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Gagnon v. Scarpelli

Supreme Court of the United States

January 9, 1973, Argued ; May 14, 1973, Decided

No. 71-1225

Reporter

411 U.S. 778 *; 93 S. Ct. 1756 **; 36 L. Ed. 2d 656 ***; 1973 U.S. LEXIS 70 ****; 71 Ohio Op. 2d 279

GAGNON, WARDEN v. SCARPELLI

Prior History: [****1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Disposition: [454 F.2d 416](#), affirmed in part, reversed in part, and remanded.

Core Terms

probation, parolee, revocation, parole, probationer, cases, revocation hearing, due process, sentenced, rehabilitation, appointed, criminal prosecution, parole revocation, supervision, revoke

Case Summary

Procedural Posture

Respondent inmate filed a petition for habeas corpus relief against petitioner state official after inmate's probation for armed robbery was revoked without a hearing and without benefit of counsel. The district court granted the habeas corpus petition. The state official's request for certiorari was granted after the United States Court of Appeals for the Seventh Circuit affirmed the judgment of the district court.

Overview

The inmate argued that he was entitled to a hearing before revocation of his probation and that he was entitled to representation by appointed counsel at the hearing. Although probation revocation, like parole revocation, was not a stage of criminal prosecution, the court found that it resulted in a loss of liberty. Therefore, a probationer, like a parolee, was entitled to a preliminary hearing to determine whether there was probable cause to believe that there had been a probation violation and a more comprehensive final revocation hearing. Although due process required only an informal hearing before revocation, the court found that the ability of that hearing to protect a probationer's rights depended on the use of skills which the probationer was unlikely to possess. Thus, there were instances where counsel was required. However, given the cost of turning every revocation hearing into a full blown adversarial proceeding, the court adopted a case by case approach to the right to counsel in revocation hearings. The court concluded that the need for counsel at revocation hearings derived from the peculiarities of particular cases.

Outcome

The court affirmed the portion of the judgment that mandated that the inmate was entitled to a hearing before his probation was revoked. The court reversed the portion of the judgment that provided that the state had a constitutional duty to provide counsel for indigents in all probation revocation cases. The court remanded for a determination of whether the inmate was entitled to counsel in this particular case.

LexisNexis® Headnotes

Criminal Law & Procedure > Counsel > Assignment of Counsel

Constitutional Law > ... > Fundamental Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

Criminal Law & Procedure > ... > Probation > Revocation > General Overview

[HN1](#) [📄] **Counsel, Assignment of Counsel**

A probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Counsel is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. Sentencing is one such stage. Counsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding.

Criminal Law & Procedure > ... > Probation > Revocation > Due Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > Preliminary Proceedings > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Entitlement

Criminal Law & Procedure > ... > Probation > Revocation > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Parole

[HN2](#) [📄] **Revocation, Due Process**

Even though the revocation of parole is not a part of the criminal prosecution, the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. A parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.

Criminal Law & Procedure > Counsel > Right to Counsel > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Criminal Law & Procedure > ... > Sentencing Alternatives > Probation > General Overview

Criminal Law & Procedure > ... > Probation > Revocation > General Overview

Criminal Law & Procedure > ... > Probation > Revocation > Proceedings

Criminal Law & Procedure > Postconviction Proceedings > Parole

[HN3](#) [📄] **Counsel, Right to Counsel**

Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty. A probationer, like a parolee, is entitled to a preliminary and a final hearing before probation can be revoked.

officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking probation or parole.

Criminal Law &
Procedure > ... > Probation > Revocation > Due
Process

Constitutional Law > ... > Fundamental
Rights > Criminal Process > Assistance of Counsel

Constitutional Law > ... > Fundamental
Rights > Procedural Due Process > Scope of
Protection

Criminal Law &
Procedure > ... > Probation > Revocation > General
Overview

Criminal Law & Procedure > Preliminary
Proceedings > General Overview

Criminal Law & Procedure > ... > Sentencing
Alternatives > Probation > General Overview

Criminal Law & Procedure > Preliminary
Proceedings > Preliminary Hearings > General
Overview

Criminal Law & Procedure > Postconviction
Proceedings > Parole

Criminal Law & Procedure > ... > Sentencing
Alternatives > Probation > General Overview

Criminal Law &
Procedure > ... > Probation > Revocation > General
Overview

Criminal Law & Procedure > Postconviction
Proceedings > Parole

[HN4](#) **Criminal Process, Assistance of Counsel**

The decision as to the need for counsel at a probation revocation hearing must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness, the touchstone of due process, will require that the state provide at its expense counsel for indigent probationers or parolees.

[HN4](#) **Revocation, Due Process**

At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements: (a) written notice of the claimed violations of probation or parole; (b) disclosure to the probationer or parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing

Criminal Law &
Procedure > ... > Probation > Revocation > Due
Process

Constitutional Law > ... > Fundamental
Rights > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to
Counsel > General Overview

Criminal Law & Procedure > ... > Sentencing
Alternatives > Probation > General Overview

Criminal Law &
Procedure > ... > Probation > Revocation > General
Overview

Criminal Law & Procedure > Postconviction
Proceedings > Parole

[HN6](#) [📄] **Revocation, Due Process**

Considerable discretion must be allowed the responsible agency in making the decision of whether to provide counsel for probationers in revocation hearings. Counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency should consider whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

Lawyers' Edition Display

Summary

After the petitioner had pleaded guilty to a charge of armed robbery in Wisconsin and the trial judge had sentenced him to 15 years' imprisonment, the judge suspended sentence, placed the petitioner on probation for 7 years in the custody of the Wisconsin Department of Public Welfare, and authorized him to reside in Illinois, where, pursuant to an interstate compact, he was accepted for supervision by Illinois probation authorities. Subsequently, he and a companion were arrested in Illinois for a burglary. Several days later, the Wisconsin Department, without affording him either a hearing or counsel, revoked his probation on the grounds that by being involved in and arrested for the burglary, and by

associating with his companion, a known criminal, he had violated his probation. Shortly thereafter, he was incarcerated in a Wisconsin prison to begin serving his 15-year sentence. In habeas corpus proceedings in the United States District Court for the Eastern District of Wisconsin, the petitioner contended that the revocation of his probation without affording him a hearing or counsel was a denial of due process. The District Court agreed with this contention and granted a writ of habeas corpus ([317 F. Supp. 72](#)), and the Court of Appeals for the Seventh Circuit affirmed ([454 F.2d 416](#)).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded the case. In an opinion by Powell, J., it was held (1) expressing the unanimous view of the court, that the petitioner was entitled to both a preliminary hearing to determine whether there was probable cause to believe that he had violated his probation and a final hearing prior to the ultimate decision whether his probation should be revoked, and (2) expressing the view of eight members of the court, that the state was not under a constitutional duty to provide counsel for indigents in all probation revocation cases, but that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation system, and that certain general guidelines as to whether the assistance of counsel was constitutionally necessary should be applied in the first instance by those charged with conducting the revocation hearing.

Douglas, J., dissented in part from holding (2) above, on the ground that since the petitioner claimed that his confession of the burglary had been made under coercion, due process required the appointment of counsel.

Headnotes

CRIMINAL LAW §110.5 > revocation of probation -- hearing
-- > Headnote:

[LEdHN/11](#) [📄] [1]

Although revocation of probation, like revocation of parole, is not a stage of a criminal prosecution, such revocation results in a loss of liberty, so that a probationer, like a parolee, is entitled to (1) a preliminary hearing to

determine whether there is probable cause to believe that he has violated his probation, and (2) a final hearing prior to the ultimate decision whether his probation should be revoked; such hearings are required even where a probationer or parolee has been allowed to leave the state in which he was convicted and has been accepted for supervision in another state.

CRIMINAL LAW §110.5 > revocation of probation or parole
-- due process -- > Headnote:

[LEdHN/2/](#) [2]

Once a probation officer or parole officer has decided to recommend revocation of probation or parole, his role as counsellor to the probationer or parolee is compromised, and when the officer's view of the probationer's or parolee's conduct differs in this fundamental way from the latter's own view, due process requires that the difference be resolved before revocation becomes final.

CRIMINAL LAW §110.5 > revocation of probation or parole
-- preliminary hearing -- > Headnote:

[LEdHN/3/](#) [3]

At the preliminary hearing to determine whether there is probable cause to believe that a probationer or parolee has violated his probation or parole, the probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing.

CRIMINAL LAW §110.5 > revocation of probation or parole
-- final hearing -- due process -- > Headnote:

[LEdHN/4/](#) [4]

At the final hearing prior to the ultimate decision whether to revoke probation or parole, the minimum requirements of due process include: (1) written notice of the claimed violations of probation or parole; (2) disclosure to the

probationer or parolee of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses, unless the hearing officer specifically finds good cause for not allowing confrontation; (5) a neutral and detached hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (6) a written statement by the factfinders as to the evidence relied on and reasons for revoking probation or parole.

CRIMINAL LAW §46.5 > right to counsel -- revocation of probation or parole -- > Headnote:

[LEdHN/5A/](#) [5A] [LEdHN/5B/](#) [5B]

In hearings involving revocation of probation or parole, indigent probationers or parolees may be entitled to appointed counsel under some circumstances, such as where (1) the effectiveness of the due process rights guaranteed to a probationer or parolee in a revocation hearing depends on the use of skills which the probationer or parolee is unlikely to possess, and (2) the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate.

CRIMINAL LAW §46.5 > right to counsel -- revocation of probation or parole -- > Headnote:

[LEdHN/6/](#) [6]

A state is not under a constitutional duty to provide counsel for indigents in all probation or parole revocation cases.

CRIMINAL LAW §513 > due process -- > Headnote:

[LEdHN/7/](#) [7]

Due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.

CRIMINAL LAW §46.4 > right to counsel -- probationer or parolee -- > Headnote:

[LEdHN/8/](#) [8]

One who has been convicted of a crime and is a probationer or parolee has a more limited due process right than the right of an accused to counsel in a criminal prosecution.

CRIMINAL LAW §46.4 > right to counsel -- > Headnote:

[LEdHN/9A/](#) [9A] [LEdHN/9B/](#) [9B]

With respect to the right to counsel, a juvenile charged in a juvenile delinquency proceeding with violation of a generally applicable statute is differently situated from an already-convicted probationer or parolee and is entitled to a higher degree of protection.

LAW §46.5 > right to counsel -- revocation of probation or parole -- > Headnote:

[LEdHN/10/](#) [10]

In hearings involving the revocation of probation or parole, the decision as to an indigent's need for appointed counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system, and a considerable discretion must be allowed the responsible agency in making this decision.

CRIMINAL LAW §46.5 > right to counsel -- revocation of probation or parole -- > Headnote:

[LEdHN/11/](#) [11]

With respect to hearings involving the revocation of probation or parole, counsel should be provided in cases where, after being informed of his right to request counsel, an indigent probationer or parolee makes such a

request, based on a timely and colorable claim (1) that he has not committed the alleged violation of the conditions upon which he is at liberty, or (2) that even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex or otherwise difficult to develop or present; in passing on a request for the appointment of counsel, the responsible agency should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself.

CRIMINAL LAW §112 > what record must show -- > Headnote:

[LEdHN/12/](#) [12]

In every case in which a request for counsel at a preliminary or final hearing involving the revocation of probation or parole is refused, the grounds for refusal should be stated succinctly in the record.

CRIMINAL LAW §110.5 > HABEAS CORPUS

§47 > revocation of probation -- opportunity for hearing -- > Headnote:

[LEdHN/13/](#) [13]

Revocation of probation without affording the probationer either a preliminary hearing or a final hearing is violative of due process, so as to entitle the probationer to be granted a writ of habeas corpus, but the court granting habeas corpus should allow the state an opportunity to conduct such a hearing.

CRIMINAL LAW §46.5 > right to counsel -- revocation of probation or parole -- > Headnote:

[LEdHN/14/](#) [14]

An indigent probationer's admission to having committed a serious crime while on probation creates the sort of situation in which counsel need not ordinarily be provided in a hearing involving revocation of probation, and even

where the probationer has subsequently asserted that his admission was made under duress and was false, this does not necessarily entitle him to the right to appointed counsel; whether or not he is entitled to appointed counsel should be decided in the first instance by those charged with conducting the revocation hearing.

Syllabus

Respondent, a felony probationer, was arrested after committing a burglary. He admitted involvement in the crime but later claimed that the admission was made under duress and was false. The probation of respondent, who was not represented by an attorney, was revoked without a hearing. After filing a habeas corpus petition, he was paroled. The District Court concluded that revocation of probation without hearing and counsel was a denial of due process. The Court of Appeals affirmed. *Held*:

1. Due process mandates preliminary and final revocation hearings in the case of a probationer under the same conditions as are specified in *Morrissey v. Brewer*, 408 U.S. 471, in the case of a parolee. Pp. 781-782.

2. The body conducting the hearings should decide in each individual case whether due process requires that an indigent probationer or parolee be represented by counsel. Though the State is not constitutionally obliged to provide counsel in all cases, it should do so where the indigent probationer [***2] or parolee may have difficulty in presenting his version of disputed facts without the examination or cross-examination of witnesses or the presentation of complicated documentary evidence. Presumptively, counsel should be provided where, after being informed of his right, the probationer or parolee requests counsel, based on a timely and colorable claim that he has not committed the alleged violation or, if the violation is a matter of public record or uncontested, there are substantial reasons in justification or mitigation that make revocation inappropriate. Pp. 783-791.

3. In every case where a request for counsel is refused, the grounds for refusal should be stated succinctly in the record. P. 791.

Counsel: William A. Platz, Assistant Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs was Robert W. Warren, Attorney General.

William M. Coffey, by appointment of the Court, 408 U.S. 921, argued the cause and filed a brief for respondent.

Judges: Powell, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, White, Marshall, Blackmun, and Rehnquist, JJ., joined. Douglas, J., filed a statement dissenting in [***3] part, post, p. 791.

Opinion by: POWELL

Opinion

[*779] [***660] [**1758] MR. JUSTICE POWELL delivered the opinion of the Court.

This case presents the related questions whether a previously sentenced probationer is entitled to a hearing when his probation is revoked and, if so, whether he is entitled to be represented by appointed counsel at such a hearing.

I

Respondent, Gerald Scarpelli, pleaded guilty in July 1965, to a charge of armed robbery in Wisconsin. The trial judge sentenced him to 15 years' imprisonment, but suspended the sentence and placed him on probation for seven years in the custody of the Wisconsin Department of Public Welfare (the Department). ¹¹ At that time, he

¹¹The Court's order placing respondent on probation provided, among other things, that "in the event of his failure to meet the conditions of his probation he will stand committed under the sentence all ready [sic] imposed." App. 10. The agreement specifying the conditions of the probation, duly executed by respondent, obligated him to "make a sincere attempt to avoid all acts which are forbidden by law . . ." App. 12.

signed an agreement specifying the terms of his probation and a "Travel Permit and Agreement to Return" allowing him to reside in Illinois, with supervision there under an interstate compact. On August 5, 1965, he was accepted for supervision by the Adult Probation Department of Cook County, Illinois.

[***4] On August 6, respondent was apprehended by Illinois police, who had surprised him and one Fred Kleckner, [*780] Jr., in the course of the burglary of a house. After being apprised of his constitutional rights, respondent admitted that he and Kleckner had broken into the house for the purpose of stealing merchandise or money, although he now asserts that his statement was made under duress and is false. Probation was revoked by the Wisconsin Department on September 1, without a hearing. The stated grounds for revocation were that:

"1. [Scarpelli] has associated with known criminals, in direct violation of his probation regulations and his supervising agent's instructions;

"2. [Scarpelli] while associating with a known criminal, namely Fred Kleckner, Jr., was involved in, and arrested for, a burglary . . . in Deerfield, Illinois." App. 20.

On September 4, 1965, he was incarcerated in the Wisconsin State Reformatory [**1759] at Green Bay to begin serving the 15 years to which he had been sentenced by the trial judge. At no time was he afforded a hearing.

[**661] Some three years later, on December 16, 1968, respondent applied for a writ of habeas corpus. After the [***5] petition had been filed, but before it had been acted upon, the Department placed respondent on parole.²² The District Court found that his status as parolee was sufficient custody to confer jurisdiction on the court and that the petition was not moot because the revocation carried "collateral consequences," presumably including the restraints imposed by his parole. On the merits, the District Court held that revocation without a hearing and counsel was a denial of due process. 317 F.Supp. 72 (ED Wis. 1970). The Court of Appeals affirmed *sub* [*781] *nom.* Gunsolus v. Gagnon, 454 F.2d 416 (CA7 1971), and we granted certiorari. 408 U.S. 921 (1972).

²² Respondent was initially paroled to a federal detainer to serve a previously imposed federal sentence arising from another conviction. He was subsequently released from federal custody, but remains a parolee under the supervision of the Department.

II

Two prior decisions set the bounds of our present inquiry.

[***6] In Mempa v. Rhay, 389 U.S. 128 (1967), the Court held that HNI[↑] a probationer is entitled to be represented by appointed counsel at a combined revocation and sentencing hearing. Reasoning that counsel is required "at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected," *id.*, at 134, and that sentencing is one such stage, the Court concluded that counsel must be provided an indigent at sentencing even when it is accomplished as part of a subsequent probation revocation proceeding. But this line of reasoning does not require a hearing or counsel at the time of probation revocation in a case such as the present one, where the probationer was sentenced at the time of trial.

Of greater relevance is our decision last Term in Morrissey v. Brewer, 408 U.S. 471 (1972). There we held that the revocation of parole is not a part of a criminal prosecution.

"Parole arises after the end of the criminal prosecution, including imposition of sentence. . . . Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional [***7] liberty properly dependent on observance of special parole restrictions." *Id.*, at 480.

HN2[↑] Even though the revocation of parole is not a part of the criminal prosecution, we held that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. Specifically, we held that a parolee is entitled to two hearings, one a [*782] preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.

LEdHN[↑] [1] Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.³³ Probation

³³ Despite the undoubted minor differences between probation and parole, the commentators have agreed that revocation of probation

revocation, [***662] like parole revocation, is not a stage of a criminal [**1760] prosecution, but does result in a loss of liberty.⁴⁴ Accordingly, we hold that [HN3](#)[↑] a probationer, like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in [Morrissey v. Brewer, supra](#). [****8]⁵⁵

[****9] [*783] III

The second, and more difficult, question posed by this case is whether an indigent probationer or parolee has a due process right to be represented by appointed counsel at these hearings.⁶⁶ In answering that question, we draw

where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole. See, e.g., Van Dyke, Parole Revocation Hearings in California: The Right to Counsel, 59 Calif. L. Rev. 1215, 1241-1243 (1971); Sklar, Law and Practice in Probation and Parole Revocation Hearings, 55 J. Crim. L. C. & P. S. 175, 198 n. 182 (1964).

⁴⁴ It is clear at least after [Morrissey v. Brewer, 408 U.S. 471 \(1972\)](#), that a probationer can no longer be denied due process, in reliance on the dictum in [Escoe v. Zerbst, 295 U.S. 490, 492 \(1935\)](#), that probation is an "act of grace."

⁵⁵ Petitioner argues, in addition, that the *Morrissey* hearing requirements impose serious practical problems in cases such as the present one in which a probationer or parolee is allowed to leave the convicting State for supervision in another State. Such arrangements are made pursuant to an interstate compact adopted by all of the States, including Wisconsin. Wis. Stat. Ann. § 57.13 (1957). Petitioner's brief asserts that as of June 30, 1972, Wisconsin had a total of 642 parolees and probationers under supervision in other States and that incomplete statistics as of June 30, 1971, indicated a national total of 24,693 persons under out-of-state supervision. Brief for Petitioner 21-22.

Some amount of disruption inevitably attends any new constitutional ruling. We are confident, however, that modification of the interstate compact can remove without undue strain the more serious technical hurdles to compliance with *Morrissey*. An additional comment is warranted with respect to the rights to present witnesses and to confront and cross-examine adverse witnesses. Petitioner's greatest concern is with the difficulty and expense of procuring witnesses from perhaps thousands of miles away. While in some cases there is simply no adequate alternative to live testimony, we emphasize that we did not in *Morrissey* intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence. Nor did we intend to foreclose the States from holding both the preliminary and the final hearings at the place of violation or from developing other creative solutions to the practical difficulties of the *Morrissey* requirements.

⁶⁶ In *Morrissey v. Brewer*, we left open the question "whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent." [408 U.S., at 482](#). Since respondent did not attempt to retain counsel but asked only for appointed counsel, we have no occasion to decide in this case whether a probationer or parolee has a

heavily on the opinion in *Morrissey*. Our first point of reference is the character of probation or parole. As noted in *Morrissey* regarding parole, the "purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able . . ." [408 U.S., at 477](#). The duty and attitude of the probation or parole officer reflect this purpose:

"While the parole or probation officer recognizes his double duty to the welfare of his clients and to the safety of the general community, by and large concern for the client dominates his professional attitude. [*784] The parole agent ordinarily defines his role as representing his client's best interests as long as these do not constitute a threat to public safety."⁷⁷

[***663] Because the probation or parole officer's function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation, he has been [****10] entrusted traditionally with broad discretion to judge the progress of rehabilitation in individual cases, and has been armed with the power to recommend or even to declare revocation.

In *Morrissey*, we recognized that the revocation decision has two analytically distinct components:

"The first step in a revocation decision thus involves [****11] a wholly retrospective [**1761] factual question: whether the parolee has in fact acted in violation of one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" [408 U.S., at 479-480](#).⁸⁸ [****12]

right to be represented at a revocation hearing by retained counsel in situations other than those where the State would be obliged to furnish counsel for an indigent.

⁷⁷ F. Remington, D. Newman, E. Kimball, M. Melli & H. Goldstein, Criminal Justice Administration, Materials and Cases 910-911 (1969).

⁸⁸ The factors entering into these decisions relate in major part to a professional evaluation, by trained probation or parole officers, as to the overall social readjustment of the offender in the community, and include consideration of such variables as the offender's relationship toward his family, his attitude toward the fulfillment of financial obligations, the extent of his cooperation with the probation or parole officer assigned to his case, his personal associations, and -- of course --

[*785] The parole officer's attitude toward these decisions reflects the rehabilitative rather than punitive focus of the probation/parole system:

"Revocation . . . is, if anything, commonly treated as a failure of supervision. While presumably it would be inappropriate for a field agent *never* to revoke, the whole thrust of the probation-parole movement is to keep men in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail." ⁹⁹

[LEdHN/2](#)^[↑] [2]But an exclusive focus on the benevolent attitudes of those who administer the probation/parole system when it is working successfully obscures the modification in attitude which is likely to take place once the officer has decided to recommend revocation. Even though the officer is not by this recommendation converted into a prosecutor committed to convict, his role as counsellor to the probationer or parolee is then surely compromised.

When the officer's view of the probationer's or parolee's conduct differs in this fundamental way from the latter's own view, due process requires that the difference be resolved before revocation becomes final. Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion -- the probationer or parolee to insure that [*664] his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety [****13] of the community.

[*786] [LEdHN/3](#)^[↑] [3][LEdHN/4](#)^[↑] [4]It was to

whether there have been specific and significant violations of the conditions of the probation or parole. The importance of these considerations, some factual and others entirely judgmental, is illustrated by a Wisconsin empirical study which disclosed that, in the sample studied, probation or parole was revoked in only 34.5% of the cases in which the probationer or parolee violated the terms of his release. S. Hunt, 'The Revocation Decision: A Study of Probation and Parole Agents' Discretion 10 (unpublished thesis on file at the library of the University of Wisconsin) (1964), cited in Brief for Petitioner, Addendum 106.

⁹⁹ Remington, Newman, Kimball, Melli & Goldstein, *supra*, n. 7, at 910.

serve all of these interests that *Morrissey* mandated preliminary and final revocation hearings. [HN4](#)^[↑] At the preliminary hearing, a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing. [408 U.S., at 487](#). The final hearing is a less summary one because the decision under consideration is the ultimate decision to revoke rather than a mere determination of probable cause, but the "minimum requirements of due process" include very similar elements:

"(a) written notice of the claimed violations of [probation or] parole; (b) [*1762] disclosure to the [probationer or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole [****14] board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole." [Morrissey v. Brewer, supra, at 489](#).

[LEdHN/5A](#)^[↑] [5A]These requirements in themselves serve as substantial protection against ill-considered revocation, and petitioner argues that counsel need never be supplied. What this argument overlooks is that the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical [*787] rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

[LEdHN/6](#)^[↑] [6]By the same token, we think that the Court of Appeals erred in accepting respondent's

contention that the State is under a constitutional duty to provide counsel for indigents in all probation [****15] or parole revocation cases. While such a rule has the appeal of simplicity, it would impose direct costs and serious collateral disadvantages without regard to the need or the likelihood in a particular case for a constructive contribution by counsel. In most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him.¹⁰¹⁰ And while in some cases he may have a justifiable excuse for the violation or a convincing reason why revocation is not the appropriate disposition, mitigating evidence of this kind is often not susceptible of proof or is so simple as not to require either investigation or exposition by counsel.

The [***665] introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates [****16] and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being "predictive and discretionary" as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the [*788] rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State -- for appointed counsel, counsel for the State, a longer record, and the possibility of judicial review -- will not be insubstantial.¹¹¹¹

[****17]

[**1763] [LEdHN/5B/](#)[\[↑\]](#) [5B] [LEdHN/7/](#)[\[↑\]](#) [7]In

some cases, these modifications in the nature of the revocation hearing must be endured and the costs borne because, as we have indicated above, the probationer's or parolee's version of a disputed issue can fairly be represented only by a trained advocate. But due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed.

In so concluding, we are of course aware that the case-by-case approach to the right to counsel in felony prosecutions adopted in [Betts v. Brady, 316 U.S. 455 \(1942\)](#), was later rejected in favor of a *per se* rule in [Gideon v. Wainwright, 372 U.S. 335 \(1963\)](#). See also [Argersinger v. Hamlin, 407 U.S. 25 \(1972\)](#). We do not, however, draw from *Gideon* and *Argersinger* the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings: there are critical differences between criminal trials and probation or parole revocation [*789] hearings, and both society and the probationer or parolee have [****18] stakes in preserving these differences.

In a criminal trial, the State is represented by a prosecutor; formal rules of evidence are in force; a defendant enjoys a number of procedural rights which may be lost if not timely raised; and, in a jury trial, a defendant must make a presentation understandable to untrained jurors. In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not [***666] employed; and the members of the hearing body are familiar with the problems and practice of probation or parole. The need for counsel at revocation hearings derives, not from the invariable attributes of those hearings, but rather from the peculiarities of particular cases.

[LEdHN/8/](#)[\[↑\]](#) [8][LEdHN/9A/](#)[\[↑\]](#) [9A]The differences between a criminal trial and a revocation hearing do not dispose altogether of the argument that under a case-by-case approach there may be cases in which a lawyer would be useful but in which none would be appointed because an arguable defense would be uncovered [****19] only by a lawyer. Without denying that there is some force in this argument, we think it a

¹⁰¹⁰ See Sklar, *supra*, n. 3, at 192 (parole), 193 (probation).

¹¹¹¹ The scope of the practical problem which would be occasioned by a requirement of counsel in all revocation cases is suggested by the fact that in the mid-1960's there was an estimated average of 20,000 adult felony parole revocations and 108,000 adult probation revocations each year. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 56 n. 28 (1967).

sufficient answer that we deal here, not with the right of an accused to counsel in a criminal prosecution, but with the more limited due process right of one who is a probationer or parolee only because he has been convicted of a crime.¹²¹²

[LEdHN/9B](#)[↑] [9B]

[*790] [LEdHN/10](#)[↑] [10]We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. [****20] We think, rather, that [HNJ](#)[↑] the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system. Although the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness -- the touchstone of due process -- will require that the State provide at its expense counsel for indigent probationers or parolees.

[**1764] [LEdHN/11](#)[↑] [11] [LEdHN/12](#)[↑] [12]It is neither possible nor prudent to attempt to formulate a precise and detailed set of guidelines to be followed in determining when the providing of counsel is necessary to meet the applicable due process requirements. The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a [HN6](#)[↑] considerable discretion must be allowed the responsible agency in making the decision. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, [****21] based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the

violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, [*791] especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for [***667] refusal should be stated succinctly in the record.

IV

[LEdHN/13](#)[↑] [13] [LEdHN/14](#)[↑] [14]We return to the facts of the present case. Because respondent was not afforded either a preliminary hearing or a final hearing, the revocation of his probation did not meet the standards of due process prescribed in *Morrissey*, which we have here held applicable to probation revocations. Accordingly, respondent was entitled to a writ of habeas corpus. On remand, the District Court should [****22] allow the State an opportunity to conduct such a hearing. As to whether the State must provide counsel, respondent's admission to having committed another serious crime creates the very sort of situation in which counsel need not ordinarily be provided. But because of respondent's subsequent assertions regarding that admission, see *supra*, at 780, we conclude that the failure of the Department to provide respondent with the assistance of counsel should be re-examined in light of this opinion. The general guidelines outlined above should be applied in the first instance by those charged with conducting the revocation hearing.

Affirmed in part, reversed in part, and remanded.

Dissent by: DOUGLAS (In Part)

Dissent

MR. JUSTICE DOUGLAS, dissenting in part.

I believe that due process requires the appointment of counsel in this case because of the claim that respondent's confession of the burglary was made under duress. See *Morrissey v. Brewer*, 408 U.S. 471, 498 (opinion of DOUGLAS, J.).

¹²¹² Cf. *In re Gault*, 387 U.S. 1 (1967), establishing a juvenile's right to appointed counsel in a delinquency proceeding which, while denominated civil, was functionally akin to a criminal trial. A juvenile charged with violation of a generally applicable statute is differently situated from an already-convicted probationer or parolee, and is entitled to a higher degree of protection. See *In re Winship*, 397 U.S. 358 (1970) (the standard of proof in a juvenile delinquency proceeding must be "proof beyond a reasonable doubt").

References

Procedural requirements, under Federal Constitution,
applicable to revocation of probation or parole

[*21 Am Jur 2d, Criminal Law 568*](#)

[****23] US L Ed Digest, Criminal Law 46.5, 110.5

ALR Digests, Criminal Law 111, 217, 223

L Ed Index to Anno, Criminal Law

ALR Quick Index, Assistance of Counsel; Pardon, Parole
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Federal Quick Index, Assistance of Counsel; Pardon,
Parole, or Probation

Annotation References:

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2d 1077*](#).

Accused's right to counsel under the [*Federal Constitution, 93
L Ed 137, 2 L Ed 2d 1644, 9 L Ed 2d 1260, 18 L Ed 2d
1420*](#).

Right to assistance of counsel at proceedings to revoke
probation. *44 ALR3d 306*.

Right to notice and hearing before revocation of
suspension of sentence, parole, conditional pardon, or
probation. [*29 ALR2d 1074*](#).

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