In the

Supreme Court of the United States

JOHN R. GAGNON, Warden,

Appellant,

vs.

GERALD H. SCARPELLI,

Appellee.

No. 71-1225

Washington, D. C.
January 9, 1973

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GERALD H. SCARPELLI, Appellee.	

Washington, D. C.

Tuesday, January 9, 1973.

The above-entitled matter came on for argument at 11:49 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM A. PLATZ, ESQ., Assistant Attorney General of Wisconsin, 114 East, State Capitol, Madison, Wisconsin, 53702; for the Appellant.

WILLIAM M. COFFEY, ESQ., 152 West Wisconsin Avenue, Milwaukee, Wisconsin, 53203; for the Appellee.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1225, Gagnon against Scarpelli.

Mr. Platz.

ORAL ARGUMENT OF WILLIAM A. PLATZ, ESQ.,

ON BEHALF OF THE APPELLANT

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

I might mention that my client pronounces his name in the French way. It is Gahyn-on.

This case commenced, actually, on July 9, 1965, when Gerald Scarpelli was convicted in Wisconsin of armed robbery in Racine County, and was placed on probation for a period of seven years in the custody of what was then the State Department of Public Welfare, which has control of all probationers and parolees in the State of Wisconsin.

He was also,at the same time, sentenced to a term of 15 years in the Wisconsin State Prison and execution of the sentence was stayed pending the 7 years probation.

He was permitted to leave the State of Wisconsin pursuant to the interstate compact for out-of-state parolees supervision and go to the State of Illinois where he resided. His residence was in a suburb of Chicago and he was employed in another suburb of Chicago.

He was accepted for supervision by the Cook County

Probation Department, pursuant to the interstate compact, on August 5, 1965.

On Friday, August 6th, the following day, a home in Deerfield, Illinois, which is a northern suburb of Chicago, and is quite some distance both from Scarpelli's residence and from his place of employment, was burglarized during the daytime, in the morning, and news of this came to the Department of Public Welfare which saw a news article in the Chicago Tribune which contained a photograph -- contained two photographs, including one of our probationer, Scarpelli, and also a statement which he gave to the Assistant State's Attorney of Lake County Illinois, in which he made a full confession of his part in the burglary.

The co-defendant -- or the other burglar -- was also his co-defendant in the Wisconsin robbery of which he had been previously convicted.

I think Frank Kleckner, the other burglar in Illinois, was not at that time convicted in Wisconsin. Kleckner was shot leaving the burglared premises. Scarpelli, however, escaped and was not taken into custody for some little time.

Q Now, are you describing the conduct which led to the revocation --

MR. PLATZ: That is what I am describing now, the conduct which led to the revocation.

Now, at that time in Wisconsin, the law was that there

was no right to a hearing on revocation of probation.

Our law on probation was enacted in 1909, two years after our parole law.

The parole law had placed parolees in the custody of the old Board of Control, which later became the Department of Public Welfare, and two years later, in 1909, the Legislature enacted the probation law under which the courts could either impose sentence and stay execution thereof and place them on probation under the custody and control of the same department which had control of parolees and under the same rules and regulations, or could withhold sentence altogether and place them on probation.

In the case of Scarpelli, it was a case of the sentence being imposed and execution stayed.

Now, originally, in Wisconsin, the probation law required that before probation be revoked, there be a hearing -- the law said a personal hearing -- full investigation and personal hearing.

In 1947, that provision was removed in the course of the revision of the statute and there have been no hearings since then.

This Court, in Escoe v. Zerbst, held that there was no constitutional right to a hearing on revocation of probation.

Q Have there been no hearings since then? I suppose there have been, perhaps in hearings since Morrissey v. Brewer,

haven't there?

MR. PLATZ: Yes, Your Honor, and since before that, too, but what I mean is up until the time of this case there have been no (inaudible).

Now, this case was commenced in the Federal Court in December 1968, which was over three years after the revocation, and it took quite a while. It was 1970 before it was decided in the court -- in the District Court.

We lost in the District Court. We appealed to the Circuit Court of Appeals, and we lost there. It took almost a year for that to be decided.

We applied for certiorari in this Court, which was granted at the end of June.

Counsel now takes the position that the case has become moot, because the original seven years of probation -- calendar years -- has expired.

I filed a reply brief, answering this claim of mootness, and in order to have more time to discuss the merits I would really prefer to leave the mootness to my reply brief.

I consider that the case is not moot, that we have a right -- if we have committed constitutional error -- we have a right to correct it and to correct it now even though the original seven calendar years have expired.

Actually, at the time this matter was before the Court of Appeals, the probationer Scarpelli had been released

on parole to meet a Federal charge and had already been tried Federally and was then in Terre Haute in a Federal institution and he thereafter was released on parole from the Federal institution, and I am not sure I know just where he is now, but we have a string on him and can get him back for a hearing if we have to.

Q The essence of your mootness argument is that the sentence has six or seven years --

MR. PLATZ: More to go.

Q -- and he may have parole revoked again.

MR. PLATZ: That is right.

On the basis of the rule which this Court has laid down whereby the States have the right to correct their errors, in case -- and on Federal habeas corpus, of course, the rule is that the court makes such order as law and justice require and it does not require that there be an absolute discharge of the defendant.

Now, at the time, as I say, we -- this man was rather summarily revoked on the strength of what he had done and his admission. On the record, there is no question that he made the admissions to the State's Attorney's office in Lake County, Illinois.

In his traverse, he admits he made the admissions to the attorney -- to the Assistant State's Attorney -- but he takes the position that he did so on the basis of some

statements having been made to him that, of course, the Wisconsin authorities would never be informed of this and that Fleckner had been killed escaping from the burglary, and that no one would be hurt if he were to admit his part in it, and he would be let out on low bail, and all that, which -- but he does not in any way deny that he made the statement.

The complete statement is set forth in the Appendix in this case and you will readily see that it contains plenty of corroborative detail from which the Department would have a right to believe that it was true and correct.

Now, however, the question before the District Court was whether he was entitled to a hearing and, if so, whether he was entitled to be represented by counsel.

At the time we asked for certiorari, we intended to raise both those issues here. However, the Morrissey case has effectively defeated us so far as the right to the hearing itself is concerned because I cannot distinguish Morrissey from this case, although Morrissey involved parole and this one involves probation. Nevertheless, the two are in law indistinguishable because our probationers are handled exactly the same as parolees.

There is one slight exception, but nothing that would make a legal distinction.

So, I am here now only on the question of the right to counsel.

However, I would ask this Court, if you can do so, to clear up one thing for us.

Now, as I mentioned, in this case, this man was permitted to go to Illinois under the interstate compact.

We have over 600 people -- Wisconsin people -- who are being supervised in other States.

Nationwide, there are at least 25,000 people who are being supervised -- parolees and probationers -- being supervised in other States.

It is very difficult for us to see how we can apply strictly the Morrissey rules to these out-of-State supervised cases.

In the first place, the preliminary hearing which is mandated by Morrissey is going to be rather difficult to -- that's for lunch, isn't it?

(Whereupon, at 12:00 o'clock, noon, the oral argument in the above-entitled matter was recessed, to reconvene at 1:00 o'clock, p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: Mr. Platz, you may continue.

MR. PLATZ: May it please the Court.

I was speaking of the interstate compact cases.

I suggest, Your Honor, that the Morrissey rule has created a special problem in reference to those cases, and, of course, to any case where the probationer or parolee has absconded and where his violations have occurred outside of the State in which he was on probation or parole.

Q About the facilities that are involved in the interstate compact, that is, assuming you had two States who were parties to that interstate compact, as between Illinois and Wisconsin, you wouldn't really have a problem, would you, if you use the facilities and personnel of the Illinois system to execute the function placed on it by Morrissey?

MR. PLATZ: Well, I don't know that we have any right to ask Illinois, under the compact. The compact does not provide for that. The compact provides only for Illinois to supervise our people and to report to us on what they have been doing. It does not provide for them to hold hearings.

Q What specific part of Morrissey are you saying --

MR. PLATZ: Well, actually, I suppose both parts. Both the preliminary and the --

Q Well, in the preliminary are you talking about when somebody is taken into custody, before he can be moved back to the prison he has to have a hearing -- some kind of a preliminary hearing? It doesn't require a hearing before you can put him in custody at that point.

MR. PLATZ: No, that's true. It does not require a hearing before he can be held in custody at that point.

Q Well, what if you don't have a compact with a State and one of your probation or parolees goes to another State and is -- and absconds, absconds and he is arrested there?

MR. PLATZ: Well, what we would have to do then would be to issue a parole revocation warrant, charging him --

Q Yes.

MR. PLATZ: -- charging him with absconding and find out whether he will waive extradition, and if he will not waive extradition --

Q So you are in no worse shape under Morrissey than you have always been.

MR. PLATZ: That is true, except only for the fact that -- if you let us bring him back. The only problem was that under Morrissey we then have to hold a hearing after we get him back here on what it was that he did in Illinois or wherever he was being supervised, and we may have to produce the witnesses.

Q Yes, but to extradite you would have to show some

kind of -- make some showing, wouldn't you?

MR. PLATZ: Well, the only showing that we have to make for extradition is the fact that he has been charged and convicted --

Q But you would have some sworn statement, or something. That would ordinarily be sufficient to provide probable cause for some official act.

MR. PLATZ: Yes, that's right.

Q There is no evidentiary hearing involved, is there?

MR. PLATZ: Not for extradition, no.

Q No. Or for the preliminary hearing in Morrissey.

Q Morrissey is not an evidentiary hearing.

Q For the first step.

Q It is probable cause here. It has been said explicitly that this could be done in the most informal way, by statements of the parole officer --

MR. PLATZ: In other words, if I understand Your Honor correctly, then that we would be permitted, having returned the man to Wisconsin in the extradition situation, to use just statements that we would have obtained from the State where the violation occurred, is that right?

Q For what purpose?

MR. PLATZ: For purpose of determining probable cause to hold him for violation of his probation or parole.

Q Well, no one of us can give advisory opinions.

I don't know if you are aware of that.

MR. PLATZ: No, I understand. That's right.

But then we still are confronted with the necessity of an evidentiary hearing for final action at which we may have to produce the witnesses who are in a position to testify to what it was he did in that other State.

Now, this may either be in a case where he was supervised outside of the State that put him on probation or parole or it may be in a situation where he has absconded from that State and gone to another State where he got into some further trouble, which did not, however, wind up with the conviction of crime.

If it wound up with a conviction of crime, I assume that he would not be permitted, under the Morrissey Rule to litigate that. We would just establish that by --

Q That certainly is clear.

MR. PLATZ: In Scarpelli's case, we had his confession, which probably would have had to be proved by inducing one of the witnesses to the confession to come to Wisconsin about it, I suppose, had the rule been in force at the time when Scarpelli violated it.

Q Not necessarily in person. Parole hearings can be conducted on interrogatories or any other such method.

MR. PLATZ: Well, if we can do it on interrogatories, that would be very helpful, of course, because we can't -- we

have no process whereby we could get the witness to Wisconsin from Illinois, for example, assuming he is unwilling to come.

Illinois is close, of course, but we've got people at much greater distances than that.

Q I have forgotten from your briefs. How many States are in the interstate compact?

MR. PLATZ: I think, just about all of them are now, including Puerto Rico, Virgin Islands, District of Columbia, I think just about all of them are in it.

Q Morrissey may require some modification of the provisions of the interstate compact to extend these additional services.

MR. PLATZ: That may be, and, as a matter of fact, the Council of State Governments is working on it and has proposed a bill, which I have examined and I don't think much of it, because it seems to me to be quite insufficient for the purpose, and I have so notified the Council. I hope they can work out something better than they already have.

But so far at least, we are thrown more or less on our own resources to comply with Morrissey in the interstate cases.

Now, coming to the question of counsel, and particularly if we have to have counsel for the preliminary and if the preliminary is to be held in another State and if counsel has to be appointed at public expense, this is going to

cause all kinds of problems, if the counsel has to be appointed in a foreign State to represent a man who is not really their boy at all, he's ours.

Q Counsel at the probable cause hearing?

MR. PLATZ: At the probable cause hearing, yes, if there has to be counsel at the probable cause hearing.

Now, I would like to drop that and go on to the question of counsel at the final hearing.

Q I gather that final hearing is the one before the full parole board.

MR. PLATZ: Yes, except that in our situation the Parole Board doesn't hear it, Your Honor.

Q Who does?

MR. PLATZ: We have had to retain hearing examiners for that purpose. We have had one for the last two years and have now added another one.

Q And what kind of hearing at that stage do you read Morrissey is required?

MR. PLATZ: We at that stage hold a hearing at which evidence is taken to determine whether or not there has been a violation and to determine whether or not the violation warrants a revocation.

Q What rules of evidence do you follow?

MR. PLATZ: Well -- not the rules of evidence applicable in court. I think they admit anything that's

considered to be relevant and probative.

Q What about affidavits? What about hearsay?

MR. PLATZ: This would all be received.

However, we understand under Morrissey that if the probationer or parolee says he wants to be confronted with the people who have given information against him, then they have -- he has to be confronted with those people unless the hearing examiner determines that to do so would be dangerous.

Q What about the burden of persuasion?

MR. PLATZ: I don't know whether that question really has come up. The question is --

Q Morrissey never suggested beyond a reasonable doubt.

MR. PLATZ: No, that's right and we don't want to apply any such burden either.

Q You don't consider it as a criminal proceeding either?

MR. PLATZ: No, sir, we do not. We consider that the question is whether the Bureau of Probation and Parole in recommending revocation has acted arbitrarily and capriciously.

And, if not, then whether the violation which has been established is ground for -- actually justifies and warrants the revocation.

Now, on that point, of course, we run into another side issue and that is what else can be considered besides this particular violation?

In the case of a judge who is about to sentence a man, he looks at more than just the crime that the man has been convicted of, he looks at a whole lot of things. He gets -- in many instances, he gets a pre-sentence investigation which was made by some of these very same people whom we are talking about here, these probation and parole agents.

Q What's been the practice in Wisconsin before Morrissey, in that respect?

MR. PLATZ: Well, the practice has been that the -- I suppose you will have to say this -- that the parole agent who is thoroughly familiar with a man's background, makes the initial determination of whether he is going to recommend probation or parole revocation.

Q He may rely on a great many things.

MR. PLATZ: He may rely on a great many things. That is right. And certainly these files contain a great deal of the man's history and matters which are officially known to the department and known particularly to the Bureau of Probation and Parole which is part of the department. These things are all known, not only personally, but on the record of the department.

Q That is, the matters which a judge can consider in sentencing are coextensive with the matters which the parole board can -- may consider properly on revocation --

MR. PLATZ: Yes, except, again, I mention it is not

the parole board. The parole board grants parole in Wisconsin, it does not revoke.

Revocation is initiated by the Bureau of Probation and Parole, which is a separate organization. It is the organization within the department which supervises the probationers and parolees and which initiates the revocations.

The revocations, actually -- the signature on the paper which makes the revocation final and gives it effect is that of the Secretary of the department, and he acts, of course, upon the advice of his people who are employed for that purpose.

Starting with the Bureau of Probation and Parole, then -- now, of course, it has to go to the Examiner and the Examiner then reports to the Assistant Secretary who reports to the Secretary.

Q What guidelines are there?

MR. PLATZ: Guidelines? Well, they are in writing. I am sorry I am not able to give them to you verbatim what they are.

Q But they do have printed guidelines?

MR. PLATZ: Well, they do have guidelines.

Q I mean guidelines as to what is considered sufficient for revocation of parole?

MR. PLATZ: I would have to admit they are pretty loose, though. In other words, the agent has to decide on the

basis of what he knows about this man, whether the time has come when the man has to be taken off parole. Now --

Q If the man talks back to him, would that be grounds enough?

MR. PLATZ: If he talked back to him? I don't think so.

You see, what may be sufficient in one case is not sufficient in another.

For example, a man may be convicted of another crime. In many instances, this would result in a revocation. In a great many, it will not result in a revocation.

Q But aren't there many that do not -- many revocations that do not include conviction of crime?

MR. PLATZ: There are some, yes, surely.

Q And what guideline do you use for those?

None, am I correct?

MR. PLATZ: I wouldn't say there are none. No, I can't say that. But neither can I give you what they are. I am not that deep enough into it, and this record, of course, doesn't go into that. Here was a case --

Q I suppose a probation officer is in a little bit different position than a sentencing judge since he may have been supervising the man on a week to week or month to month basis over a period of years, and may have a closer acquaintance with that particular man than a sentencing judge would just on

the basis of his probation officer's report.

MR. PLATZ: That is right. I would say that the type of thing that he considers is probably very much the same. But, what I am concerned about is does all this have to be proved at the hearing, or can we take into account these facts which are known officially to the department?

Q Suppose you have an alleged commission of another offense -- another crime, but the, as you call him, parole agent, or whatever he may be, who has been supervising him over a couple of years has overlooked as not justifying revocation a number of infractions, for example, of the restrictions. He shan't leave the State and he's left the State two or three times. And that's the kind of record he has. And your question is, I suppose, whether, on the revocation hearing, may that kind of evidence bear on the record to be made at the revocation hearing.

MR. PLATZ: That could be an example, yes, that sort of thing.

In other words, the whole record this man has made over the period of his supervision.

Q Is your statement that the power to revoke or the evidence that you may base revocation on is similar to that a judge may rely on when he is sentencing?

What becomes of confrontation then? I mean that is just sort of unregulated hearsay, a lot of it, isn't it?

MR. PLATZ: That's what it is in Court, Your Honor. That's what this Court said was all right way back in Williams v. New York .

Q I just wondered to what extent Morrissey is not tenable any longer in a revocation hearing?

MR. PLATZ: That's what I am asking this Court. Is it tenable or isn't it? And if it isn't, why isn't it? If a court can act on that kind of information, then why can't the department which compiles the information which is considered good enough for a court to act on, why can't the department act on it?

Q Well, the Morrissey opinion didn't address itself --

MR. PLATZ: No, it didn't. It did not. That's right, and that's what we would like to know.

Q Did it indicate a modification of Williams v. New York?

MR. PLATZ: No, it did not. It did not. But it did say that one of the questions that has to be decided on the basis of the hearing is whether the violation is sufficiently serious to justify a revocation.

Q Unless you think Morrissey requires confrontation your interstate problems are negligible.

MR. PLATZ: That is true, but it does seem to me that Morrissey requires confrontation if demanded by the

defendant -- by the probationer or parolee -- unless the Examiner finds that to require confrontation would be dangerous.

I am sorry I am not able to go into further what I -- but I hope I have it well covered in my brief.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Platz.

Mr. Coffey.

ORAL ARGUMENT OF WILLIAM M. COFFEY, ESQ.,

ON BEHALF OF THE APPELLEE

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

I would very briefly like to first address myself to the contention of the respondent that this matter is moot.

July 9, 1965, Gerald Scarpelli, on his plea of guilty, was sentenced to 15 years in State penitentiary.

That sentence was stayed and he was placed on probation for 7 years.

That probation was ultimately revoked by the State of Wisconsin, Department of Health and Social Services, in September of 1965.

Q That was within the 7 years, wasn't it?

MR. COFFEY: It was within the 7 years, Your Honor, but Scarpelli had filed a writ of habeas corpus in the State of Wisconsin Supreme Court and later in United States District Court, claiming that his probation was illegally

revoked in that he had not been granted a hearing prior to revocation of that probation.

The United States District Court held Scarpelli's claim to be valid, held that he was entitled, as a matter of constitutional law, to a hearing prior to any revocation of his probation.

It also held that he was entitled to be represented by counsel at that hearing.

The State of Wisconsin appealed that decision to United States Court of Appeals for the 7th Circuit, and the District Court was affirmed.

In the interim period, the Wisconsin Supreme Court also decided that as a matter of constitutional law that Scarpelli's probation was illegally revoked in that he was entitled to a hearing.

Q Under whose constitution?

MR. COFFEY: The Federal Constitution, Your Honor.

Q And did they purport to be following, or did they consider themselves in any way bound by the 7th Circuit holding?

MR. COFFEY: No, they did not. I do not believe there is anything in the Wisconsin opinion -- the Wisconsin Supreme Court opinion -- that you can interpret as saying that we are bound by the decision in Hahn v. Burke, and Hahn had been the first case deciding he had a right to have a hearing.

Wisconsin has a statute that says that any time you

place a man on probation, during that term of probation, you may modify the terms and conditions of probation and you may extend the period of probation supervision.

Now, no matter how this Court resolves the right to counsel issue, Scarpelli is entitled or was entitled to a hearing prior to the revocation of his probation.

No one in the State of Wisconsin took any action to extend Scarpelli's probationary period. The illegal revocation of that probation, we contend, cannot operate to extend that period of probation.

Q You aren't abandoning your claim that he has a right to counsel, are you?

MR. COFFEY: No, I am not, Your Honor. I am just talking first about the moot decision.

Q The counsel issue is here, isn't it?

MR. COFFEY: My position if the case is moot and as a result of the illegal revocation his probationary period --

Q How can it be moot if the counsel issue is -- was validly here and you haven't abandoned it? And there is going to be a hearing at which you claim they have a right to counsel.

Q I guess the answer is you want to win the case for your client and if it is moot and you win it that way you will take that?

MR. COFFEY: That is correct, Your Honor, in that

it is my theory that if we could go back to Wisconsin on it, it would be my position that they can't hold that theory.

Q You went into Morrissey v. Brewer in effect even though you don't have a right to counsel.

MR. COFFEY: That's correct.

So I can go back to Wisconsin now and argue, "Look, you had from -- 7 years from July 1965; as of July 9, 1972, the seven years has expired, you didn't extend the probationary period. You no longer have any authority or control over this man to give him a probationary --"

Q Is that under a Federal or State law?

MR. COFFEY: Which, Your Honor?

Q That proposition you just advanced.

MR. COFFEY: There is no authority whatsoever in the laws of the State of Wisconsin to extend this man's probation.

Q What makes it Federal law?

MR. COFFEY: It is not a Federal law. As a matter of the operation of the State law, his probation wasn't extended. His 7 years are up, and, therefore, no one has extended that probationary period --

Q We know that the Wisconsin Supreme Court may not say that for the purposes of that statute on this set of facts it was extended?

MR. COFFEY: I don't believe -- the statute is not self-executing.

Q Don't you have to -- do you have to say that Morrissey v. Brewer is retroactive to come out with that result?

MR. COFFEY: I don't know the answer to that. You may very well have to.

Q Well, if you have to, Morrissey v. Brewer said it wasn't retroactive.

MR. COFFEY: Correct. But the position I am taking is that the State of Wisconsin is not here contending that Scarpelli is not entitled to a hearing. They are not here contending that Hahn v. Burke, which was decided by 7th Circuit Court of Appeals, isn't the law.

Q Did Morrissey involve probation or parole?

MR. COFFEY: Morrissey involved parole. Hahn v. Burke, which is out of the 7th Circuit, involved probation. Scarpelli involves probation.

Q Is Scarpelli out now or is he confined?

MR. COFFEY: Scarpelli is out. He is presently out, I believe, on both State and Federal parole.

Q And your position is he's out, just as if had served an expired sentence, in effect, and was freed at the end of that sentence?

MR. COFFEY: That's correct.

Q Or put it another way, he's out in the same legal posture as though his parole had never -- his probation had

never been revoked.

MR. COFFEY: That's correct.

Q In fact or law.

MR. COFFEY: Correct.

The revocation was illegal and, therefore, nothing told the running of it. The seven years have expired, and the question is moot.

I'll leave the mootness question for a moment to go to counsel.

In Morrissey, this Court held that due process required a hearing prior to the revocation of parole.

The Court's decision is based on the determination or the finding by this Court that this is a procedure or a proceeding where an individual, if he loses his freedom, even though conditional, suffers a grievous loss, and, therefore, due process applies. The question is, what processe is due?

In Morrissey, the Court recommends -- suggests that it is constitutionally mandated for a parolee that the procedure include a written notice, a disclosure of the evidence against parolee, an opportunity to be heard in person --

Q A disclosure of evidence or a recital of the ultimate facts --

MR. COFFEY: A recital of the conditions he is

alleged to have violated and the basis on which --

Q Not the evidence against him?

MR. COFFEY: I am sorry, and the basis on which you claim he violated conditions of his parole, an opportunity to be heard, to present witnesses, documentary evidence, the right to confront and cross-examine witnesses, with the exception that you don't have the right of confrontation if there is a determination that it is a danger to the witness.

He is entitled to a neutral and detached hearing officer, and he is also entitled to a written statement of the evidence relied on and the reasons for revoking the parole.

Now, to grant that right to parolees and to recognize that a parolee is entitled constitutionally to that kind of a hearing, suggests that there is no real distinction or difference between probationers and parolees, and, in fact, with a parolee, you are dealing with someone that has been in the institution, that has served a sentence and the question is just whether he is going to be returned.

With the probationer, you are dealing with a person who has never been in the insitution.

And in Wisconsin, the judicial determination made at the time someone is placed on probation, is that the person is not likely again to commit crime and is not a threat to the community, and, therefore, should not suffer the penalty

of incarceration.

Q If he, in fact, commits some crime, what happens to all these theories?

MR. COFFEY: At least at the moment probation is granted, that's the determination that is made. Subsequent events may prove that to be erroneous as subsequent events prove many things erroneous.

Q But probation, by and large -- or at least -- if you put it another way -- probation is granted to first offenders as the largest single class of all probationers, isn't that correct?

MR. COFFEY: I believe that would be accurate, yes.

And then, this is an individual who has never been put in the penal institution. So we believe that all of the reasoning and all of the rationale of Morrissey and parolees applies with equal force to the probationer and that the same hearing requirements should be required in terms of the probationer as in the parolee.

The question in this case is if Morrissey is extended to probation revocation proceedings, and the same type of hearing as is set forth in Morrissey, is required in probation revocation proceedings, does that mean also that the individual is entitled to be represented by counsel, either counsel of his own choosing -- retained counsel that is, or court appointed counsel?

So I think, on the basis of some decisions, Goldberg v. Kelly, and the like, of this Court, there could be an argument made that the person that is in the position to retain his own attorney, under the precedents of this Court, is clearly entitled to be represented by counsel, and the only really open question is whether the indigent is entitled to be represented by appointed counsel?

Q Does Wisconsin permit lawyers to be present at revocation hearings?

MR. COFFEY: Yes, they do, Your Honor. It is interesting that Scarpelli arises in Racine County. For 5 6 years prior to Hahn v. Burke, or any of these cases, the State of Wisconsin, Milwaukee County, which is the most populous county in the State by a large number, is a city of the first class -- in Milwaukee County, for 5 or 6 years prior to 1970, probation violators were given a hearing and a lawyer.

The only places you didn't get a hearing and a lawyer were in counties outside of Milwaukee County.

However, since these cases, the Wisconsin Supreme Court has decided that both probationers and parolees are entitled to hearing, and they also have decided that they are entitled to be represented by lawyers, and that they are entitled to be represented by court appointed lawyers if they cannot afford to hire their own.

Q This is based on the Federal Constitution? The Wisconsin Supreme Court's decision? Or under the Wisconsin Constitution?

MR. COFFEY: Under the Federal Constitution.

Q Is the Due Process Clause of the Wisconsin Constitution essentially the same as the Federal?

MR. COFFEY: Yes, it is, Your Honor. It is almost word for word.

Q Did they decide under the Due Process Clause or under the Sixth Amendment?

MR. COFFEY: Under the Due Process Clause, Your Honor.

Q Just right across the board on all cases?

MR. COFFEY: Well, what happened is -- it was kind of a long involved procedure.

Hahn v. Burke, as decided by the 7th Circuit Court of Appeals, said you had a right to a hearing in a probation revocation case.

After Hahn v. Burke, the Wisconsin Supreme Court decided State ex rel. Johnson v. Cady, and said that probationers and parolees were entitled to hearings prior to the revocation, but they were not entitled to court appointed counsel.

Then, Scarpelli was decided by the United States District Court and then by the 7th Circuit Court of Appeals,

then the Wisconsin Supreme Court decided State ex rel. Bernal -- he is someone who was involved in juvenile -- said he had to have a right, he had a right to be represented by a lawyer at his probation revocation proceeding, and they later decided State v. Oestrich, which are cited in the briefs, and also held that an adult was entitled --

Q What about the situation where revocation is based on, or purported to be based on conviction of another crime, and that a certified copy of the conviction present, they get the man there without counsel and they revoke his probation.

In that situation would the revocation be invalid?

For the absence of counsel.

MR. COFFEY: I think that's the one situation where there probably could be a valid distinction between a hearing and a right to a lawyer, because it is pretty irrefutable if you have a man that's on probation --

Q Well, you are just taking then a pure due process argument. In those situations where it would be critical to have counsel present, he should have had counsel, but there would be other situations where it isn't?

MR. COFFEY: I think you could draw that distinction, Your Honor. I have some problems with it. I think my own view would be that it is much simpler to say that he has a right to have a hearing and he has a right to have a lawyer, because --

Q Well, the Wisconsin Supreme Court -- has it drawn that line?

MR. COFFEY: That's what they say.

Q I mean have they drawn any line at all?

MR. COFFEY: No, they have not.

Q But they purported to be implying the Federal Constitution.

MR. COFFEY: That's correct.

Q Mr. Coffey, if this Court should disagree with the 7th Circuit decision in this case and say that counsel is not required in a probation revocation hearing, would there be an independent State right to counsel, either under case law or statute in Wisconsin, apart from the Federal Constitution?

MR. COFFEY: I assume that if this Court rejects the argument that counsel is required at probation or parole revocation proceedings, that the Wisconsin Supreme Court may very well reevaluate its position.

Q Since it depended on the Federal Constitution --

MR. COFFEY: I think that they decided it is a matter of Federal Constitutional law.

Q But in the sequence -- I thought you said -- of these Supreme Court cases in Wisconsin, there was a stage where they said there was no requirement to appoint counsel, at one stage. And it was only after another 7th Circuit case, this one came along, that they then said, "All right, now you

must provide counsel."

MR. COFFEY: That's correct, Justice.

Now, the reason I say that I believe, or I think it more appropriate to say that there is a requirement of a hearing and I think there is a requirement to counsel, is that in the case where you do have the irrefutable fact of a subsequent conviction, lawyers have things to do. There aren't going to be many lawyers -- or there aren't going to be many defendants around who say, "Gee, I want a hearing before you can revoke my probation, because even though I was just convicted down the hall of a subsequent criminal offense -- "

Q But I thought Mr. Platz suggested earlier there had been instances in Wisconsin where a subsequent conviction didn't necessarily result in the revocation of parole.

MR. COFFEY: My own experience -- and I am not in a position to quote Mr. Platz on that -- my own experience would be that the subsequent -- I have never run into a case where the subsequent conviction of another crime has not resulted in a revocation of parole.

I have run into the situation where the subsequent conviction of another offense has not resulted in the revocation of probation, but not in parole.

But I am not in a position to say it is not the case. It may well happen.

But I think it is important we talk about these

hearings, and when we say we are going to set up these procedures and afford probationers the rights of a Morrissey hearing, we have to recognize that the right is really meaningless if he doesn't have an attorney. These people are in jail.

First of all, most times anyone is facing a probation or parole revocation, the man is in jail. So when you say you can call witnesses and you can produce documentary evidence and you can do this and you can do that, this is a man that is confined. He can't do anything. If he's lucky, he gets one phone call a day out of the county jail. He can send a letter and hope people show up. He has no way of effectively communicating with anyone in terms of preparing his defense, if he has a defense. And if he has counsel, counsel is able to do that.

I think also important is the ABA recognizes the function of a lawyer -- the role that the lawyer can play -- and the ABA minimum standards for criminal justice, the standards relating to probation.

The American Bar Association recommendation is that people facing probation revocation be provided with counsel, and they state the central task of ascertaining whether the prisoner has committed the acts alleged and measuring the acts proven against the standard to which he was obliged to conform, is precisely the business of the criminal trial itself, where

the right to the assistance of counsel has been recognized as one of the immutable principles of justice.

Indeed, in many contested revocation proceedings, the conduct charged actually constitutes the commission of a criminal act.

It would seem patently at war with the central concept of procedural justice to deny to a person with his liberty at stake the opportunity to hear and meet the specific charge against him with the benefit of counsel.

In this case, in Wisconsin, as I am sure in most other places, Gerald Scarpelli was on seven years probation. Gerald Scarpelli could have done six years, eleven months and ten days on probation, and he could then have had his probation revoked and a fifteen year sentence executed, and he would have received no credit for the six years and eleven months, and whatever number of days, it was he was on probation, because it is dead time.

When a man is facing the possible loss of fifteen years of his life in a very substantial period of incarceration in a penal institution, it seems to me that if you are going to give him a hearing, which I think is and should be constitutionally mandated and required, that to make that hearing meaningful and to have form, and not just to have form but to have substance to the hearing, there has to be counsel involved.

I think that this Court pointed out in Chief Justice Burger's opinion in Morrissey the person running the hearing and the people that set up the rules and procedures can see to it that the hearing is conducted to only issues that are germane and relevant to the determination as to whether probation should be revoked.

Q Since you are relying on Due Process Clause, you are nevertheless saying -- or are you saying -- that as an invariable principle, or an invariable rule, you must have counsel at probation and parole revocation hearings?

MR. COFFEY: Yes, sir.

Q Is it possible, Counsel, that the processes of probation and parole will -- could get so weighted down with burdens that as a policy decision the States might say for themselves, apart from the Federal Government, that it is just too difficult to get this kind of a program working, and so we will abandon it? Is that a possibility?

MR. COFFEY: I would only state, I can only state in response, Chief Justice, that, yes, I think, sure, there is a possibility of that if the persons that set up the procedures and conduct the hearing allow them to become too cumbersome and too much like a criminal trial, yes, but I don't think there is any need for that, and I don't think that's what anyone is asking for or requiring.

I think also --

Q You don't think lawyers -- appointed lawyers will turn these proceedings into criminal trials or make them as close to that as possible?

MR. COFFEY: I suggest, Mr. Justice White, that criminal lawyers will do what they are permitted to do, and if you have a hearing examiner or you have a procedure adopted for a particular State that will allow the criminal lawyer to turn it into criminal trial, he may very well. But I suggest that I think Morrissey makes it clear that that's not the procedure or the requirement this Court is setting up, and that it is the obligation or the duty of those persons that are setting up these procedures to see to it and conduct those hearings in a way that they don't become criminal trials.

Q If the State of Wisconsin, for example, created a corps or staff of lawyers attached to these institutions of confinement on a permanent basis and just by rotation furnished them as counsel, would that satisfy the due process claim to counsel?

MR. COFFEY: I think, Your Honor, any time you provide legal counsel and it is effective, yes, it satisfies the due process claim.

I also think that has been suggested in Argersinger and probably also in Morrissey -- the University of Wisconsin Law School -- they have a clinical program set up at Waupun, the State institution.

Q Do you think these have to be lawyers admitted to practice or can they be trained personnel, short of being lawyers admitted to practice law?

MR. COFFEY: I, personally, would have no difficulty with trained persons other than lawyers conducting the hearings or representing the defendants, as long as someone was in a position to determine whether or not a man had a defense or anything in mitigation of the violation that is alleged to have been committed.

Q Other than just legal argument, which you have presented to us, is there some empirical consideration that you might advert to? Are there some studies made that indicate that probation parole revocations are particularly unreliable or that there have been grave miscarriages of justice, or is this just a deductive approach that due process requires hearings, due process requires lawyers, and so on?

MR. COFFEY: I can't cite the Court to any study, as such, but --

Q You just know that it is unreliable unless --

MR. COFFEY: I have been a criminal lawyer for some eight or nine years now. I've been at a lot of probation revocation proceedings. I would hate to have some day my freedom taken away from me on some of the bases upon which I've seen people go to jail.

Q So your answer is yes, there are some empirical considerations; based on your own observations, a lot of injustices could be done at parole revocation hearings?

MR. COFFEY: I don't think there is any question about it.

When you give someone a standard, as involved in Scarpelli, association with a known criminal. What is a known criminal?

In Wisconsin, up until two or three months ago, traffic offenses were criminal offenses.

Q So in Scarpelli's case, it was pretty well established that he was associating with a known criminal because the man was shot and killed by the police in the course of committing a robbery, wasn't he?

MR. COFFEY: He was not shot -- he was shot -- he was not killed --

Q Didn't he die shortly after?

MR. COFFEY: No, that was,Scarpelli's claim was that he was told to induce the confession that the other man had been shot, but my understanding is that he had recovered.

Q But at least that made a reasonable case, that he was associating with known criminals.

MR. COFFEY: Yes, in Scarpelli's case, fine, maybe you have what is known as a "known criminal," but, you know, when you give someone, a probation officer, a standard such as

don't associate with people of bad character, this that, or the other, that's really a vague, vague, standard to have someone make a determination to send someone to prison.

Q Mr. Coffey, you have given us your subjective evaluation and these things are sometimes helpful, your own evaluation based on your own experience, but from that same experience, would you say that there is any evidence that probation and parole officers tend to be prosecution minded, that they are trying to get people off the street and back into institutions, or is the contrary the case?

MR. COFFEY: I would think, Mr. Chief Justice, that there are probably as many answers to that question as there are probation and parole officers.

I don't mean to stand here and suggest that any large percentage of probation and parole officers are in a hurry to put people back in institutions, but probation and parole officers are human, they are subject to the same deficiencies as the rest of us, there are personality conflicts --

Q Isn't it a widely accepted proposition in the community of professional probation and parole people that every return to the prison represents a failure of the supervising officer? Isn't that a known standard?

MR. COFFEY: I read that in the material that Mr. Platz gave as an addendum to his brief --

Q Probably in the Morrissey opinion also --

MR. COFFEY: I don't know how anyone arrives at that conclusion.

Yes, I would think the probation officer probably would be slightly irritated upon the return of a probationer going to the institution. I am not sure that he would necessarily take it as a failure, that it is a personal failure. He may very well take it as being someone not demonstrating good faith with him in cooperation with him and, therefore, maybe he shouldn't be as helpful --

Q You are converting him into an adversary now.

MR. COFFEY: I think they are, Chief Justice. I really do.

I think they have a great deal of authority and a great deal of power, and they don't have a lot of guidelines and standards, and I really believe and I really feel that it's something that there does have to be a check on. I don't think a man's freedom or right should really depend on something we all believe to be and hope to be the good faith and the good intention of a supervising agent.

Q Mr. Coffey, in Milwaukee County, which, I take it, has some history of hearings in parole revocation, is there anything corresponding to a prosecuting attorney, the way you have in a criminal case? Or is it more or less just a hearing officer calling a bunch of people before him?

MR. COFFEY: In the probation revocation proceedings that occurred in Milwaukee County prior to the adoption of the new procedures mandated by Morrissey, the hearings were in court in Milwaukee County -- that was only Milwaukee County. There were departmental decisions outside of Milwaukee County.

In Milwaukee County, the hearing was in court. The probation officer was called and sworn as a witness. Usually, the presiding judge asked the probation officer the questions, in terms of, "Do you have a report to make?"

The District Attorney was present, the defense counsel was present.

At the conclusion of the agent's report to the court, counsel from both the District Attorney's office and the defense, were entitled to cross-examine, or ask questions of the agent, and then the court made its determination.

Q Was counsel allowed to sum up?

MR. COFFEY: Yes, sir.

Thank you.

CHIEF JUSTICE BURGER: Thank you, Mr. Coffey.

Thank you, Mr. Platz.

The case is submitted.

(Whereupon, at 1:49 o'clock, p.m., the oral arguments in the above-entitled case were concluded.)