliminary parole revocation hearing within ten business days of the imprisonment of a parolee/releasee pursuant to a parole violation warrant.

3. Prior to the date of the preliminary parole revocation hearing, the parolee/releasee shall be informed that he/she shall be provided with a preliminary parole revocation hearing within 10 business days of imprisonment pursuant to a parole violation warrant, subject to the conditions outlined in Paragraph 2.

4. The terms of this Decree are applicable to Adult Division parolees/releasees charged with the commission of a new criminal offense and detained in a jail or other penal institution in Cook County pursuant to a parole violation warrant issued and executed by the defendants.

5. The parties shall attempt to resolve informally any problems concerning compliance with the terms of this Decree before bringing alleged violations to the attention of this Court. Isolated or inadvertent failures to comply with the terms of the Decree shall not be deemed to be a violation of its requirements.

6. This Decree is conditioned on the judicial approval of a proposed consent decree in Kareem Faheem-El v. Klincar, No. 84 C 2561.

7. This Decree is conditioned on the entry of an order by this Court dismissing with prejudice this action against all defendants.

8. This Decree shall not be construed as an admission of liability by the defendants or their successors, liability having been expressly denied.
9. The named plaintiffs, for themselves, their heirs, executors, administrators and assigns, hereby release and forever discharge the defendants, the Illinois Department of Corrections, the Illinois Prisoner Review Board, and the State of Illinois and their agents, employees and members in their individual and official capacities, their executors, administrators, successors and assigns, from any and all claims and demands, actions and causes of actions resulting or arising from the subject matter and allegations at issue in this case.
This cause coming on to be heard by agreement of the Parties, after due notice, and the Court being duly advised as to the circumstances,

IT IS HEREBY ORDERED:

1. In all final parole revocation hearings, the Prisoner Review Board, and each of its members, shall conduct the final revocation hearings in such a manner that confrontation and cross-examination of adverse witnesses is allowed as described below.

2. Standard of Proof. The standard of proving charges of a violation at a final parole/MSR revocation hearing is a preponderance of the evidence. If the evidence supporting the charged violation as a whole shows that it is more probable than not that the parolee has violated, as charged, then the Board shall so find. In those cases in which the evidence as a whole does not show that it is more probable than not that the parolee has violated, as charged, the Board shall find no violation.

3. Burden of Proof. The charge of a violation, by itself, does not establish evidence of a violation. If the charge is not admitted by the alleged violator, then the charge must be supported by some presentation of evidence sufficient to meet the burden of proof. Except in those cases where a document bears, on its face, constitutionally adequate indicia of reliability or where an additional extrinsic factor enhances the reliability of the documentary evidence, the failure to call witnesses constitutes an absence of sufficient proof. In such a case, the Board shall find that the parolee did not violate as charged.

4. Confrontation. The alleged violator has a right to confront and cross-examine persons who have provided adverse information, whether in a document or by means of live testimony, upon which a charge of violation is based.

   a. If the documentation itself contains a sufficient indicator of reliability, examples of which are listed below, the alleged violator need not be granted the right to confront, in person, the preparer of the documentation or any witness whose statements formed the substance of the documentation and the Board may then find a violation as charged. However, the Board may, in its discretion, allow confrontation even where a document contains a sufficient indicator of reliability.

   b. If the documentary evidence does not contain a suffi-
cient indicator of reliability, the Board may not find that the parolee violated as charged unless the right of confrontation is granted.

c. The Board may deny confrontation for “good cause” as described in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and those cases cited in Judge Moran’s Memorandum and Order dated February 11, 1991. Any finding of “good cause” must be placed on the record and must be consistent with the indicators of reliability described in paragraph 5 below.

5. Indicators of Reliability. Any one of the following factors may be accepted by the Board as an indication that documentary evidence alone may be relied upon to prove the charged violation. These factors are representative examples only and should not be construed as an exhaustive list.

a. The nature of the documentation proves, in itself, a certain geographical or biographical element of the violation or documentation prepared by the parole officer establishing a non-criminal violation of the conditions of parole. Example: (1) An out-of-state arrest report establishes parolee’s whereabouts when absconson is in issue; (2) Parolee is charged with failure to report monthly as ordered, and parole officer specifies the missed month or presents as evidence business records showing missed office visits.

b. The documentation is a transcript of testimony under oath in another setting, where the parolee had the opportunity to cross-examine the witness whose testimony or report is at issue in the revocation proceeding.

c. The documentation is a copy of a signed order or finding of a court of law or other competent tribunal which establishes the parolee’s guilt of the criminal violation, which is the basis of the parole violation.

d. The documentation is a lab report or forensic evidence prepared by a competent scientific source, where the only issue is the subject-matter of the scientific report.

6. The Board may rely upon documentary evidence that contains none of the described indicators of reliability, even absent confrontation, if the documentary evidence is presented in conjunction with some additional extrinsic factor that adequately enhances the reliability of the documentary evidence.

7. Whether an additional extrinsic factor is sufficient to enhance the reliability of the documentary evidence must be determined by the Board on [a] case-by-case basis.
8. A police or parole agent report which summarizes the statements or observations of a citizen (non-police) witness may bear sufficient reliability upon which to find a violation of parole, absent confrontation, if, and only if, some additional extrinsic factor is presented which adequately enhances the reliability of the police or parole agent report. Such a report, standing alone, unenhanced by any additional extrinsic factors, does not bear sufficient indicia of reliability to revoke parole absent confrontation.

9. An eye-witness police report (one that indicates that the officer who prepared the report claims to have seen the alleged violation) may bear sufficient reliability upon which to find a violation of parole, absent confrontation, if, and only if, some additional extrinsic factor is presented which adequately enhances the reliability of the police or parole agent report. Such a report, standing alone, unenhanced by any additional extrinsic factors, does not bear sufficient indicia of reliability to revoke parole absent confrontation.

10. If a Board member determines that confrontation will not be allowed, that Board member must include on the record the specific reasons for not allowing confrontation.

11. This Order shall be applied consistent with the rules and regulations of the Board as found in Ill.Rev.Stat. Ch. 38, par. 1003-3-1 et seq. and Title 20, Ch. IV, Section 1610.140 of the Illinois Administrative Code and is intended to supersede or modify those rules only to the extent that they relate to the issue of confrontation at a final revocation hearing.

12. Defendants hereby agree to pay to plaintiff[s] reasonable costs and attorneys’ fees from monies properly appropriated by the State of Illinois and set aside for such purpose by the Department of Central Management Services.

13. Plaintiffs release and discharge the Board, its members and the State of Illinois from any and all claims for damages resulting from those actions which formed the subject matter of this action. Nothing in this order shall be construed as an admission of liability.