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In the

Supreme Court of the United States

JOHN J. MORRISSEY and
G. DONALD BOOMER,

Petitioners,

VS.

LOU V. BREWER, Warden, et al.,

Respondents.

No. 71-5103

Washington, D. C.
April 11, 1972

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first in No. 71-5103, Morrissey and Booher against Brewer.

Mr. Brittin:

ORAL ARGUMENT OF W. DON BRITTIN, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. BRITTIN: Mr. Chief Justice, and may it please the Court:

I am counsel --

MR. CHIEF JUSTICE BURGER: Before you proceed, counsel, let me mention one other factor, that Mr. Justice Marshall is unavoidably absent this morning, but he will participate in the cases to be heard today on the basis of the files, records, briefs, and the recording of the oral argument.

MR. BRITTIN: Thank you, Your Honor.

I was appointed by this Court to represent the petitioners in this case, which are habeas corpus cases. I was likewise appointed by the United States Court of Appeals for the Eighth Circuit to represent petitioners in the cases below.

The opinion of the United States Court of Appeals for the Eighth Circuit, which is under review in this case, affirmed the orders of Judge Stephenson, at that time United States District Judge for the Southern District of Iowa, denying both petitions involved in these cases.

Petitioners had both been prisoners in the Iowa State

Penitentiary and had both received paroles from the Iowa Board of Parole.

Subsequently, each of those respective paroles were revoked by the Iowa Board of Parole, such revocations having been accomplished without either of the petitioners having been afforded any type of evidentiary hearing to establish the fact of parole violation.

Both petitioners allege in their petition for habeas corpus, filed in the District Court, that their constitutional rights to due process of law had been violated by the action of the Iowa Board of Parole in revoking their paroles without a hearing, and that such State action constituted a deprivation of liberty without due process of law.

Judge Stephenson, in separate orders, denied the respective petitions, holding that the applicable Iowa statutory law did not require such a hearing, and that the procedures followed by the Iowa Board of Parole have been held sufficient for Federal constitutional purposes.

After granting the certificates of probable cause, the United States Court of Appeals for the Eighth Circuit head the cases en banc and, by a vote of 4 to 3, affirmed the orders of Judge Stephenson.

This Court granted certiorari on December of last year.

The question then presented to review in this case

is whether or not the action of the Iowa Board of Parole, in revoking petitioners' respective paroles, without providing either of said petitioners a prior evidentiary hearing to establish the fact of parole violation, denied petitioners liberty without due process of law, in violation of the due process clause of the Fourteenth Amendment to the constitution of the United States.

At this point I believe a brief factual review of the circumstances is appropriate.

With respect to Petitioner Morrissey first: he entered a plea of guilty to a County Attorney's Information charging him with false uttering of a check and was sentenced by an Iowa State District Court to the Iowa State Penitentiary for a term of seven years.

After serving approximately one and a half years of his sentence, Morrissey was granted a parole by the Iowa Board of Parole. After being on parole approximately seven months, he was arrested for a parole violation, confined in the County Jail, and shortly thereafter his parole agent filed a written report of violation with the Iowa Board of Parole, recommending that his parole be revoked.

Three days later an order was entered by the Iowa Board of Parole revoking his parole and ordering that he be returned to the penitentiary.

This order was entered by the Iowa Board of Parole

solely on the basis of the parole officer's written report without granting the petitioner a hearing of any kind to determine the fact of parole violation.

Q Mr. Brittin, as I understand the record, the parole officer had talked to Morrissey, had he not?

MR. BRITTIN: I believe you're correct, Your Honor, but he had talked to Morrissey in jail at the time he had been arrested, after the parole agent got the warrant for his arrest for parole violation.

Q As I understand, it is respondent's contention that Morrissey pretty well admitted the charges against him.

MR. BRITTIN: You are correct in stating that it is respondent's contention, if I understand his contention accurately, and I don't wish to speak for him, but I do believe that he contended that Morrissey admitted at that time that he violated the conditions of his parole.

However, it is our position that he did not unequivocally admit the alleged violations. He admitted certain acts which may have constituted violations, if there were no explanation for them. He did offer explanation for certain of his acts, which, I believe, were in mitigation and may tend to establish that he did not in fact violate his parole.

Q How about the automobile?

MR. BRITTIN: Excuse me, Your Honor? The auto-

mobile?

Q Yes, the automobile.

MR. BRITTIN: He admitted that he had purchased an automobile under an assumed name.

I might point out that --

Q Is that in violation of --

MR. BRITTIN: I don't think that the parole agreement specifically required -- prohibited him from doing that, but I think that that act was probably in violation of his parole agreement.

Q Well, he admitted that one act, anyway?

MR. BRITTIN: He admitted the act, that's right, Your Honor. He did not admit that he had violated his parole, but he did -- you are correct in saying that he did admit an act which would --

Q Well, there's no dispute about the facts on that particular thing?

MR. BRITTIN: About the automobile? I think you're correct, Your Honor.

Q And it's just a question of whether or not that should amount to a violation of a parole agreement?

MR. BRITTIN: That's right, and whether or not that --

Q That even if it was a violation, what parole should be revoked?

MR. BRITTIN: That's right.

And I might point out at this time that both with respect to Petitioners Morrissey and Booher, and this situation was similar with Booher, he was sentenced and served two and a half years, was paroled, was out about nine months, and then he was arrested for a parole violation. The parole agent filed a written report. The Board of Parole revoked his parole on the basis of that written report.

The violations with respect to Booher were quite similar to the ones in Morrissey. He was alleged to have been driving an automobile without permission of his parole officer and while his license was under suspension. He was accused of leaving the territorial limits of O'Brien County, Iowa, without the parole officer's permission, and he was accused of not being able to keep a job.

These things -- and I think that he admitted operating the motor vehicle. Apparently it was his wife's vehicle. But he did admit operating the motor vehicle without the permission of his parole officer.

I might point out that these violations, what we're talking about are what may be called technical violations. They are filed acts which constitute -- the charged acts, if proven, would constitute technical violations of the parole agreement. It is not alleged --

Q You mean an automobile purchase is in that category, Mr. Brittin?

MR. BRITTIN: I don't believe the purchase of an automobile --

Q Under a false name?

MR. BRITTIN: I don't believe that that would be -- that that would necessarily constitute a crime, Your Honor. It's certainly deception --

Q It would constitute -- I thought you had indicated to Justice White that that would be a basis for revoking parole?

MR. BRITTIN: Yes, I think I indicated to him that, if proven, that fact would constitute an act which might form the basis of a revocation of parole. However, it's a technical violation --

Q If it's admitted, why do you need proof? Is it -- would you say that it would be unreasonable to analogize that to a plea of guilty to a charge?

MR. BRITTIN: I think there's a great difference, Your Honor, because the only evidence in this record, and I think the only evidence that there is at all, whether inside or outside the record, is with respect to what -- the statements that the parolee made to his parole agent while he was in custody; and I don't believe that the Board of Parole or anyone else should rely solely upon those statements when submitted to the Board of Parole in written form, as a basis for a parole revocation.

I believe that a parolee should be given a chance to tell the Board of Parole, to admit or deny to the Board of Parole, whether or not he's violated his parole; and I think he should have an opportunity to appear before the Board and to confront and cross-examine the persons who are making the allegations against him, be it the parole officer or other persons.

What we're talking about is a situation in which a parole, which is a -- we don't want to call it a right or a privilege, I don't think it's correct to call it either. It's a status enjoyed by the parolee, and we're talking about a revocation of that based upon a written statement by a parole agent.

I think that the Constitution --

Q And that statement, at least with respect to Morrissey, appears at page 65 of the Appendix, does it not?

MR. BRITTIN: I think that's correct, Your Honor.

Q Is there a copy of the parole agreement in here?

MR. BRITTIN: There is, it's at page 100, Your Honor, of the Appendix.

Q Page 100. And is it a standard parole agreement that both of these petitioners signed?

MR. BRITTIN: In fact, the one at page 100 is a form of parole agreement that was submitted to the District Court.

It was not ever established, and I do not know if this is the exact form that was signed by either one of the petitioners herein is that. Those forms have never been produced in this case. But this is, it is my understanding, the standard form of parole agreement which is used in the State of Iowa.

Q And this is, presumably, what each one of these petitioners --

MR. BRITTIN: Presumably, Your Honor.

Q -- signed. And then I suppose with respect to individual parolees, other conditions may be added; or am I wrong about that?

MR. BRITTIN: You may be correct, Your Honor, except that I do not know that additional conditions were added in either of these cases.

Q Do you think that the parole officer's conversation with these parolees at least established probable cause to believe that a violation had occurred?

MR. BRITTIN: I think that they may well have established probable cause to believe --

Q That is, you don't object to the fact that, having found out what he found out, the parole officer could arrest them? And ^{defend?} defend them?

MR. BRITTIN: No, I don't object to that, Your Honor.

Q So that arrest and detention pending a hearing

would be satisfactory, as far as you're concerned?

MR. BRITTIN: So far as I'm concerned in this case, Your Honor, that would be satisfactory. What I'm talking about in this case is the revocation of parole and sending a parolee back to serve the remainder of his sentence, which could be five or six years.

Q Well, I'm not saying this is this kind of a case, but let's just assume that there was no need because of the admission of a series of events and acts, you call them technical violations if you want to; let's assume that there is no need for an evidentiary hearing as to what the facts were, and it's just a question of a judgment as to whether parole should be revoked.

MR. BRITTIN: Assuming that facts have been established, and I would maintain that those facts should be established by --

Q Right.

MR. BRITTIN: -- a hearing. But assuming that they have been established --

Q Well, you wouldn't have -- I suppose if you got a man, a probationer, for example, before a court, into the court, and the judge says, "Did you do these things?" And he said yes. Would you --

MR. BRITTIN: No, I wouldn't object to that, and I wouldn't, I don't think, object to it if the parole board

would call the parolee in and give him a hearing. What you're talking about, when you're talking about a probationer being before the court is what I'm talking about: a parolee being before the Parole Board and having a chance to admit or deny the allegations, to present evidence on his own behalf.

Q But this would be after he had been arrested and --

MR. BRITTIN: After he had been arrested, --

Q -- been incarcerated.

MR. BRITTIN: -- and incarcerated, and if that time was a reasonable time, that is not what I'm talking about in this case.

Q So if the Parole Board -- if he's returned to jail and then the Parole Board calls him before them and he has an opportunity to say yes or no, to say whatever he wants to, that's enough?

MR. BRITTIN: If he has an opportunity to admit or deny the allegation, to confront and cross-examine the witnesses who may offer evidence against him --

Q That is if he denies it.

MR. BRITTIN: If he denies them. If, Your Honor, he admits the violation to the Parole Board, under circumstances from which it is clear that he does so voluntarily and knowing the consequences of his admission, then I have no objection to a parole revocation in that circumstance, without further

proceeding.

Q Mr. Brittin, did the Parole Board here, after your client had been returned to prison, interview him with respect to the alleged parole violation?

MR. BRITTIN: I think that they did interview him, and that word is very critical, Your Honor. I think the word is "interview"; they did not give him a hearing. They --

Q Well, how would you distinguish between what was done and what you think ought to have been done in the way of a hearing?

MR. BRITTIN: Very frankly, Your Honor, I was not aware until the respondents filed their brief herein that there was any such interview at all, and I know nothing more about that hearing --

Q Nor were we.

MR. BRITTIN: -- than is in the respondents' brief. So I don't know what happened at that hearing. I do know that there is a thing called a post-revocation interview. But I don't know what happens there. I don't know who is there, I don't know whether -- of course, this occurs at a time after the parolee is already back in prison, and I don't think that a hearing at that time satisfies the requirements of due process.

Q Well, how long after the arrest on parole violation was this interview process held?

MR. BRITTIN: From respondents' brief --

Q. Am I correct that it was about 29 or 30 days?

MR. BRITTIN: From respondents' brief, I know that it was not more than two months after the revocation. Now, the arrest for violation was in another approximately week to two weeks, depending on whether we're talking about Morrissey or Booher, prior to the revocation.

I think, Your Honor, that any hearing, the kind of hearing I'm talking about is a hearing prior to the order of revocation. Once the order of revocation, once the parole is revoked, the prisoner is back in prison, and I don't think a hearing at that time is sufficient for constitutional purposes.

Q. Well, where do you think he should be between the time he is arrested for the parole violation and the time of the hearing? Would it be inappropriate for him to be back in prison?

MR. BRITTIN: I think if he has a -- there is evidence that his presence in society as any other person than as a parolee would be dangerous to society, that he should -- I do not object to his incarceration --

Q. Well, you said he could be arrested because of the probable cause to believe that he violated his parole. Now, after -- you mean that constitutionally he can be arrested but then he must be released again?

MR. BRITTIN: No, the point I was trying to make, Your Honor, is that if this person is a dangerous person, I think that he should be incarcerated, pending the -- if there's probable cause to believe that he is --

Q Unless there is some finding that he's dangerous, he must be -- he has to be released after bail, is that it?

MR. BRITTIN: No, I really don't think that's important to the case, Your Honor.

Q Well, would you rather have him in the city jail than in some jail as to where the --

MR. BRITTIN: Well, I think that the hearing should be held within a short time. I'm talking about a week or so. And in Iowa, only because the penitentiary is way off down in one corner of the State, I think transporting a prisoner back and forth may not be necessary, and holding him in the county jail for a period of a week or so, particularly so he can talk to counsel if he has some, so he can make preparations for the hearing would be appropriate to the case. And I don't think that it would be necessary to return him to prison.

Q You're not contending here that he's entitled to counsel at this hearing, are you?

MR. BRITTIN: I think that once it is determined that a petitioner is entitled to a hearing, prior to revocation

of his parole, and considering the substantial interest he has in his continued liberty, that there is authority for this Court to hold that he is entitled to counsel at such a hearing.

Q Well, are you pointing to anything at this proceeding that he was entitled to counsel as well as to a hearing?

MR. BRITTIN: The issues in this case are, by the record, limited to the right to a hearing and do not include the question of a right to counsel. However, I do believe that if this Court feels that the Constitution does require a hearing prior to revocation of parole, that due to the serious nature of the consequences to a parolee should his parole be revoked without a hearing, and not in compliance with the Constitution, that there is sufficient authority for this Court to also hold that he should be entitled to appointed counsel, should he not -- that he should be entitled at least to have retained counsel present.

That's -- that, however, goes to the kind of hearing that's required; and I think it's first most important for the Court to determine whether or not a hearing is required. And of course it's our contention that it is.

In contending that a hearing is required, we rely principally upon that line of cases of this Court which have held due process of law requires a hearing and an opportunity

to be heard whenever important rights are substantially affected by State action. And these cases I'm talking about are cases like Goldberg vs. Kelly, Bell vs. Burson, Groppi vs. Leslie, and Greene vs. McElroy. These cases all held that a hearing and an opportunity to be heard are required prior to the termination by State action of various types of rights or privileges enjoyed by these individuals.

And the types of rights that were involved in those cases are: not being disqualified for unemployment compensation; an individual's interest in continued welfare benefits; an individual's interest in not having his name arbitrarily posted on a public list of excessive drinkers; an individual's interest in not being held in contempt of the State Legislature; and an individual's interest in, an uninsured motorist's interest in not having his driver's license suspended after an accident.

Q Mr. Brittin, would you contend that a hearing is also required when the Parole Board sits to make a determination as to whether parole should be granted or not?

MR. BRITTIN: No, I would not, Your Honor.

Q Isn't that an equally important page in the criminal proceeding, or doesn't that equally affect the substantial rights of the defendant?

MR. BRITTIN: It does extend -- you're correct that it does affect his interests. However, I think that what is

most important in that situation is that the Board of Parole in sitting on determining whether or not to release a person on parole is guided only by considerations in its expertise, in examining the conduct of the prisoner, to determine whether or not they feel that he is a good risk for parole and should be permitted to go outside of the walls of the prison and attempt to continue his rehabilitation, which they believe is, to some extent at that point, on the outside of the prison.

After --

Q Well, his conduct consists of factual matters, and I suppose it's conceivable the Board might be misinformed. Shouldn't he be entitled to cross-examine at least factual witnesses at that stage on his conduct? If you're right.

MR. BRITTIN: I suppose an argument can be made that if the Board of Parole denies a parole, when considering whether or not to give a parole, denies it on the basis of allegations of fact concerning his conduct, an argument could be made that he should be entitled to appear before the Board.

As a matter of fact, as a matter of practice, most -- as I understand -- most prisoners, at the time they're being considered for parole, do appear before a Board.

I think an argument could be made that he should be entitled to some hearing at that time; but I'm not making that argument, and I don't think it's critical to this case, because what we're talking about is a parolee, a person whom

the Board of Parole has decided is worthy of this conditional liberty of parole and being permitted to go back out in society and attempt to make a full community and family life, to contribute to society. I'm talking about revocation of that status, which has previously been granted by the Board of Parole.

And I think there's a valid distinction there.

Q Is the parole officer's report, on which the revocation was based, at page 65 in the record? Is that the report?

MR. BRITTIN: That is the report with respect to Petitioner Morrissey, and the report with respect to Petitioner Booher is at page 106, I believe.

Q Okay. Thank you.

Q When he had the interview that you've described at the institution, does this record show that he then admitted that he had bought the car under a false name?

MR. BRITTIN: No, this record doesn't even show that there was such a hearing, Your Honor.

Q All we know about that comes from your brother's brief on the other side; there's nothing in the record about any such?

MR. BRITTIN: Nothing in the record of the District Court, the Court of Appeals, or in this case concerning that alleged hearing.

Q Assuming now that at that interview, the facts stated at the top of page 68, that he admitted that he bought the 1960 Chevrolet, and so forth, and registered it in a false name, and having in mind that one of the conditions of his parole was that he would neither own nor operate an automobile, and other vehicles, without the consent of the Chief Parole Officer, would you think that would be grounds for making the decision without hearing any further from him after his admission?

MR. BRITTIN: Well, I think that the Board of Parole should, after his admission that he in fact purchased an automobile under an assumed name, I think the Court should hear from him his explanation, whatever reasons there may be in mitigation.

Now, I can't think of what they would be at this point for why a person would do that, except maybe to avoid violating of a specific term of the parole agreement; but I do think that that conduct constitutes a violation of the spirit of it, if not the technical terms of it.

Q Mr. Brittin, in your brief, you point out that a parole hearing has a twofold function: first, to ascertain whether or not there was a violation; the second, to determine what's to be done.

As I read your brief, you take the position that the hearing relates to the first aspect of that only.

MR. BRITTIN: I think that that -- that the hearing relates to that part most importantly; I would not concede that presence of the parolee at the time the Board may be making that second decision may not be of assistance to the Board. But I think that for the purposes of this case a right to hearing on the determination of the fact of violation is what we're talking about in this case.

Q And hearing could be terminated at that point, under your submission here today?

MR. BRITTIN: I believe that's correct, that the hearing could be terminated once the Board of Parole has heard from the parolee; he's either admitted or denied the violation. If he's admitted it, then he may have offered some extenuating circumstances or other facts in mitigation. At that point I believe it would be proper for the Board of Parole to adjourn the hearing, to consider and deliberate in private with respect to what action should be taken once the facts have been established.

Q There is an overlap, as you suggest, however, isn't there, because you can show that the -- well, for example, one of the conditions of the parole agreement was that the petitioner is not to leave the county.

MR. BRITTIN: That's right.

Q And if you can show in a factual hearing, yes, he did leave the county, but you could further show that he

left because his mother was dying and he tried to reach his parole officer and it was a weekend and he couldn't reach his parole officer, so in that emergency he left; and he returned promptly.

MR. BRITTIN: I believe that's --

Q That would show a violation of the parole, but it would also show mitigating circumstances that would presumably affect the Parole Board's decision upon whether or not to revoke the parole, would it not?

MR. BRITTIN: That is correct, Your Honor. And in fact, in this case, the purported violation with respect to Petitioner Booher shows that his parole agent was out of the State for -- on vacation during the period of time the alleged violations occurred. So he did not know about them firsthand anyway. That he was accused of leaving the county, to which he was assigned, and that the violation shows that there are two possible reasons for leaving the county.

One was, his wife went to Iowa City, Iowa, in another county, to have a baby. The other reason was that he was having trouble keeping himself employed, and he left the county to work.

Now, one of the conditions of parole is that he keep himself employed; and another one is that he not leave the county. His parole agent was out of the State, and he left the county to work.

I believe that circumstances like this can be shown at a hearing. The parole agent, I'm not saying here, Your Honor, that parole agents are dirty guys and we shouldn't believe them; but I'm saying that there are circumstances that exist that where bias or prejudice or even honest misinformation will lead to parole revocations without a hearing; and I believe that due process requires that before a parolee has his conditional liberty terminated, he's sent back to the prison for five to seven additional years, that he's entitled to a hearing to establish the fact of the parole violation before the Board goes any further to determine whether or not his parole should be terminated.

Q And to argue mitigating circumstances?

MR. BRITTIN: And to argue mitigating circumstances in the event that he does admit the fact. Take the situation of Booher leaving the county to find -- to work. He's on the horns of a dilemma. If he has a job offer outside of the county, he'll be violating his parole agreement if he doesn't take it, he'll be violating his parole agreement if he goes out of the county to work.

I think circumstances like these, particularly when the revocation is based on what we call technical violations, that the parolee is entitled to a hearing to establish the fact of violation.

If the parolee is charged with an act that con-

stitutes a crime of an armed robbery, a burglary, something like that, the criminal process comes into play. He can be arrested for a violation of that crime, and once he's convicted of that crime he's going to be in custody probably while that crime is being considered.

Once he's been convicted of that crime, I have no objection to a revocation of his parole based on that conviction.

Q You say he's going to be in custody while he's waiting for that trial, isn't the contrary more likely to be true that he would be at large?

MR. BRITTIN: Well, in fact, I believe you're correct, Your Honor. The contrary is probably if he's charged with a separate crime and in the criminal process he probably will be on bail during that time.

Q I understand your arguments that perhaps a technical violation to leave the county in order to get a job, under the circumstances of Booher's case, but as to Morrissey, where he bought the car under a false name and he entered into contracts in which he signed the names of other persons to purchase furniture and various things, you wouldn't really call those technical violations, would you?

MR. BRITTIN: They may -- they are certainly not --

Q One is either fraud or forgery.

MR. BRITTIN: I think that's correct, Your Honor.

And I think that Booher's case in this respect, on the facts of the violation, is much better than Morrissey's case.

Q What is the practice in Iowa when a parole agent is on vacation? Is there only one in the county?

MR. BRITTIN: It's my understanding that there is only one in the county, and actually the parole agreement, if you will examine it, requires that when he obtains permission to do something, the parole agreement says he has to obtain permission from the Chief Parole Officer, which is in Des Moines, the capital of the State.

I assume that when the parole agent is gone from the county, that then the Chief Parole Officer in Des Moines is the person that has the immediate supervision of that parolee. It's my understanding that there is no other agent in the county which would handle it at that time. There may be in Des Moines and some of the other larger cities of the State, more than one parole agent; but in the small county that Booher was from, I'm quite confident that there would not be more than one agent there.

Q What is the county seat of his county?

MR. BRITTIN: I can't think of it, Your Honor. O'Brien County is up in the northwest part of the State. I can't tell you right now.

Q You're not making any claim in this case that the parole agreement itself is so impossibly vague as to not

really set any ascertainable standards, are you?

MR. BRITTIN: You know, Your Honor, we have not made that argument here -- I do think that --

Q Referring to paragraph 6, where it says "I will avoid questionable associates, keep reasonable hours, avoid all places of questionable reputation" that would be rather subjective as to whether or not he had violated those provisions, wouldn't it?

MR. BRITTIN: I think that a very good argument could be made that this type of thing you're talking about is another reason why a hearing may be critical prior to revocation of his parole. But we are not making the argument that the parole agreement should be held to be unconstitutional for vagueness.

Q Well, even if parts of it were, there's nothing vague about the majority of the provisions, is there?

MR. BRITTIN: No, I think that's correct, Your Honor. I think an argument -- while it's also not germane to this case, an argument can be made that parole agreements are unfair in extending some conditions that should not be extended, but that again is not a part of this case.

MR. CHIEF JUSTICE BURGER: Very well. Your time is up, Mr. Brittin.

Mr. Seuferer.

ORAL ARGUMENT OF LARRY S. SEUFFERER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SEUFFERER: Mr. Chief Justice, and may it please the Court:

I think I should begin, in light of some of the questions that have brought out a lot of the factual circumstances in this case, by making a couple of points concerning the factual aspects of the case with regard to the hearings. We also did not realize that there were hearings in this case when -- when I came into it at any rate; and had this, the posture of the question which is presently before this Court been somewhat different, at the District Court level we undoubtedly would have had an evidentiary hearing there where all of this stuff would have been brought out. As it was, we did not.

There is an indication in the record, in the Appendix at page 56, that Petitioner Morrissey in fact received a hearing before the State Board of Parole. It's in the first paragraph on page 56. He denies he received a revocation hearing. In the context of the rest of the petition, I think the inference is clear that that was before arrest or before any revocation.

And then he suggests that he was denied counsel to represent him at said hearing that was conducted behind closed doors by the State Board of Parole.

It was this matter that --

Q Well, that's internally inconsistent, isn't it?

MR. SEUFERER: It appears that it is, Your Honor, and I think --

Q In using the word "said", at least.

MR. SEUFERER: Yes. I believe that on its face it does appear inconsistent. It's only if the entire petition, which was a petition for writ of habeas corpus filed in Lee County District Court, if the entire petition is read, it appears that he's saying "I didn't receive a revocation hearing before my parole was revoked, and I was denied counsel at the hearing I did receive before the State Board of Parole, behind closed doors." I think in the total context.

It was this that caused us to really bring out the matters of the other hearing. Now, it is possible in this regard to submit affidavits of the State Board of Parole showing that both these petitioners in fact received some sort of hearing after their return to the penitentiary.

Q Is this a statutory matter?

MR. SEUFERER: It is not a statutory requirement that they receive it, Your Honor.

Q A post-revocation hearing; there is not a statute?

MR. SEUFERER: It is not statutory. In fact, the statutory provisions which provide for the authority of

granting or revoking paroles do not cover the matter of a hearing.

Q Well, what's the practice?

MR. SEUFERER: The practice is, as we've stated in our brief, is to provide a post-revocation hearing. In other words, the parole is revoked, they're sent back to the institution from whence they came, and within no longer than two months the Board of Parole sits at the various institutions around the State and conducts these hearings.

Q What's the practice prior to revocation? A parole officer's report and a reliance on that, and what then?

MR. SEUFERER: I think that what happened in this case is substantially the practice, the parole officer hears of a violation, as he did in this case, through some method. He investigates it to some extent. He confronts the parolee with it, as he did in this case, and gets whatever he has to say about it. He writes up his report, submits it along with his recommendation to the Board of Parole, and on the basis of this they revoke the parole or do not revoke the parole.

Q And that goes by mail individually to each of the three members of the Board?

MR. SEUFERER: That's correct, Your Honor.

Q Who live in various parts of the State, is that it?

MR. SEUFERER: That's correct.

Q They don't get together and confer?

MR. SEUFERER: No. They act individually on this. It's my understanding that there may be some instances where they will communicate by telephone on a particular case; but the normal circumstances are as just stated.

Q Do these post-revocation hearings often result in the parolee again being released on parole?

MR. SEUFERER: Your Honor, I --

Q I noticed in your brief you say something about only two or three within the memory of the members of the Board --

MR. SEUFERER: That's correct, Your Honor.

Q -- that have been denied.

MR. SEUFERER: You're right, Your Honor. The attorney member, Mr. Beddel, of the Board of Parole, is the one I conducted extensive conversations with concerning this matter once it came to my attention, and he indicated that only three times since he's been on the Board has any one denied the alleged violation.

Q I gather that must mean that not more than three, if that many, have ever been released again on parole?

MR. SEUFERER: That's right. One of those three was in fact released after further investigation. The other two, they affirmed the action of revocation.

Q Yes.

MR. SEUFERER: According to his comments to me.

Q Now, all of this you've learned -- what -- since certiorari was granted in this case?

MR. SEUFERER: In fact, Your Honor, since the Appendix was prepared in this case. I came in --

Q And from your conversations with Mr. Beddel?

MR. SEUFERER: Yes. I came into this case only at the time certiorari was granted; was not familiar with it. And looking through the Appendix, when I came across this aspect about Mr. Morrissey, that triggered my talking to these individuals, and that's where this information came to light.

I think it's unfortunate an evidentiary hearing was not held at the District Court level, because that would have undoubtedly brought these matters out.

It is our contention, however, that the question, the posture of the question in this case is that a hearing was not granted prior to revocation; and, in any event, the hearing that was granted was most certainly after the initial act of revocation.

There is a reason, a reason that was not unfavorable to the parolee, as a matter of fact, as to why the initial revocation takes place at the time it does. A section of the Iowa Code, 247.12, which is set out early in petitioners' brief, indicates that a parolee is not credited with time

served while he's on parole -- this is against his original sentence -- or while he's away from the institution, if the parole is revoked.

What this means is that if an individual, the petitioners in this case, for instance, sat in the county jail or the local jail until such time as the Parole Board could make arrangements to get there with all the facilities that would be necessary for some sort of hearing, none of that time would count against their original sentence.

What the initial action of the Parole Board does is it provides that as soon as revocation takes place, they are returned to the institution, and any time they serve subsequent to that, but still prior to any hearing that may be held at the institution, is credited against their original sentence.

Q Well, it really wouldn't make much difference to your procedure if the formality of revocation didn't take place until he was returned to the institution?

MR. SEUFERER: Under the way the procedure actually operates, it probably wouldn't Your Honor. It makes a difference only in terms of -- well, let me back up a step.

Q It would be merely a question of a label, instead of calling the action the Parole Board takes when it now revokes a revocation, it could serve as sort of a preliminary hearing?

MR. SEUFERER: That's not entirely correct, Your Honor, as far as our position goes. That would be true on the face of it. However, if the parole is not revoked, the individual would not be sent back to the institution, and --

Q He has to be revoked before he gets back there?

MR. SEUFERER: Before he gets back to the institution. So what this means is that if we do not revoke the parole, initially, --

Q He just sits in a jail.

MR. SEUFERER: -- he sits in a jail and the hearing that is subsequently conducted would have to be conducted all over the state, anywhere a county jail might be; and this would cause a considerable burden on the Board of Parole --

Q Yes.

MR. SEUFERER: -- and its administrative facilities.

Q Well, what about the credit for the time in jail while he was --

MR. SEUFERER: The credit would not count, Your Honor, until that parole was revoked. According to the statute in effect in the State.

Q How many prisons are there in the State?

MR. SEUFERER: You mean --

Q Prisons.

MR. SEUFERER: Your Honor, most counties have a prison --

Q Well, they have jails, do they not?

MR. SEUFERER: They have jails. Prisons, there are only three institutions, yes.

Q That answers my question.

MR. SEUFERER: There's a reformatory -- well, three where the Board of Parole sits, but --

Q Three where the Board of Parole visits.

MR. SEUFERER: -- but normally, the normal situation is there's one, the State Penitentiary at Madison is the one that most of the cases fall within, because that's where the most serious offenders are sentenced, and that's naturally where they are paroled from.

Q And then there is, as you say, a jail in each county, or almost in each county?

MR. SEUFERER: Almost in every county.

Q How many counties are there in Iowa?

MR. SEUFERER: About 100 counties -- 99.

Q Ninety-nine?

MR. SEUFERER: Yes, 99.

So it's an administrative thing, too, as well as --

Q Are these matters briefed in the Court of Appeals?

MR. SEUFERER: No, Your Honor, none of these things were covered in terms of that.

Again, the problem with this is --

Q Well, I know it's not in the record, but I thought they might have been briefed or mentioned, referred to in oral argument, or --

MR. SEUFERER: I can't speak for oral argument, I wasn't there. But as far as the brief, the briefs that were filed, I don't think any of these matters were covered --

Q As far as you know, they weren't known to counsel until --

MR. SEUFERER: I don't think they were, Your Honor, because they certainly, the counsel that handled this case at the Court of Appeals level certainly never gave me any indication of it. So I presume they didn't know.

Q Is the order of the District Court requesting the documents from the penitentiary in the record?

MR. SEUFERER: Not to my knowledge, Your Honor. I don't know if it's in there --

Q It know it isn't, --

MR. SEUFERER: It could well be. I'm not sure whether it is or not.

Q Because they call for certain records from the penitentiary, didn't they, with respect to --

MR. SEUFERER: This is the Federal District Court, and --

Q Yes.

MR. SEUFERER: -- for the Southern District.

Q Yes, the court's order of March 25. Well, never mind --

MR. SEUFERER: I'll tell you what might be indicated --

Q -- never mind; that's all right.

MR. SEUFERER: Okay.

The record that would indicate a hearing was held in this case would be a record held by the Parole Board at any rate, and its central office in Des Moines may not -- may well not be a part of the total prison records.

Additionally, we feel that the question in this case being a prior hearing, that there are several reasons why a hearing prior to revocation is not necessary and not advantageous.

One of the things is the aspect of detriment to the parolee, we do not feel is there. Obviously, if he's taken away from a job, if he's deprived of living at home with his family and so forth, these deprivations are going to be there whether we have a prior hearing or not under the system as it works, and in almost all the cases; because the parole violations, even though they may only be allegations at one point, in most cases are sufficient to justify the issuing of a warrant and picking him up and holding him in the county jail.

So whether he really sits in the county jail or the

penitentiary seems relatively immaterial in terms of his interests and remaining on his conditional liberty.

Q Well, isn't there a great deal of difference, including a psychological difference, let alone perhaps a burden-of-proof difference, as to whether or not the hearing is held prior to the decision of the Parole Board to revoke parole, as contrasted with a hearing after that fact accomplished, after the Board has decided to invoke parole; then there's a very great burden, is there not, on the parolee to convince the Board to undo what it's done? I'm thinking of cases like Armstrong v. Manzo, you may be familiar with, and there are many others, that emphasize the importance of a prior hearing, before the decision is made.

MR. SEUFERER: Your Honor, I think if the situation was one where the parolee steadfastly denied the allegations alleged, that that psychological difference might come into practice.

Q How about burden of proof? I suppose there's no formal principles that have been worked out in parole revocation as to burden of proof, has there?

MR. SEUFERER: No, Your Honor, as a practical matter, I guess it hasn't really proved necessary to, because there are so few cases where anything changes. There are so few cases where there's a denial of the offense. And, in fact, these two cases here, not only do the reports of violations --

which, admittedly, the comments in there are the comments of the parole officer as taken from the individual parolee,-- but in both of those instances, if they are carefully read, the rules that he alleges were violated, the petitioners admit the violation of those rules. And I think the significant thing about it is, nowhere in all of the proceedings of this case, including at this level, have they ever denied commission of those offenses, have they ever said, "We didn't do what they said we did."

Nowhere have --

Q Well, what about in the Booher case, though, as counsel suggested, that in Booher's instance, he left the county, all right, but he did it because his wife was having a baby in some county, or because he had a job offer?

MR. SEUFERER: Your Honor, I think that's --

Q They may be violations, but might they not be waived at a prior hearing, as not justifying, under those circumstances, the revocation?

MR. SEUFERER: I think, Your Honor, that there's a point to be made in that respect. However, I think that there's a point that weighs against that, too. In that you'll notice, I think, in both of these cases, and in the majority of cases, a parole is not revoked on the basis of one alleged violation.

In other words, there are three in both of these

instances, and usually, I think also, that the reported violations indicates there are some past problems.

Normally, the people we're talking about here, the parole officers and the Board of Parole, are interested in a rehabilitative process. It's an expensive proposition to maintain a prisoner, and it's not as expensive to maintain a parolee. They're interested in working with these people, and --

Q And a violation means failure?

MR. SEUFFERER: A violation means -- it's an admission of failure, really, by the people that are trained to help them.

And I think that the -- I think there is something to be said for the mitigating circumstances. But I believe this is a discretionary question that has to be waived by the Board along with this guy's entire past history, including the psychiatry reports they have from the institution when he was there, his performance there, everything else. And I think in the sum total of things that this decision, the second decision, if you will, as to whether or not the parole should be revoked, once the fact of violation is established, is such a discretionary matter and as such involves so many non-legal, non-technical type considerations that it would serve no useful purpose to have factual proof on some of these things.

It had been brought to the attention of the Board of Parole, at any rate. In other words, they knew about it.

Q Well, in Booher's case, I gather, the only other violation was that he was driving a car without -- a car registered in his wife's name, without the consent of his parole officer. Is that it?

MR. SEUFERER: That's correct, Your Honor.

I think it's -- I believe his --

Q In that one of his conditions was: "I will neither own nor operate an airplane, automobile, truck, motorcycle" --

MR. SEUFERER: That's correct, Your Honor.

Q -- "without the written consent of the Chief Parole Officer."

MR. SEUFERER: And of course the employment aspect, too. Booher had several problems remaining employed, apparently due to temper.

Q Yes.

MR. SEUFERER: And so there were -- really, the only mitigating circumstances go primarily to the leaving of the county or the place.

Q Well, actually the loss of his liberty depends, doesn't it, on the parole officer. When he comes up with a report like this, automatically he's picked up, isn't he?

MR. SEUFERER: The parole officer is the one who

initiates the warrant for arrest, yes.

Q Automatically, then, he's picked up on that, and --

MR. SEUFERER: He's not -- I don't think the pickup is automatic. I think in the case of fact for Petitioner Morrissey, the parole officer submitted his report of violation on, I believe, January 28, '69; the parole was revoked, and Morrissey was in fact incarcerated in the local jail on the arrest warrant on the 31st of January, which would indicate that, in that instance, --

Q Well, tell me what the process is. The report is filed with whom?

MR. SEUFERER: With the Board of Parole and with the -- there are actually about five copies of it, one goes to each of the three members of the Board of Parole and the State office.

Q And then what's the procedure then which leads to an order of revocation?

MR. SEUFERER: The procedure then is that the Board of Parole, on just -- really on the basis of the information contained therein and on any past records of the individual, vote individually, usually --

Q You mean by telephone or mail or --

MR. SEUFERER: Normally it's by mail. They vote by mail to the Chief Parole Officer, who is located in Des

Moines, in the capital; and two votes out of the three trigger the issuance of a revocation.

Q And until that procedure has been completed, the parolee is not picked up?

Q No, he's in jail.

MR. SEUFERER: Well, he may be in jail. No. What I am saying is that in Morrissey's case he was not. In Booher's case, he was in jail --

Q Well, that's what I was trying to get at. How does that come about?

MR. SEUFERER: Him being in jail?

Q Yes.

MR. SEUFERER: Once the parole officer, parole supervision has information of alleged violations, he may have a warrant issued for the man's arrest, holding him in the local jail.

Q And where does he get the warrant?

MR. SEUFERER: That comes through the local authorities. It's approved by the State parole officer, though. In other words, it's --

Q Well, then, I'm still puzzled. Booher had a parole officer, to whom he had to report.

MR. SEUFERER: This is correct.

Q And who supervised him.

MR. SEUFERER: This is correct.

Q Now, that parole officer decided he had committed violations.

MR. SEUFERER: That's correct, Your Honor.

Q Now, then, how, what was the procedure which led up to Booher's going to the county jail?

MR. SEUFERER: The parole officer, with -- usually it's a matter of informing the Chief Parole Officer in Des Moines, who supervises the whole operation, of the information available to him, and that he wished a warrant issued to pick up Petitioner Booher because he was in the process of filing a report of violation on him.

Q Now, the warrant, is it an administrative warrant?

MR. SEUFERER: It's an administrative -- well, no, Your Honor, it's not; it's a warrant issued by the local authorities, but --

Q By local authorities, you mean a local magistrate or a local judge?

MR. SEUFERER: Yes. Yes. Which picks up or arrests Petitioner Booher and incarcerates him in a local jail. Then --

Q Then there starts the process --

MR. SEUFERER: Then there starts the process; that is correct.

Q -- of getting the parole members involved?

MR. SEUFERER: That's correct.

Q Thank you.

Q Let me take you to the setting in which the parole officer has received some information that violations have occurred, but before he has completed his investigation and made his report to the State Parole Board. Now, in that setting, does he contact the prisoner as a matter of practice, the parolee, and confront him with the suggestion of violation and give him an opportunity to explain them or answer --

MR. SEUFERER: As was done in these cases, yes.

Q Yes. Isn't that always done?

MR. SEUFERER: Your Honor, I hesitate to say always; but the normal practice is that that's what they do. Unless the parolee is -- that they're unable to pick him up, because in some cases he of course is gone from the State, and in that case he does not.

Q But the Parole Board is about to revoke the parole without a report from the parole officer as to what he's found out?

MR. SEUFERER: No, they do not. As a matter -- they just do not do that.

Q It may say "he's gone; I can't find him"; that's all he knows.

MR. SEUFERER: Well, it depends on --

Q At least that's what the parole officer says to the Parole Board.

MR. SEUFERER: Yes. Well, if that's without some verification that he in fact is gone, I really don't know what the Parole Board would do. It's unlikely they would revoke in that case.

Q But as a practical matter, what has the Parole Board to act on except the report of the parole officer?

MR. SEUFERER: In essence, that's what they have. Aside from whatever past records they have of him. They of course have files on all of these people.

Q Yes. But, ordinarily, if there is a recommendation by the parole officer that his parole be revoked, I take it that's what the Parole Board does, does it not?

MR. SEUFERER: That's not correct, Your Honor. As a matter of -- again we're talking about things on which I don't have the exact statistics on it, but in my discussions with Mr. Beddel, it was his indication that they reject a lot of these, in other words turn the man loose, depending upon their judgment in terms of whether he's still a good risk to remain on parole.

In this kind of situation, where you have three alleged violations, all admitted, I would say almost always they're going to buy that recommendation. If you have one allegation, it was Mr. Beddel's opinion that normally if it is strictly a technical one, in other words he left the county or something, --

Q Like the one you had with Booher, where he was going to pick up a job in another county?

MR. SEUFERER: Yes. Now, that's the type of thing, if that was the only violation, the probabilities are they would not --

Q The probabilities are there wouldn't be a recommendation; he's already gone.

MR. SEUFERER: That's right, the probabilities are there wouldn't be.

Q We're now, however, talking about a situation where there is a recommendation by the parole officer.

MR. SEUFERER: Well, it's my understanding that in many of these cases, in many cases -- you know, "many" is, I realize -- I can't pin this down statistically; I'm sure we could more closely from members of the Board of Parole. But in many cases they don't accept the recommendation, to answer your specific question.

I could only speculate as to what cases --

Q This is from what Mr. Beddel told you?

MR. SEUFERER: Yes, that's what he told me. That was verified by the Chief Parole Officer, who is right next door to me, and I'm able to talk to, at any rate, on a daily basis; but it's my understanding they do not accept the recommendation in every case.

Q I glanced through the appendix to one of the

amicus briefs here, that indicates about 30 out of the 50 States has some form of hearing. Is that -- have I counted that correctly?

MR. SEUFERER: I think there might even be more than that, Your Honor, that have some sort of hearing. Not necessarily provided by statute or by case decisions in the State, but by a practice, as is the situation in Iowa.

Q Nor necessarily before revocation?

MR. SEUFERER: That's correct, Your Honor.
Nor necessarily before revocation.

Q Well, do you know how many have them before revocation?

MR. SEUFERER: I do not have that figure available, Your Honor.

In respect to what you've mentioned, the statistics you've mentioned there, there is a publication that will, I understand, be published this summer by the National Council on Crime and Delinquency, which is called the Organization of Parole Systems, and is prepared by the National Parole Institute, and they studied or -- not studied, but set out the procedures of parole operation, both granting and revocation in all the States, or attempted to in all 50 States.

There is a section in there on the State of Iowa, which indicates -- I looked at some of these, the draft of some of these, and they're not terribly specific, but it does

indicate that there is a revocation hearing subsequent to the parole revocation -- that there is a hearing subsequent to revocation, I should say.

Q In your State?

MR. SEUFERER: In our State, yes. That is that the Iowa section will cover --

Q Bearing out what you've learned and have briefed?

MR. SEUFERER: Yes, bearing out the general procedure. Not that these two specific individuals specifically had one.

Q Mr. Seuferer, I'm looking at page 67 of the Appendix now. At the bottom of the page, under Roman numeral III, "Parolee's Version of the Offenses", and that is followed by a summary of the effort on the part of the parole officer to get a response.

MR. SEUFERER: That's correct, sir.

Q And that's followed in turn by a recital of the previous violations and his parole history. Is this report, if you know, typical of the types of reports which the parole agents make to the Board in connection with a proposed revocation?

MR. SEUFERER: I think it's substantially typical in terms of what they've covered. It's not necessarily in terms of form. And in a lot of cases they may not know of some of the previous violations, and that sort of information.

But in terms of setting out the rules violated, setting out some sort of summary of how they were violated, setting out something about the parolee's version of these offenses, and a conclusion or recommendation; that, I think, is substantially what the bulk of them cover.

As far as this information about previous violations and parole history, if they know it, if they're aware of it, has been his parole officer all the time, they generally will include something about that. If they don't, which they may not, they don't have to.

Q And you've said in response to some questions from the bench that before the warrant, the violation -- the parole violation warrant is served and the arrest made there is some local magistrate or officer, a neutral officer who issues that warrant. Just who is that?

MR. SEUFERER: Your Honor, that's --

Q A municipal judge, or what kind of person?

MR. SEUFERER: Your Honor, I'm not really sure who issues that warrant. It's a -- it may be -- I'm sure it's not, in most instances, a judge. Some sort of --

Q It's a person in the locality where the agent and the violation --

MR. SEUFERER: I think that is usually the situation; but it's on the basis of -- I think I should make this clear; it's on the basis of the approval, really, by the

State, Chief Parole Officer in Des Moines. In other words, the local judge or the local magistrate is not, 99 times out of 100, going to refuse to issue a warrant.

Q This is just, say, for all practical --

MR. SEUFERER: It's a procedure thing.

Q -- for all intents and purposes it's a case of a parole-police officer determining that the facts are such that there's probable cause for arrest, and arresting?

MR. SEUFERER: In essence, that's correct, Your Honor.

Q And I suppose that down under 247.9 of your Code, which makes a parolee subject at any time to be taken into custody.

MR. SEUFERER: That's correct, Your Honor.

Q Would it administratively be feasible if the process that's covered in this report of the parole officer be presented to that local magistrate or whatever other officer may be involved on the warrant, and have him at least make a preliminary determination and give the parolee an opportunity to answer to the specific charges before the revocation -- before the arrest was made?

MR. SEUFERER: If your question is, would that be administratively possible --

Q Yes.

MR. SEUFERER: -- I think it probably would, Your

Honor. As to where --

Q Remember in Hiser v. Reed,⁷ that was what was ordered with respect to the federal system.

MR. SEUFERER: That's correct.

Q That within a reasonable time after the determination of a probable violation, the parolee must be given an opportunity to be heard to show why he should not be arrested and returned to the federal institution.

MR. SEUFERER: That's correct, Your Honor. And the only problem that comes to mind on that kind of process is the local magistrate, if you will, is going to be considering certainly only the facts that he has before him. This is -- while this would seem -- in the case where there is no question, where the individual had admitted the violations, this would seem unnecessary, unless there's some question of voluntariness of that admission.

And at least so far as the cases of the Petitioners, there has never been any allegation that they were in any way coerced in anything they did.

Administratively possible? I think yes, Your Honor, it would be.

We would then, in summary, -- our contention is that the Petitioners, Morrissey and Bocher, both admitted the fact of parole violation; have never in any manner denied that admission. And in light of these facts, we would submit that

regardless of what may be nice or better, maybe, in a general proposition, the two petitioners here got all the process they were due, and we respectfully request that this Court affirm the lower court decision.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Seufferer.

Your time is up, Mr. Brittin, but I want to express the Court's appreciation for your accepting the appointment in this case, and for your assistance to your clients and to the Court.

MR. BRITTIN: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:05 o'clock, a.m., the case was submitted.]