ORIGINAL

In the

Supreme Court of the United States

Minor Boody,

Petitioner,

V.

Loren Daggett, Warden,
United States Penitentiary,
Leavenworth, Kansas,

Respondent.

No. 74-6632

Washington, D. C.
October 12, 1976

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MINOR MOODY,

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v. No. 74-6632

LOREN DAGGETT, Warden,
United States Penitentiary,
Leavenworth, Kansas,

Respondent.

Washington, D. C.,

Tuesday, October 12, 1976.

The above-entitled matter came on for argument at 10:59 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MRS. PHYLIS SKLOOT BAMBERGER, The Legal Aid Society, Federal Defender Services Unit, 509 United States Court House, Foley Square, New York, New York 10007; on behalf of the Petitioner.

FRANK H. EASTERBROOK, ESQ. [pro hac vice], Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 6632, Moody against Daggett.

Mrs. Bamberger, you may proceed when you're ready.

ORAL ARGUMENT OF MRS. PHYLIS SKLOOT BAMBERGER

ON BEHALF OF THE PETITIONER

MRS. BAMBERGER: Thank you, Your Honor.

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

This case comes here upon a writ of certiorari to the United States Court of Appeals for the Tenth Circuit, raising the question of whether a federal parolee, who violates his parole by the commission of a new crime, is constitutionally entitled to a due process revocation proceeding early during the service of the intervening sentence.

Two questions must be analyzed: The source or nature of the interest, and the process which is due if there is an interest.

As the facts in the case will reveal, such a hearing in this case will determine how much of the almot six years due on the petitioner's first sentence will be served concurrently with his present sentence, and thus will affect his ultimate release date from custody altogether.

QUESTION: Do you suggest that there is some expectation -- a basis for an expectation that it would be allowed to be concurrent?

MRS. BAMBERGER: Your Honor, under the scheme -- let us step back a minute and say that he is in fact still on parole. His parole has not been revoked, it has not been taken away from him.

QUESTION: Well, we can hypothesize that. But the fact is he's in another prison for the commission of another crime, while he was on probation. While he was on parole.

MRS. BAMBERGER: Yes, Your Honor.

The scheme of the rules under which this case takes place, of the Parole Board, envisions that there is, indeed, a good likelihood or a possibility of concurrency, and, in fact, in Jones v. Johnston, decided by the D. C. Circuit, it notes a survey taken by the Federal Parole Board which would indicate that one in three of such parolees do in fact serve their sentence concurrently or have the detainer revoked altogether.

Now, --

QUESTION: What does that work out, in fact, Mrs. Bamberger? Would you explain that to us? How the concurrency comes about.

MRS. BAMBERGER: Yes, Your Honor. Under the rules, as they applied in this case, and those rules are no longer in effect because of the new statute and the new rules, the Board would review a file, the Parole Board file, and we know that the file consisted of the pre-sentence report, the case agent's report, the information which the supervising parole officer

had obtained during the period of parole.

At the end of that review, the Board could give one of three dispositions. It could revoke, it could remove the detainer altogether. In that situation, the parolee would get full concurrency with the present sentence, and, in fact, he would be restored to the position that he would have been in, had the warrant never been issued. That is, he would get street time, he would get good time, and his sentences would in essence be running at the same time.

QUESTION: When you say full concurrency, that means that the time that he would be serving under his first sentence begins to run again?

MRS. BAMBERGER: It would have -- yes, he would have lost no time back to the date of his release, in fact.

Now, the other, the second disposition which the Board could have made is to revoke parole. Now, that's where we get into the question, and the possibility which would come up -- the real possibility which would come up in a case such as this. From the moment of the Board's decision to revoke parole, the sentence would start to run, would commence to run concurrently with the new sentence.

In other words, the issuance of the warrant stops the time on the first sentence from running. When the Board gives its review and makes a decision to execute the warrant, in essence to revoke parole, from that moment, under the Board's

regulation, the time commences to run again; and it is, in fact, running concurrently with the new term.

And so he is actually serving two sentences at the same time, and his release date on the first sentence will obviously be shortened, because he's serving that sentence.

Now, the third disposition, the one which took place here, is to have the file review and to do nothing, to let the warrant and the detainer stand.

In that situation, it is automatic, under the Board's prior rules and under the present rules, that the first sentence will be served consecutively to the new sentence; so that when he is released from the second sentence and returned to the federal institution, he then recommences that first sentence, and he has to serve it.

Now, he may be released on parole at some point later on, but he is still either in custody or in parole custody.

QUESTION: But I thought he could, at that last step, be held to have served it concurrently.

MRS. BAMBERGER: Your Honor, that gets to the question of retroactive concurrency. In other words, at the time --

QUESTION: So it's possible.

MRS. BAMBERGER: No, it is -- I do not believe that it is possible under the Board's rules. There is no provision, either under the old rules or under the new rules for the Board to make the sentence run back to an earlier point in time. If

the Board does not give its hearing at an earlier date during the service of the intervening sentence, it loses the power to make that term run back to a certain date. And I think that th's the crux of the matter here, is that his -- or at least one of the liberty interests --

QUESTION: The Board couldn't release him?

MRS. BAMBERGER: The Board --

QUESTION: Could not release him.

MRS. BAMBERGER: They could re-parole him, or -- well, at that point, they could do several things. They could remove the detailer altogether, so that he would get full concurrency.

Now, in a situation where a parolee has committed a new crime, that --

QUESTION: I'm talking about after he served his first sentence.

MRS. BAMBERGER: Yes, they could remove the detainer, the warrant and the detainer altogether, and that would put him back in the position that he was in at the date of his first release. He would get full credit for all of that time, from the date of his release to the date of the Board's decision, which may, in fact, --

QUESTION: I thought you said that's what they couldn't do.

MRS. BAMBERGER: They cannot give him partial

retroactive concurrency.

In other words, if a man is --

QUESTION: I didn't say partial.

MRS. BAMBERGER: -- if a man is released on parole on January 1st, and he violates and he is sentenced to a new sentence, and he serves that sentence and he is released on January 1st of the following year, at that point he gets a parole revocation hearing.

The Parole Board, unless it totally lifts the detainer, cannot make his term run again from the first January 1st. It cannot make his term run from, say, March 1st or April 1st.

QUESTION: But they can lift the retainer.

MRS. BAMBERGER: It can lift it altogether. But that eliminates from the Board its third option, which is to let the sentences run concurrently from some intermediate point during the intervening sentence.

QUESTION: Let me see if I follow you. Are you saying that the Board may not credit time served?

MRS. BAMBERGER: Not if it revokes, no.

Now, if it revokes during the period of the intervening sentence, from that moment the two -- say, on March 1st of this January 1st to January 1st sentence, the first term will continue to run as of March 1st, so he will get ten months' credit on his old sentence. He will lose the first two months of credit.

If the Board revokes altogether -- I'm sorry, if the Board lifts the warrant altogether, then he will get the rull year.

What the Board cannot do at the end of the intervening sentence is to make the term run concurrently from some -- retroactively to some intermediate date. It can give him the full term, but not a partial term of credit.

QUESTION: Mrs. Bamberger, may it not do substantially the equivalent thing by deciding to parole him somewhat earlier than they otherwise would have paroled him?

MRS. BAMBERGER: Well, but then he loses -- the revocation causes him to lose -- well, first, the answer to that is not the same thing, because he is still in parole custody as opposed to having complete freedom.

QUESTION: Correct. I understand that.

MRS. BAMBERGER: And during that --

QUESTION: But he could be released from incarceration at an earlier date than he otherwise would.

MRS. BAMBERGER: Yes. But there can't be any doubt about -- the Borad could do that in its discretion, but there's no doubt about the fact that total freedom is better than the conditional freedom of parole.

QUESTION: Could the problem, this problem you describe, be cured by an amendment to the Board regulations, to give them a little broader discretion at that point?

MRS. BAMBERGER: You mean to give him partial --

QUESTION: To give them power to allow a partial --

MRS. BAMBERGER: Partial retroactive.

QUESTION: -- credit.

MRS. BAMBERGER: It could, but there then is still another problem with the liberty interest.

QUESTION: Well, before you get on to the other one, let me clear up another thing that troubled me.

You pointed out that if there were total revocation -- if there were revocation immediately upon conviction of the State crime, that then the sentences under present regulations would be served concurrently, --

MRS. BAMBERGER: That's right.

QUESTION: -- and that's the benefit your client lost.

MRS. BAMBERGER: That's right.

QUESTION: But if we should decide the case for you, is it not possible that the Board would adopt new regulations, which would make that -- would change that and make it the normal practice to make the sentence be consecutive rather than concurrent?

MRS. BAMBERGER: Oh, yes. In assuming -- and in fact there are several States that do that. It's interesting that two of the amici in this case require that the sentence run consecutively. There is no discretion in the Board one way or the other, the sentences must run consecutively.

In that case there is no deprivation of liberty as opposed to having a liberty interest. And yet the Board could do that. And --

QUESTION: So that your liberty claim really is contingent, if I understand your correctly, on the present form of the Board regulations. The Board could revise their regulations in a way that would defeat the liberty interests which you assert.

MRS. BAMBERGER: It couldn't defeat the liberty interests, but it could make the denial of that liberty interest not in essence a denial; it could make it harmless, yes. That's right.

QUESTION: That's what I'm saying.

MRS. BAMBERGER: Except that there is another side to this liberty interest, and that is when a person is in an institution with a parole detainer lodged against him, the Board is, in effect, imposing conditions of parole. It has modified the conditions of parole, because of the effect of that parole detainer upon the prison conditions.

Now, this is not the argument that was rejected in Meachum and Montayne, although we do present that argument in our brief, and we believe that under the Bureau of Prisons regulations there is an interest in the conditions that a prisoner has in an institution, in not --

QUESTION: Mrs. Bamberger, on that point, would you

help me, because it's kind of a subtle point, but is there a difference in terms of the conditions of confinement between having a detainer lodged against the man, or, in the alternative, having no detainer, but having the fact noted of record that he was convicted of the State crime?

MRS. BAMBERGER: Oh, yes. There is a difference. And, in fact, two States, which again aigned the amicus brief, direct -- they lodge the detainer so that the confining prison will have notice that there is another proceeding pending, and then they lift the detainer with a notice to the confining institution that the detainer is not to have any effect on the conditions of confinement.

Now, as a Bureau of Prisons regulation, cited in our brief, indicates, there is consideration separately of the facts of the new crime and the fact of the detainer being present. The reason is twofold.

No. 1, the Bureau of Prisons considers, in making its classification study, both the length of total confinement -- now, where there's a detainer pending, the length of total confinement can be much longer, because he may have to serve the parole sentence, and the Parole Board has, in essence, notified not only that it wants to take this man back, but that he may have to serve a very long sentence, or some sentence, at the end of the intervening sentence.

The other thing that the Bureau of Prisons considers

in its classification study is whether the individual can sustain himself in a position of relatively unsupervised or degree of supervision that he's required.

Now, if the detainer is present, it's an indication to the Bureau of Prisons that there was something wrong with the parolee's ability to structure himself without constant watching. And that also goes into the classification study: what institution he will be in; what jobs will be available to him; whether he will be on minimum or maximum custody in that institution.

So that, yes, the detainer does have a definite and separate impact, aside from the facts of the new crime, on the classification.

Now, --

QUESTION: Is it possible, Mrs. Bamberger, that the conduct of the prisoner in prison under the second sentence, for whatever period he's there, would have some bearing on the Parole Board's exercise of discretion as to whether or not they ought to then require him to serve all of the balance of his first sentence?

MRS. BAMBERGER: Yes, it -- and that's one of the government's arguments; but the answer to that --

QUESTION: Yes, but why should they then be compelled to make the decision before they know what his conduct is going to be?

MRS. BAMBERGER: Well, I think the answer is as follows,

because the decision-making process, as far as the Board is concerned, includes much more than just the institutional conduct. The institutional conduct will always be there for them to review on documents that are presented by the institutions periodically.

But the Board is also concerned with his life out in the community while he was out on parole, the full Parole Board file, which includes FBI reports, correspondence from various people, and the facts of the new crime.

Now, with that --

QUESTION: But aren't you overlooking the fact that they have already determined that he has committed a criminal act, and there is, by full due process, a judgment of the court that he has violated his conditions of his parole?

MRS. BAMBERGER: Your Honor, that gets right to the question of the nature of this right, that the federal --

QUESTION: Which right?

MRS. BAMBERGER: Of the parolee's rights. The federal parole scheme requires a two-stage process, exactly like the one outlined in Morrissey. There is the determination of whether or not there has been a violation, and in this case that's out of the picture; but there's also the dispositional aspect of the case. The Board has an obligation to make a disposition. It is not required to make any particular disposition. It is not required to revoke. And this gets back

to an earlier question that was asked. If the Board were required to revoke on the basis of a new conviction, then he would not have any claim, conviction would eliminate his interest in conditional freedom which was provided by the grant of parole.

QUESTION: But perhaps the Board's position might be that we don't want to make the decision on whether we'll revoke the parole until we see how he conducts himself in this second round, under his second conviction. That is, if, during that second period, his conduct is such that he's denied all his good-time credits, if he engages in prison riots and violence, I suppose you would agree that the Parole Board would not be very sympathetic with having his sentences run concurrently.

MRS. BAMBERGER: Well, let me answer that by saying that the Board can consider at an early hearing all of the non-institutional factors relating to mitigation.

QUESTION: No, but let's stick to my question.

MRS. BAMBERGER: Now -- get to -- if they make the decision, and it's unfavorable to the parolee, during the term of his institution, the Board has the right to reopen, based on information it receives at the -- from the institution. So that it can reconsider an adverse decision to the parolee, based on institutional conduct.

Now, if they render a favorable decision to the parolee, and he is granted parole so he can serve a dual

status, which is recognized in the parole scheme, he can be serving the second sentence and on parole with respect to the first sentence, the Board can, in essence, revoke the parole that it had granted him, based on his prison conduct. So the Board is not left without a remedy either to consider favorable or adverse the institutional conduct.

Now, the question as to whether or not this reconsideration of the case has to have an in-court appearance for the due process requirements of such a review proceeding is not before the Court.

But the Board is not precluded, even by its own rules, and never has been, from considering institutional conduct.

In the first situation, under the rules which applied at the time that this case came up, they did it by an annual review.

Under the Board's present statute, they can always reopen and always reconsider information which is presented to them.

And so I think that the argument that the institutional conduct has to be considered is correct, but it doesn't go far enough, because what we have to do is we have to freeze the mitigating circumstances that would come up with respect to the life in the community and the factors of the new crime.

Now, the question of mitigation, of course, goes to what process is due under the circumstances. What is the interest?

What is the private interest of the parolee in presenting his mitigating circumstances?

And I think that that's where that factor comes up, if a parolee has committed a new crime, the Board can consider that; it also can consider its full record. But at the time of his record review the parolee is not allowed to be present, he doesn't know what's in the Parole Board file because until the present statute and the possible applicability of the Right to Privacy Act provisions, he had no disclosure of the file -- now, we don't know what the file indicates in this case, but the government has indicated, from the facts that it has presented, that there are certain mitigating circumstances.

For instance, in this case, the judge could have sentenced the defendant up to life imprisonment. He didn't. He gave him two consecutive terms of custody -- I'm sorry, two concurrent terms of custody of only up to ten years, although his discretion to impose the life sentence was present.

He also made the sentence run under 4208(a)(2), which meant that the Parole Board could parole him on the second crime at any point it desired.

So obviously the judge believed that there was something there which did not require the full extent of his sentencing powers.

Now, the government appendix includes a document from the Parole Board file, and it's interesting,because that docu-

ment, in itself, contains information which is not confirmed, which we don't know is error. For instance, it indicates that he murdered his wife.

In fact, that was not the crime that he was convicted of, he was convicted of voluntary manslaughter in the heat of passon. And we don't know what those facts are; it's not reflected in the record, nor in the documents which the government choses to add as part of its appendix.

It reflects that there was a conflict as to his family. The report indicates that his family had alcoholic problems. He indicates that he had a good family relationship.

Now, in terms of whether or not to revoke parole, where the parolee will live is obviously an important consideration. There's a very critical dispute of fact here, which should have been resolved in a situation where the parolee could present his mitigating circumstances.

Now, the government argues that there were no mitigating circumstances presented here. I think the fact is due in part, No. 1, to the possibility which is reflected in the record that the petitioner did not know that he could submit mitigating circumstances, he was never told that. And the documents submitted by the Board establish that fact.

The second factor, of course, is the same as in Goldberg, is that he might not have known how to do it, or what was relevant, or what to put before the Board. Because

he had no representation, nor one who could assist him in that.

And then, as another matter, he never knew the basis for the Board's decision to make his sentence run consecutively, because they never told him what factors they were considering, and the reasons for their decision to make the sentence run consecutively.

And so the absence of mitigating circumstances here should not be held against the petitioner and, in fact, the record, as presented by the government, indicates that there may be substantial disputes of facts, and the Board should have known both sides of the story in an amply presented argument on behalf of the petitioner.

Now, if -- the government argues that its total discretion to revoke the parole after a new crime eliminates the parole status which he still presently enjoys.

The answer, I think, is that both Gagnon and Morrissey and Goldsmith and Roth dispute that argument, they lay it to rest. Gagnon and Morrissey both say that where there is a vested interest, which he still has, both the State and the parolee have an interest in accurate fact-finding and an informed use of discretion.

The citation in Roth to Goldsmith indicates that the broad discretionary power must be construed to mean an exercise of discretion after investigation, notice, hearing, and opportunity to respond. None of that was afforded here.

Now, the remedy that would be afforded the petitioner in this instance would be, first, if the Court were to find that there wasn't an interest, and were also to find that it was protected by due process, the first remedy would be to remand to the district court to determine whether or not he lost any mitigating evidence due to the substantial delay between 1971 and this time, in granting a timely hearing.

If that were not true, if he hadn't lost any mitigating evidence, then he would be entitled to a parole revocation under the new statute.

Now, it is not necessary for the Court to consider the new statute, if it were to find that the old proceedings were invalid, because the new statute affords the petitioner certain due process rights, which may indeed satisfy Morrissey, depending upon how the Board was commissioned now, chooses to enforce its new rules.

First, it provides him with counsel.

Second, it may provide him with disclosure of the full file.

Third, the Board may find that, under its regulations, it can provide notice of the reasons and the facts underlying its decision. And its own regulations require notice of the underlying charges and reasons and procedures.

So that I think, if we find that the old procedures were invalid, that the new ones should be given an opportunity

to be used in this situation to determine whether or not -- to determine whether or not it provides with due process.

QUESTION: How can you say this is still a live case, Mrs. Bamberger, if new rules have been substituted for the ones that you're litigating?

MRS. BAMBERGER: Well, it's still a live case because the petitioner here is not eligible for a hearing under the new rules, because there's a provision in the statute which says that any valid order of the Parole Board shall not be reopened or reconsidered under the new statute.

So that unless the old procedures are deemed invalid, which we believe they are, because there is an interest, there's a present interest as Roth defines it, and the old procedures did not adequately protect that interest, that he would be entitled to a new proceeding to determine whether or not his parole should be revoked, to determine whether or not he should get concurrent sentences, and to determine whether or not, as the Board has the option to do, to leave the detainer in effect.

QUESTION: And if the Court rules against him, then he would not have the advantage of a new rule? If the Court rules against your constitutional contention, he couldn't go back and say, "Well, now I want a hearing under the new rules"?

MRS. BAMBERGER: That's right. The only thing that could happen is that the Board could periodically review the institutional reports, and perhaps revise its decision based on

those reports.

But it wouldn't reconsider the mitigating factors with respect to his life on parole,with respect to the crime, and other factors which he may choose to introduce.

I would like to reserve the rest of my time for rebuttal.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Easterbrook.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE RESPONDENT

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

The claim of a right to an immediate oral parole hearing in this case has an aura of implausibility to it.

Petitioner is not now suffering imprisonment on account of his parole violations. No one proposes to revoke his parole now.

He suffers no loss of freedom now because of the possibility of revocation a year from now, when his sentences for murder and manslaughter will come to an end.

His losses caused by his intervening convictions and ten-year sentence, the possibility of revocation, eventually, is not caused by the detainer lodged against him; it was caused by the intervening convictions upon his plea of guilty.

Petitioner has had a full hearing on the question of his guilt and the murder convictions establish a full foundation for the eventual revocation of parole, if that is what the Parole Commission decides to do.

In the sentencing hearing on his two convictions, he had both the opportunity and the incentive to bring forward any mitigating evidence he might have, that might induce either the sentencing judge or the Parole Commission to treat him leniently.

Petitioner has met with a social worker in federal prison, and refused even to discuss with the social worker any mitigating conditions or circumstances. He told the social worker that all the information was in his file. That statement appears at page 26a of the Appendix of our brief.

To this day, petitioner has not said what he wants to say in an immediate oral dispositional hearing, let alone what he wants to say that cannot be conveyed equally well on paper.

He has made no claim that would, if true, induce the Parole Commission to invoke his parole and to let the revocation run concurrently.

I will devote my argument to three propositions:

First, that no hearing is necessary at any time, once the violations of the conditions of parole have been established, as they were here, beyond dispute.

Second, that the time for an oral hearing, if one is

required, does not arrive until the end of the intervening sentence when the Parole Commission decides to revoke petitioner's parole.

Third, that if something is required before that time, the Parole Commission's dispositional review procedure provides ample safeguards against error.

The due process clause requires a hearing concerning the revocation of petitioner's parole,in this case, only if petitioner has a liberty interest or a property interest in continuing to be a parolee.

We think that there is no liberty or peroperty interest in a case like this one.

Petitioner doubtless has an interest in a constitutional sense, held in common with his other man, in being free from imprisonment until, by a judgment of a court of competent jurisdiction, it has been decided that he must surrender that interest for a period of years.

That interest was extinguished for a period of ten years, by his 1962 conviction for rape. Petitioner served a little more than four years of that before being released on parole. And that release on parole restored to him a form of conditional liberty, parole, created by statute, the terms and conditions and extent of which are defined entirely by statute.

This new conditional liberty is a creature of the statute, and petitioner has no more of it than the statute

provides.

The federal statutes and regulations provide for termination of this conditional liberty if the parolee commits another crime. That happened here. Once that happens, every fact necessary to revoke parole has been established. The decision whether to revoke parole in response to those facts is committed to the discretion of the Parole Commission.

Let me make it clear that we have no dispute with Morrissey's holding that a grant of parole sets up a legitimate claim of entitlement that can be revoked only upon provision of due process.

What this means, though, is that before revoking parole, the responsible officials must determine, by a procedure comporting with the due process clause, that the conditions of the parole have been violated, and that --

QUESTION: Mr. Easterbrook, can I just ask you, right at that point, is it your view that Morrissey does not apply to any case in which the parolee admits the fact justifying revocation?

MR. EASTERBROOK: Yes, Your Honor, that is our view.

It is our view, in sum, that once the facts justifying the revocation have been established, those facts forfeit the claim of entitlement to remain free, and once that claim of entitlement can no longer be set up against the parole authorities, there is no remaining liberty or property interest.

Petitioner has pleaded guilty to second-degree murder and to voluntary manslaughter. Two violations are the terms of his parole. No more is required. Those convictions ended his legitimate claim of entitlement to retain his statutory liberty interest.

QUESTION: Mr. Easterbrook, I don't have the Morrissey opinion in front of me, but I have a recollection of there being a discussion of the double need for fair procedure. One, to establish the fact of violation; another on the dispositional phase.

MR. EASTERBROOK: That's right, Your Honor. There are two discussions of that sort in Morrissey. One discussion, appearing at page 490 of the Morrissey opinion, says, and I quote, "If it's determined that petitioners admitted violations to the Parole Board, and if those violations are found to be reasonable grounds for revoking parole under State standards, that would end the matter."

That has happened here. There have been two convictions of guilty. It's clear that those convictions are reasonable grounds for revoking parole, and we think that ends the matter.

But Morrissey went on to say that it would be useful to have a parole hearing -- and this is at page 488 -- for the purpose of determining whether the Parole Board should exercise its discretion.

We have no dispute with that, either. The relevant

federal statutes, both at the time of the consideration of petitioner's case and now, provide for two hearings, one is an ultimate hearing before parole is revoked, and one is the dispositional review which may or may not include a hearing, depending upon whether the Parole Commission believes that one is necessary.

So we have no dispute with the proposition that it's useful to have a hearing, to determine how the discretion shall be exercised; the question whether the Constitution requires that hearing is, we think, left open in Morrissey, because in Morrissey the fact of violation itself was disputed, and the question whether the Constitution required a hearing in the absence of such dispute was not before the Court.

QUESTION: Wall, how is that question different from the question you have in any criminal case, where you have, first, the determination of guilt where clearly there must be due process applied, and then a subsequent discretionary hearing before the judge as to what sentence shall be imposed?

Why is -- I take it the Constitution does require a fair procedure at the sentencing hearing; but why is the situation different at the other?

MR. EASTERBROOK: There is one way in which it is different and one way in which it is the same, Your Honor.

The way in which it is different is that that is part of the criminal process and it is directly controlled by the

Sixth Amendment. This Court held, in Mempa v. Gray, that counsel was required at a sentencing hearing, basing its holding entirely on the Sixth Amendment.

But the Court held in Morrissey and Gagnon that the Sixth Amendment does not apply to parole revocation hearings and to parole proceedings; and that's --

QUESTION: Well, are you saying that -- putting the Sixth Amendment to one side for a moment, are you saying that the due process clause has no application to a sentencing hearing in a criminal proceeding?

MR. EASTERBROOK: We're saying that the due process clause has no application, Your Honor. In fact, --

QUESTION: To the sentencing proceeding in a criminal trial?

MR. EASTERBROOK: That's right, Your Honor.

The Court held, in Specht v. Patterson, a case that's cited and discussed in our brief, that there is no need, at a sentencing hearing conducted by State authorities, to allow the accused to be heard or to present evidence.

And it's our view that that is the same here, once it's been established beyond doubt that there has been a violation, as here, there is no need to allow the accused to be present or to present evidence.

QUESTION: What's the underlying theory? That he has no -- this is not going to have any deprivation of his liberties

as a result of a sentencing hearing? Or how do you analytically fit that in?

MR. EASTERBROOK: The analytical theory, I think, is that the legitimate claim of entitlement to remain free, the liberty interest, is --

QUESTION: I'm talking about the criminal proceeding, not the --

MR. EASTERBROOK: Yes, Your Honor.

QUESTION: Yes. That's gone once he's found guilty?

MR. EASTERBROOK: Is gone once he's found guilty. Or once he pleads guilty.

QUESTION: And he has an insufficient interest in whether the sentence is for ten days or for life, to justify due process?

MR. EASTERBROOK: His interest in the range of sentences is protected by the statute establishing the range of permissible sentences. And of course in the federal system, I would like to point out that there is no arbitrary procedure in the federal system. Congress has provided for procedures that go, in our view, well beyond what the Constitution requires.

QUESTION: What about -- he could get probation, couldn't he?

MR. EASTERBROOK: In the federal system? Yes, he could, Your Honor.

QUESTION: So, I mean, either he has his liberty or not.

MR. EASTERBROOK: The federal system allows a broad range of alternatives from a suspended sentence to a sentence the maximum of its statute. The question whether that is provided is entirely committed to the discretion of the judge.

That proposition is supported by the Dorszynski case in 418 U.S., in which the Court held that not even a statement of reasons is required for what the judge does, and that there is no way, under the present constitutional statutes, to inquire into what the judge has done, unless Congress provides explicitly that that should be done.

QUESTION: You mean that a judge could be arbitrary? In sentencing.

You mean a judge could say that everybody that comes in here with red hair, I give ten years; and those that don't have red hair, I'll probate?

MR. EASTERBROOK: Your Honor, that raises a question of a different sort. That's the question of the reliance on an impermissible reason.

QUESTION: But you say he doesn't need any reason.

MR. EASTERBROOK: In our view, if there is no reason, then the judge has full discretion, and the Parole Commission has full discretion.

Let me set up a contrast between two cases. Last

spring --

QUESTION: Well, suppose it shows, the record shows -- he never gave any reason, but the record showed that he had sentenced forty people, twenty red heads and twenty non-red heads, each red head had gotten twenty years and each non-red head had been paroled? You wouldn't find anything wrong with that?

MR. EASTERBROOK: Yes, Your Honor, we would. And we would find something wrong in the reliance on an impermissible and irrelevant reason.

But the question whether it's permissible to rely on an irrelevant or impermissible reason is different from the question whether there must be an oral hearing to determine whether such considerations have entered the process.

Let me offer as an example Elrod v. Byrnes, a case decided last spring, in which the Court held that employees who held their positions in Illinois at the discretion of their employer, no statutory safeguards, no property interest in their employment, could not be discharged for reasons based on their political beliefs. That was use of an improper reason.

Yet, at the same time, the employees in Elrod v. Byrnes were in the same position as the employees in Board of Regents v. Roth. They could be discharged for any reason without the need for a hearing.

QUESTION: Mr. Easterbrook, there's a big difference

between that and the question Mr. Justice Marshall asked. In Elrod v. Byrnes they allegedly were discharged for a constitutionally impermissible reason, namely, the exercise of free speech rights. There's no constitutional right to be a red head.

MR. EASTERBROOK: It might be suggested, Your Honor, that you have very little choice in being a red head at birth, I mean, the use of that is discriminatory --

QUESTION: No, but the Constitution is neutral on the point. It's completely independent of any constitutional claim.

MR. EASTERBROOK: I think the point is the same, Your Honor, though, that a claim that a decision has been made for an impermissible reason is very different from a claim that a decision has been made without notice and an opportunity for an oral hearing.

And that it is not necessary to have a hearing in every case in order to minimize or avoid the possibility of reliance on an improper reason.

QUESTION: Mr. Easterbrook, how long, in British common law and the law in the United States, has it been since a judge said, "Do you have anything to say before I pass sentence on you?" How long has that been going on?

MR. EASTERBROOK: Your Honor, in some States the right of allocution is not now allowed.

QUESTION: How long has that been going on under British common law?

MR. EASTERBROOK: In the federal system it has been going on as long as I know.

QUESTION: Well, that's good enough.

MR. EASTERBROOK: And it's provided by the Rules of Criminal Procedure.

QUESTION: Right. Just wasted time?

QUESTION: Mr. Easterbrook, aren't you really arguing a good deal more than you have to argue to sustain the government's position?

MR. EASTERBROOK: I am.

QUESTION: For about ten minutes, I would suggest.

MR. EASTERBROOK: I am about to turn to a little bit less ambitious argument.

[Laughter.]

MR. EASTERBROOK: The second point is that if a hearing is required, it's not required now.

Morrissey indicated, as I have discussed in response to Mr. Justice Stevens' question, that a hearing will be helpful to determine whether the authority should exercise discretion to revoke parole. In the federal system a hearing is provided.

At the end of the intervening sentences for murder and manslaughter --

QUESTION: Mr. Easterbrook, I hate to interrupt, as

you get to the heart of your argument, but you've directed my attention to page 488, and you just used the term, that the opinion suggested that a hearing would be useful; but as I read the sentence, the parolee must have an opportunity to be heard and to show if he can that he did not violate the condition or, if he did, that the circumstances in mitigation suggest that the violation does not warrant revocation.

The "must" language applies to both considerations.

MR. EASTERBROOK: Yes. To the extent the "must" clause applies to both considerations, it's inconsistent with the language on page 490 of the same opinion, indicating that if it were established that there had been a violation, that would end the matter.

QUESTION: Do you think this -- do you think the language on 488 is constitutionally inaccurate, in other words?

MR. EASTERBROOK: It's inaccurate in light of the language on page 490, Your Honor.

QUESTION: But I just want to be sure I understood your position.

MR. EASTERBROOK: Yes. That is our position.

Petitioner is not now subjected to imprisonment as a parole violator. His imprisonment is justified by the ten-year sentence imposed in 1971 for murder and manslaughter.

Morrissey held -- and this time I quote another sentence on page 488 of the same opinion -- that the right time

for a hearing was "a reasonable time after the parolee is taken into custody".

Petitioner has not yet been taken into custody as a parole violator, and so the time set by the court for a hearing has not yet arrived.

Several reasons support the decision of Congress to defer hearings until the expiration of the intervening sentence. Revocation is the rule, and earlier hearings would be useless in most cases. A hearing at the end of the intervening sentence is the best time, because then the Parole Commission has available to it all of the information about the parolee's institutional behavior and can answer the question, Should the prisoner now be released?

It will have access to the parolee's prison record, and it will avoid the inconvenience of sending teams of examiners to prisons to make recommendations that will, in every case, or almost every case, have to be reconsidered at the end of the intervening sentence.

A hearing could be required years before the ultimate decision on revocation only if the detainer affected liberty or property rights in some way. And, as we understand it, this is the core of petitioner's argument.

Petitioner has suggested a number of ways in which that might happen. The detainer might affect the conditions of confinement on the intervening sentence. The delay might

jeopardize the opportunity for concurrent service of the term, or the delay might permit the loss of mitigating evidence.

We submit that the argument about effect on the conditions of confinement must yield to this Court's decision in Meachum v. Fano, which held that when prison officials have discretion to choose the place and conditions of confinement, the due process clause does not require particular procedures to be used in making that choice. The choice itself does not involve a legitimate claim of entitlement.

In the federal prison system it is true, as petitioner contends, that the officials know whether there has been a detainer, and in many cases they consider whether that detainer should have an effect on their decision. But the fact that a detainer has been considered is no different from the fact in Meachum that the prison officials considered whether the prisoners there had committed arson or had been alleged to commit arson, or might commit arson.

The question is not whether particular facts have been considered in making the decision, the question is whether there is a duty to respond to those facts in particular ways; that is, whether there is a legitimate claim of entitlement to have particular conditions of confinement. There is none in the federal prison system. Petitioner has not contended that there is. And we submit that there is no liberty or property interest from that source.

The second source, the one with which petitioner opened the argument, is the argument that opportunities for concurrent revocation, concurrent service of the revoked term will be lost. We submit that that argument is simply fallacious; it is fallacious, as a matter of fact, and it doesn't help petitioner even if it's true.

First, because of the dispositional review that is now provided, the warrant can be dismissed and the detainer released with or without an oral hearing. The absence of an oral hearing does not prevent concurrent service of the term.

But, more importantly, after the intervening sentence has expired, the Commission has a number of options available to it, each of which will achieve, in practice, the equivalent of concurrent service.

First, the Commission can decide simply not to revoke parole, to withdraw the warrant, to treat it as if it had never existed. That achieves concurrent service in practice. It can decide to revoke and grant immediate re-parole, and that's provided by Section 4214(d)(5) of the Parole Commission Act.

This has much the same effect, but we understand that petitioner's objection to the revocation and the immediate re-parole is that it will extend the length of the time as a parolee and that there are some ancillary restrictions during that extended time.

The Parole Commission has a statutory device to deal

with that. Section 4211 of the new Parole Commission Act says that the Commission can, on its own motion, terminate its supervision over the parolee at any time. So that although his time as a parolee might be extended by a revocation and immediate re-parole, the Commission has the discretion under 4211 to terminate that supervision, achieving concurrency or partial concurrency retroactively.

QUESTION: Well, Mr. Easterbrook, you refer to the new Parole Act. I understood it was your opponent's contention that the new Parole Act didn't have any application to this case because her client was not able to take advantage of it if the old procedures were constitutional.

MR. EASTERBROOK: The new Act both applies and does not apply to this case. Under the new Act it is not possible for petitioner to seek a reopening of decisions that were already made under the old procedures. But the question of whether petitiioner will be released on parole after the end of his convictions for murder and manslaughter will be decided by procedures under the new Parole Act, and that's why we are relying on the provisions of the new Parole Act, to show what options the Commission will have at its disposal when, a year from now, petitioner is released from his current sentence by virtue of good time.

QUESTION: So, when you refer to a provision of the new Parole Act in your argument, you are referring to a provision

that would have some applicability, in your view, to the petitioner?

MR. EASTERBROOK: Yes, it would, Your Honor.

The Commission's next option is an option set up by 28 C.F.R. 2.52(c)(2), which we reprint at page 19a to the Appendix to our brief.

It says that the Commission can revoke but, and I quote, "may" decide to forfeit the intervening time served before and during the intervening conviction.

The Commission interprets this as allowing partial concurrent revocation, retroactively. And I don't think that there is any reason to be worried about petitioner's argument that the Parole Commission does not have that option, when the Parole Commission itself believes that it does, and will act as though it does.

QUESTION: But it could allow both, either partial or total concurrence, could it not?

MR. EASTERBROOK: Yes, it could.

QUESTION: That is, it could allow total concurrence by simply a decision that they would not revoke parole at all.

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

QUESTION: That might even eliminate the second hearing.

MR. EASTERBROOK: They would probably have a second hearing to determine which of the courses they would follow, and

that would be a full oral adversarial hearing.

QUESTION: But under Morrissey, which will no longer be applicable after -- it will be superseded, at least, by the new Act, when this occurs. Under Morrissey, the first preliminary hearing might result in a determination not to have a second hearing at all; would it not?

MR. EASTERBROOK: It might, if it were determined that there is no probable cause.

QUESTION: Yes. Hypothetically, they might have gotten the wrong man, a person with the same name, or that the violation of parole was so minimal that it wasn't significant.

MR. EASTERBROOK: That's right, Your Honor.

In this case, petitioner would be on much sounder ground, asking for an immediate oral hearing, if petitioner were contending that he was not the person who was convicted of murder and manslaughter in 1971 in Arizona. But that argument has never been made.

Finally, petitioner has an argument that mitigating evidence might be lost in the interim, and that this will affect the Commission's ultimate decision.

But petitioner has never contended that he has any such evidence. His habeas corpus pleading in the district court in this case contended that the reason for requiring a prompt hearing was to have the opportunity for concurrent service of the revoked sentence.

Moreover, the Commission has rules that will allow him to have an oral hearing if he were to make a persuasive claim that he has mitigating evidence, that it might affect their decision, and that it might be lost. But petitioner has never made a claim of that sort, either in his pleadings or at any later stage.

And the claim that evidence might dissipate, in some cases is, we submit, not enough to require an oral hearing in every case.

Even in cases decided under the speedy trial clause of the Sixth Amendment, in which dissipation of evidence, and in which the possibility of prejudices to the defense, is a pressing if not overriding concern. The possibility that evidence will dissipate is not sufficient. Dissipation of evidence, prejudice to the defense, is a matter of proof, at a very minimum it's a matter of claim, and it's not sufficient to require a hearing in every case, that there might be prejudice in some cases.

If that happens, there will be time enough to correct it when it occurs.

Finally, I turn to petitioner's argument that the procedures now used by the Parole Commission are inadequate to guard against these kinds of intervening losses, the loss of the possibility of concurrent revocation, the loss of mitigating evidence during the interim, and so on.

We think that the argument has little to recommend it. The Commission conducts a full file review and sets an oral hearing whenever it appears that one would be useful.

Petitioner's argument, thus, quickly boils down to the argument that there must be a hearing in every case, even when it does not seem likely to serve a useful purpose in a particular case.

We start, in this regard, from the proposition that if a parolee is convicted of another crime while on parole, then revocation of parole, to begin after the intervening sentence, is the ordinary disposition. The Parole Commission's rules so provide, and that's Rule 2.47(c), which we have reprinted at page 13a of our brief.

What the Commission does is establish a file review and essentially to require the parolee to bear the initial burden of showing that he should receive exceptional treatment and that an oral hearing, as opposed to a paper file review, is necessary in order to determine whether that is so.

We think that there can be no doubt that that comports with the due process clause, even to the extent something is required in the interim.

The interests involved for the parolee are slight. As I have pointed out, the fact of incarceration itself is not at stake, because that was determined by the 1971 murder conviction. The Parole Commission has ample discretion to allow

concurrent revocation retroactively, or partial concurrent revocation.

And it is unlikely that someone who has been convicted of murder will show that he's entitled to exceptional treatment.

But, putting that aside, it's clear that whatever procedures the Parole Commission may use, there's no chance of an erroneous decision. The possibility of error was extinguished by the conviction for murder.

QUESTION: Mr. Easterbrook, let me just raise a question here, you may have answered it, but I want to be sure I understand your answer.

One of their arguments, as I gather it, is that,under existing rules, if there had been an immediate revocation hearing, and presumably there would have been revocation, then the sentences would have been required to run concurrently. And he has automatically lost that benefit by the delay.

MR. EASTERBROOK: Your Honor, that's not true. That question was raised in Zerbst v. Kidwell, a decision at 304 U.S., which is cited in our brief. An identical argument was made and this Court unanimously rejected it. After a prompt intervening hearing, there is no need for a concurrent revocation.

QUESTION: Well, I didn't under Justice Stevens' question to be quite that, whether or not there was a need for

it. But whether or not, in fact, that is what happens.

MR. EASTERBROOK: Your Honor, it's not in fact what happens.

My understanding, and we've been informed by the Parole Commission, is that when an oral dispositional hearing is held during the intervening conviction, during the term of the intervening conviction, the usual disposition is to make no disposition. The Commission takes the evidence that the parolee has to offer and makes no decision.

In some cases it makes a decision to lift the warrant and to lift the detainer; in other cases it makes a decision to revoke concurrently, on the spot; but in most cases it makes no decision at all.

And the court that has discussed this problem most thoroughly, the Court of Appeals in Jones v. Johnston, has concluded that there is no constitutional or statutory obstacle to having the hearing and making no decision. And that, we believe, is what the Commission will continue to do.

QUESTION: Mr. Easterbrook, I don't feel you have quite answered the question. I want to be sure I have it.

Assuming that they do have a prompt hearing and make a prompt decision to revoke, then your opponent says that the rules provide that in that eventuality the sentence will be concurrent. Is your opponent correct or not?

MR. EASTERBROOK: My opponent is not correct, Your

Honor. They can make a prompt decision to revoke and, at the same time, make the decision that the revocation will begin after the conclusion of the intervening sentence.

QUESTION: The revocation will begin or the -- I see.

MR. EASTERBROOK: That the time served as a parole violator will begin after the intervening sentence.

QUESTION: I see.

MR. EASTERBROOK: The last point I want to make is the point that it's usually thought that due process procedures are necessary to prevent or to reduce the risk of erroneous decision-making. That is the typology this Court set up in Mathews v. Eldridge.

But in a case like this, we think, there is no possibility of erroneous decision-making.

An exercise of discretion may be unwise, it may be uninformed, it would not be erroneous.

QUESTION: What would happen if the man had been pardoned?

MR. EASTERBROOK: Excuse me, Your Honor? If this man had been pardoned?

QUESTION: What would happen if this man had been pardoned, and nobody had notified the Board?

That would have been a mistake then, wouldn't it?

MR. EASTERBROOK: Yes, Your Honor, it might have been a mistake.

QUESTION: So you can't be sure that there's no way to have a mistake.

MR. EASTERBROOK: Your Honor, there is no way that the possibility of error can be excluded on suppositions of that sort. But, as the Court said in Mathews v. Eldridge, the possibility, that kind of remote possibility of error in a few cases is not sufficient to call for hearings in every case.

Thank you very much. We submit that the judgment should be affirmed.

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

Mrs. Bamberger, do you have something more? You have five minutes.

REBUTTAL ARGUMENT OF MRS. PHYLIS SKLOOT BAMBERGER,
ON BEHALF OF THE PETITIONER

MRS. BAMBERGER: Yes, Your Honor.

The government refers to its new regulation to say that they can give partial retroactive concurrency. I think the government misconstrues the words of the regulation, if not the intent. It relates to street time. Under the statute a parolee who violates by anything but a new conviction or a new crime is entitled to receive credit for the time that he has served while on parole.

The exception is for a parolee who violates the parole by the commission of the new crime,he loses his street time. And that section relates directly to the loss of street time.

The question of retroactive concurrency, partial retroactive concurrency, I think, is answered by 4214(d), which is the relief provision of the new statute, which applies to the hearing which is granted at the end of the intervening sentence. And it lists five dispositions which the Board might make at a hearing granted at that time.

And partial retroactive concurrency is not one of them.

The Board's own regulation, Section 2.52, does not include that as a possible remedy.

I think the government misconstrues the decision in Zerbst. In Zerbst, the petitioners were requesting that the Parole Board must make the sentences run concurrently. We're not urging that they must do so, we're urging that they, in the situation where they may do so, there must be a due process proceeding, because the Board must -- because that is a liberty interest which he currently possesses.

Now, I think --

QUESTION: Well, won't that due process hearing occur when, as, and if the parole is revoked?

MRS. BAMBERGER: Not at the end, Your Honor, because -- well, the hearing will occur at the end, but he will be harmed because of the effect of the detainer -- because of the modification of the parole conditions, which result from the detainer while he is in the institution, and from the loss of

concurrency.

Now, getting to the government's interpretation --

QUESTION: But perhaps they will declare it, perhaps the action will result in its being concurrent. How can you predict that now?

MRS. BAMBERGER: Well, the government's position is that the total withdrawal of the detainer and the warrant at the end of the intervening sentence, where the new crime is serious, is not likely to occur. But what is more likely to occur is the possibility of concurrency, where the violator doesn't get everything but he gets something. And the inability to give the partial retroactive concurrency deprives the parolee of that intermediate dispositional aspect, which the Commission can grant.

I think the government misconstrues the last -- that line in Morrissey and Gagnon which, in Morrissey, it relies on. That section relates to those jurisdictions in which there is no discretion, where there is a violation of parole, not to revoke. In other words, as in Tennessee, where the sentences must be served concurrently on a finding of violation, that sentence in Morrissey would apply. They would not need to give a hearing on the dispositional aspect of the case.

But where there is a discretion, Morrissey in no fewer than three places, at 480, 484, 488, and at Gagnon in 411 at 790, say that where there is this discretion, the hearing

must be given. And it's interesting to note that in Gagnon the violation was admitted by the parolee. He said he had committed the burglary. And so the Court, with that fact, still viewed the dual aspect of the process very important.

QUESTION: Has he not admitted it here?

MRS. BAMBERGER: Oh, yes, we're not disputing that he has admitted it. But we're saying that even where he admits it, the dispositional phase is still critical. And the government attempts to distinguish Morrissey and Gagnon, saying that they don't apply where the parolee has admitted the violation. And they are hardly distinguishable if that fact existed in those very cases.

The government asserts here that we urge that an oral hearing is required.

Now, it is our position that the old Board's rules, which did not provide for notice, disclosure of the file, any kind of representation, or any statement of the facts or reasons, does not comport with Morrissey. If the Court finds that is true, then the parolee in this case, the petitioner, would be entitled to a new hearing at the present time.

Now, under the new rules, he would be entitled to more than he would have been entitled to then. And it is our position that perhaps in some situations an oral hearing would not be required, but that this is not a decision which the Court must make now.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

The case is submitted.

[Whereupon, at 12:00 noon, the case in the above-entitled matter was submitted.]

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