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Corrections Law—Right to Counsel at Preliminary Parole Revocation Hearings in New York State to Be Determined by the Parole Board on Case-By-Case Basis.

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RECENT CASES

CORRECTIONS LAW—RIGHT TO COUNSEL AT PRELIMINARY PAROLE REVOCATION HEARINGS IN NEW YORK STATE TO BE DETERMINED BY THE PAROLE BOARD ON CASE-BY-CASE BASIS.

Appellants Calloway, Robinson and Richardson and Respondent Stephens were parolees charged with violating the conditions established for their parole. Appellants Calloway and Robinson brought a habeas corpus proceeding to obtain their release from custody following arrest and detention. The trial court ordered that the parole board conduct a preliminary hearing, subject to certain rules,[1] to determine whether there was probable cause to believe appellants had violated their conditions of parole. Both Calloway and Robinson requested the aid of counsel at the preliminary hearings, but their requests were denied. In both cases the parole officer, by written decision, found probable cause that these parolees had violated parole. Each was detained without bail pending a final revocation hearing. Both habeas corpus petitions were dismissed by the trial court,[2] and the dismissals were affirmed by the appellate division.[3]

Appellant Richardson initiated a proceeding under New York C.P.L.R. Article 78[4] seeking a judgment granting him an immediate preliminary inquiry at which he would have the assistance of counsel, receive a copy of the charges against him, and have an opportunity to contest these charges to determine whether there were reasonable grounds to believe he had violated the conditions of parole. Ultimately, he sought a decision rescinding the determination which had, without such inquiry, declared him a delinquent parolee. The trial court granted his requests,[5] but the appellate division reversed.[6]

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1. Included among these rules were the requirements that: (1) the hearing officer make a written report including a summary of the evidence presented at the hearing, a statement of the evidence relied on, and the reasons for whatever determination was made and (2) notice be given to petitioners and their attorneys of the date, time, place, and purpose of the preliminary hearing. People *ex rel.* Calloway v. Skinner, 71 Misc. 2d 810, 811, 337 N.Y.S.2d 37, 39 (Sup. Ct. 1972).

2. *Id.*

3. People *ex rel.* Calloway v. Skinner, 41 App. Div. 2d 106, 341 N.Y.S.2d 775 (4th Dep't 1973).

4. N.Y. CIV. PRAC. LAW §§ 7801-06 (McKinney 1963).

5. *In re* Richardson v. Board of Parole, 71 Misc. 2d 36, 335 N.Y.S.2d 764 (Sup. Ct. 1972).

6. *In re* Richardson v. Board of Parole, 41 App. Div. 2d 179, 341 N.Y.S.2d 825 (1st Dep't 1973).

The facts in the case of respondent Stephens were substantially similar; however the appellate division reached a contrary result. In this case the appellate division unanimously affirmed[7] the trial court's judgment in a proceeding under Article 78[8] granting a petition for a judgment directing the New York State Division of Parole to hold a preliminary hearing to determine whether there were reasonable grounds to believe petitioner had violated his parole, and directing a hearing to be held. At this hearing, Stephens was afforded the assistance of counsel.

On appeal to the New York Court of Appeals, the four cases were consolidated. In a divided opinion, with three judges dissenting, the court *held*: No absolute right to counsel exists under either the New York State or United States constitution for a parolee at a preliminary parole revocation hearing, but the right to assistance of counsel at such hearing should be determined on a case-by-case basis according to federal constitutional guidelines;[9] there is no right to bail or to release for a parolee pending a parole revocation hearing.[10] *People ex rel. Calloway v. Skinner,* 33 N.Y.2d 23, 300 N.E.2d 716, 347 N.Y.S.2d 178 (1973).[11]

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7. Stephens v. Hirsch, 41 App. Div. 2d 703, 340 N.Y.S.2d 615 (2d Dep't 1973) *(mem.)*.

8. N.Y. CIV. PRAC. LAW §§ 7801-06 (McKinney 1963).

9. These guidelines were set out by the United States Supreme Court in Gagnon v. Scarpelli, 93 S.Ct. 1756, 1764 (1973).

10. In addition to the constitutional holdings, the court ruled on two subsidiary questions. The first was raised by appellants Calloway, Robinson and Richardson. They argued that Morrissey v. Brewer, 408 U.S. 471 (1972), which grants to all parolees a right to a preliminary revocation hearing, was fully applicable to all parolees whose revocation was pending on June 29, 1972, the date *Morrissey* was decided. The court held that "if on the date of the *Morrissey* decision, the charges of delinquency had not yet been considered and the parolee had not yet been declared delinquent by a member of the parole board, then he should be entitled to a *Morrissey* preliminary hearing *for the revocation process had not yet been engaged.*" People *ex rel.* Calloway v. Skinner, 33 N.Y.2d 23, 33, 300 N.E.2d 716, 720, 347 N.Y.S.2d 178, 183 (1973). *See also* People *ex rel.* Maggio v. Casscles, 28 N.Y.2d 415, 271 N.E.2d 517, 322 N.Y.S.2d 668 (1971) for the state of the law regarding retroactivity for hearings under People *ex rel.* Menechino v. Warden, 27 N.Y.2d 367, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).

The second subsidiary issue was raised by petitioner Richardson. He contended that *Morrissey* required that preliminary hearings for alleged violators who were arrested in New York City and whose alleged violations occurred there be conducted within New York City, in order to facilitate production of witnesses and other evidence. His argument was unsuccessful. The court held that because of the overcrowding of detention facilities within the City of New York, it is not a violation of the *Morrissey* "at or reasonably near" standard to detain parolees and conduct preliminary hearings at Ossining, some thirty-five miles away from New York City. 33 N.Y.2d at 34-35, 300 N.E.2d at 720-21, 347 N.Y.S.2d at 185.

11. Hereinafter cited as instant case.

Throughout Anglo-American legal history a concern for the procedural rights of the individual accused of a crime has gradually developed.[12] However, it is only in the last few years that the judiciary has begun to examine the question of what constitutes the rights of those convicted and sentenced.[13] Consequently, parole revocation due process requirements, until recently, were in a state of protean evolution, subjecting parolees to jurisdictional discrepancies.[14] These discrepancies corresponded to the variations in theories of parole adopted by each court.[15] The philosophical debate centered around a right-privilege distinction.[16] Some jurisdictions held that parole revocation was analogous to the prosecutorial deprivation of liberty protected by the fifth, sixth and fourteenth amendments,[17] while others treated parole revocation as an administrative proceeding with very limited procedural rights.[18] This latter "privilege" theory followed from the assumption that the parolee has no liberty of which he is deprived during the period between his release on parole and the date his sentence is set to expire.[19]

New York was one of the states which provided due process rights for parolees[20] prior to the Supreme Court's recent decisions[21] on the

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12. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 578-91 (2d ed. 1898); *See e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968); Griffin v. California, 380 U.S. 609 (1965); Gideon v. Wainwright, 372 U.S. 335 (1963).

13. *See, e.g.*, Gagnon v. Scarpelli, 93 S.Ct. 1756 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

14. Before *Gagnon,* some jurisdictions held that a parolee had no right to counsel at a parole revocation hearing. *See, e.g.*, Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969); Rose v. Haskins, 388 F.2d 91 (6th Cir. 1968); Hyser v. Reed, 318 F.2d 225 (D.C. Cir. 1963); Johnson v. Stucker, 203 Kan. 253, 453 P.2d 35, *cert. denied,* 396 U.S. 904 (1969); Robinson v. Cox, 77 N.M. 55, 419 P.2d 253 (1966); State *ex rel.* London v. Parole & Pardon Comm'n, 2 Ohio St. 2d 224, 208 N.E.2d 137 (1965); Beal v. Turner, 22 Utah 2d 418, 454 P.2d 624 (1969). Other courts held the contrary view. That is, that the right to the assistance of counsel at such hearing was constitutionally mandated. *See, e.g.*, Warden v. Palumbo, 214 Md. 407, 135 A.2d 439 (1957); People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971); Commonwealth v. Tinson, 433 Pa. 328, 249 A.2d 549 (1969).

15. *See,* Comment, *The Parole System,* 120 U. PA. L. REV. 344-46 (1971).

16. *Id.* at 289-300.

17. *Id.* at 344 n.405.

18. *Id.* at 344 n.406.

19. *Id. See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439, 1451 (1968).

20. N.Y. CORREC. LAW § 212(7) (McKinney 1970) gives the alleged parole violator an opportunity to be heard. People *ex rel.* Menechino v. Warden, 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971) guaranteed a right to counsel at such hearing.

21. Gagnon v. Scarpelli, 93 S.Ct. 1756 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972).

subject. Before January 1971,[22] New York parolees were statutorily granted the right to a hearing before a three member board so that the charges against them might be explained.[23] The statute, although allowing the parolee to appear personally, expressly forbade the appearance of counsel. The New York Court of Appeals in *People ex. rel. Menechino v. Warden*[24] held that this statute vested the parole board "with unfettered discretion"[25] in deciding whether or not a parole violation had occurred and if one had, whether or not the parolee should be returned to prison. The United States Supreme Court had not as of the date of the *Menechino* decision had occasion to consider whether a right to counsel exists at parole revocation hearings. Therefore, reasoning by analogy from prior Supreme Court decisions requiring that counsel be afforded a probationer at a proceeding to revoke probation and impose sentence,[26] the New York Court of Appeals held that a parolee had a corresponding right under the New York State and federal constitutions,[27] since both procedures might result in a deprivation of liberty.[28]

Subsequent to *Menechino,* the United States Supreme Court in *Morrissey v. Brewer*[29] provided, as one of the guidelines for due process in parole revocation proceedings, the right to a preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts which could constitute a violation of parole.[30] Prior to *Morrissey,* such right to a preliminary hearing was mandated neither by statute nor case law in New York. More recently, the Supreme Court in *Gagnon v. Scarpelli,*[31] defined the limits of the federal constitutional right to counsel at the preliminary and final revocation hearings. The question then became: What will be the effect of these recent United States Supreme Court decisions on the New York law regarding the right to counsel in the parole revocation process? The answer can be found in *People ex rel. Calloway v. Skinner.*

22. This was the date of *Menechino.*
23. N.Y. CORREC. LAW § 212(7) (McKinney 1970).
24. 27 N.Y.2d 376, 267 N.E.2d 238, 318 N.Y.S.2d 449 (1971).
25. *Id.* at 380, 267 N.E.2d at 240, 318 N.Y.S.2d at 451.
26. McConnell v. Rhay, 393 U.S. 2 (1968); Mempa v. Rhay, 389 U.S. 128 (1967).
27. 27 N.Y.2d at 382, 267 N.E.2d at 242, 354 N.Y.S.2d at 454.
28. *Id.,* 267 N.E.2d at 241, 347 N.Y.S.2d at 453.
29. 408 U.S. 471 (1972).
30. *Id.* at 485.
31. 93 S.Ct. 1756 (1973).

At the core of the *ratio decidendi* of the instant case was the court of appeals' attempt to reconcile *Menechino* with *Gagnon,* since the two were partially at variance. The *Menechino* court, attempting to predict the Supreme Court's reaction, had held that all parolees had an absolute federal and state right to counsel.[32] In *Gagnon,* however, the Supreme Court had found no such absolute right, and left the issue to be settled on a case-by-case basis.[33] Consequently, the *Calloway* majority[34] set out to correct *Menechino's* faulty conjecture. Not wishing to overrule the earlier decision outright, the majority instead emasculated it by finding that parolees had an absolute state constitutional right to counsel at the final hearing,[35] but lacked a corresponding right at the preliminary adjudication.[36] Thus, the question remaining to be decided in the instant case was narrowed to whether the state constitution required the assistance of counsel at the preliminary parole revocation hearing.

To answer this question the court reasoned in the following manner: Revocation of parole is not part of a criminal prosecution, and thus, not all of the rights due a defendant in a criminal proceeding apply to parole revocations. The preliminary hearing is intended to be informal and summary in nature, with only a "minimal inquiry" necessary to determine whether there is probable cause or reasonable grounds to believe that the parolee has committed acts that would constitute a violation of parole. Since the preliminary hearing does not require a final resolution of the charges on factual issues, it is doubtful that the presence of counsel would be of any constructive assistance to the parolee. Therefore, in the vast number of cases, the right to counsel at a preliminary parole revocation hearing is not required by due process under the New York State constitution since the preliminary revocation hearing is not critical to the fairness of the final

32. 27 N.Y.2d at 380, 267 N.E.2d at 240, 318 N.Y.S.2d at 452.

33. 93 S.Ct. 1756, 1763 (1973).

34. The dissenting opinion, however, saw no need to reconcile *Gagnon* and *Menechino* at the state level. Rather it called for a state right to counsel at the preliminary as well as at the final hearing, despite the fact that there may not be a corresponding federal right. The state right should be based upon the rationales underlying *Menechino* rather than *Gagnon.* Instant case at 35, 300 N.E.2d at 721, 347 N.Y.S.2d at 185 (Fuld, C.J., dissenting). This majority-minority difference of opinion becomes clearer when note is taken of the fact that the judge who authored the *Calloway* dissent also wrote the *Menechino* majority opinion, while the spokesman for the majority in *Calloway* dissented in *Menechino.*

35. Instant case at 30, 300 N.E.2d at 718, 347 N.Y.S.2d at 182.

36. *Id.* at 31-32, 300 N.E.2d at 719, 347 N.Y.S.2d at 181-82.

hearing. However, the court also concluded that the assistance of counsel at the preliminary hearing might in some cases be necessary to satisfy the requirements of due process. Therefore, the court held that the parole board must determine, on a case-by-case basis, in accordance with *Gagnon,* which situations require the assistance of counsel for fundamental fairness.

To reach this result, the majority applied only the black letter rules of *Menechino, Morrissey* and *Gagnon,* while disregarding or distorting the reasons behind the decisions. This methodology was the most glaring defect of the court's opinion, for it culminated in a negation of the spirit of cases which were meant to be an expansion rather than a diminution of parolee rights.

The reason for the *Menechino* holding was that parole revocation results in the deprivation of liberty.[37] When there is the possibility of such deprivation, the fourteenth amendment mandates the aid of counsel to insure an effective presentation of the parolee's case. The parole board would thus be prevented from basing its determination on a mistaken view of the facts due to the parolee's inability to adequately represent himself.[38]

Morrissey, like *Menechino,* begins its reasoning process with a recognition that parole revocation involves a deprivation of liberty.[39] Citing *Menechino,*[40] the Supreme Court recognized that society, as well as the individual parolee, has an interest in not having parole revoked because of erroneous information or because of a mistaken evaluation of the need to revoke parole.[41] For the sake of accuracy in a procedure with such serious consequences, due process mandates[42] that two hearings be held.[43] The first hearing is to be a factual determination of whether there is probable cause to believe that the parolee committed the violation,[44] while the second hearing is an evaluation of any contested evidence and a consideration of whether the facts as determined warrant revocation.[45]

37. 27 N.Y.2d at 381-82, 267 N.E.2d at 241, 318 N.Y.S.2d at 453.
38. *Id.*
39. 408 U.S. at 479-82.
40. *Id.* at 484.
41. *Id.*
42. *Id.*
43. *Id.* at 484-88.
44. *Id.* at 471.
45. *Id.* at 487-88.

The Supreme Court in *Gagnon*,[46] made no distinction between the preliminary and final revocation hearing when it decided the question of whether a parolee has a federal due process right to be represented by retained or appointed counsel at the *Morrissey* hearings. Instead, it reaffirmed the reasons for the two hearings as stated in *Morrissey*.[47] The Court then held that the presence of counsel, although not constitutionally mandated in all cases, *is* required *if* the unskilled parolee has difficulty in presenting his version of the disputed facts or where the presentation of evidence requires the examination or cross-examination of witnesses or when complex documentary evidence must be offered or dissected.[48] The reason that *Gagnon* did not mandate counsel in all cases was that in most cases there is no factual dispute;[49] rather, in the routine case, the parolee has been convicted of another crime or has admitted the charges against him.[50]

The *Calloway* court, however, by ignoring the reasons for the *Gagnon* rule, distorted the decision by placing an erroneous emphasis on what it calls a "discretionary" right,[51] with the discretion to be exercised by the parole board.[52] If the majority were as concerned with accurate information as were the courts in the cases relied on, it would have had to establish a state right to counsel, not only at the primarily evaluative final hearing but also at the preliminary hearing, the major purpose of which is fact-finding. Instead, the majority makes a theoretical distinction between the two hearings; a distinction made neither in *Morrissey* nor *Gagnon*. The distinction was premised on the theory that the preliminary hearing is "not critical"[53] to fairness at the final hearing where the right to counsel is guaranteed. The observation that, in practice, most of the fact-finding is done at the preliminary hearing, demonstrates the unsoundness of the court's premise.[54] Furthermore, the conclusion that the prelim-

46. 93 S.Ct. 1756 (1973).
47. *Id.* at 1761.
48. *Id.* at 1762.
49. *Id.*
50. *Id.*
51. Instant case at 30, 300 N.E.2d at 718, 347 N.Y.S.2d at 182.
52. *Id.* at 32, 300 N.E.2d at 719, 347 N.Y.S.2d at 182.
53. *Id.* at 31, 300 N.E.2d at 719, 347 N.Y.S.2d at 181.
54. Interview with Herman Schwartz, Professor of Law, and other attorneys who have handled parole revocation hearings in New York State, in Buffalo, New York, Sept. 29, 1973.

inary hearing is not a "critical stage" overlooks many significant questions. If no official record is kept of the proceeding because it is an "informal"[55] administrative hearing, "summary in nature,"[56] how will a lawyer be able to prepare the case for the final hearing after being excluded from the first? If "the parolee is arrested at a place distant from the state institution, to which he may be returned before the final decision is made concerning revocation,"[57] how will the attorney, retained or appointed at the place of the reincarceration, be able effectively to gather proof or find witnesses, especially poor and inarticulate witnesses who might find it difficult to answer written interrogatories?

It is clear from the Supreme Court's decision in *Morrissey* that parole officers are permitted to employ the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence.[58] In fact, the parole officers, employed and domiciled at the place of arrest rather than at the place of reincarceration, will most likely elect to use such substitutes rather than to travel in order to appear. In such a case, how will the attorney, having no opportunity to cross examine the parole officer at the time of the preliminary hearing, ever regain at the final hearing, such an important tool for ascertaining truth? This question is particularly significant because the parole officer's testimony, based primarily on hearsay, is often the most substantial part of the evidence against the parolee, and is unlikely to be overturned.[59] Given these problems, the argument can certainly be made that the preliminary hearing is indeed a "critical stage."

Another weakness of the decision is its lack of specificity and concrete hypotheticals to illustrate to lower courts and to parolees the conditions which would mandate such "discretionary" right to counsel.[60] The standard established is vague and uncertain, and merely restates the broad *Gagnon* guidelines

55. Instant case at 31, 300 N.E.2d at 719, 347 N.Y.S.2d at 181.

56. *Id.*

57. 408 U.S. 471, 480 (1972).

58. *See* Gagnon v. Scarpelli, 93 S.Ct. 1756, 1760 n.5 (1973).

59. *See* note 54 *supra.*

60. The primary responsibility for this weakness of course lies with *Gagnon,* whose guidelines were merely adopted by *Calloway.* Another reason, however, is that the instant case did not consider the facts of the four lower court cases. This occurred because relators Calloway and Robinson were no longer restrained from their liberty as of the

> that counsel should be provided in cases where . . . the probationer or parolee makes such a request, based on a timely and colorable claim (1) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (2) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate and that the reasons are complex and otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider especially in doubtful cases, whether the [parolee] appears to be capable of speaking effectively for himself.[61]

How is a parolee to know what would constitute a mitigating circumstance? How is he to know whether his situation is complex enough to require a request for a lawyer? The meaning of "capable of speaking effectively for himself" is not at all clear. Moreover, the majority neglected to point out that *Gagnon* required that the parolee be informed of his right to counsel.[62] Upon notifying the parolee of his rights, the parole boards should have also been required to explain to the parolee the guidelines which, if met, would constitutionally mandate the right to counsel in his particular case. Furthermore, to require that the parolee be so inarticulate as to be unable to present his own case, while simultaneously requiring that he be sufficiently intelligent to appropriately request for himself the aid of counsel is to establish a contradiction which could effectively preclude the right to counsel in all cases. Although this contradiction is rooted in the *Gagnon* case-by-case approach, the court's conclusion is contrary to the spirit of the decision it relied on.

The court also considered the question of whether the right to bail or pre-hearing release exists for a parolee detained in advance of a revocation hearing. While neither the New York State nor federal constitution explicitly decrees a right to bail, they both proscribe

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time of the decision, petitioner Stephens was afforded the assistance of counsel at his hearing, and petitioner Richardson was declared delinquent and ordered returned to custody before the date of the *Morrissey* decision and was therefore not entitled to a *Morrissey* preliminary hearing. The court did not dismiss for mootness, however, because of the importance of the issues raised and the desirability of prompt resolution. Instant case at 30 n.1, 32 n.2, 300 N.E.2d at 717 n.1, 719 n.2, 347 N.Y.S.2d at 180 n.1, 183 n.2.

61. *Id.* at 31-32, 300 N.E.2d at 719, 347 N.Y.S.2d at 182.

62. 93 S.Ct. at 1764.

"excessive bail."[63] From this language, the majority concluded that the parolee has no constitutional right to bail.[64]

The majority can certainly be criticized for its narrow treatment of this issue. The court should not have summarily dismissed the possibility of a constitutional right to bail without first considering whether or not the absence of bail could be interpreted as "excessive bail" and therefore constitutionally proscribed.[65] Moreover, if the majority had concerned itself with the issue of deprivation of liberty, as did *Menechino, Morrissey* and *Gagnon,* it might have found a due process right to bail or pre-hearing release by balancing the interests involved. The parolee's pre-hearing release is a necessary component of accurate fact-finding, which is clearly an important societal concern. Since no right to counsel was found, the court should have found a right to bail or release, in order to facilitate the parolee's ability to compile evidence in order to insure that his right to be heard will be effective. Moreover, society has a stake in whatever chance there may be of restoring the parolee to normal and useful life. Certainly incarcerating the parolee before he is found to have committed a violation will not enhance his chances of rehabilitation. Rather, it will decrease that possibility by arbitrarily tearing the parolee from the family and vocational life he should be attempting to rebuild. Unless the parolee is suspected of a serious crime, the repetition of which would endanger society, the state clearly has no interest in an action which will do such violent damage to the rehabilitative process. This would be especially true if at the final hearing it were ultimately determined that the evidence did not establish sufficient grounds to reincarcerate him.

Furthermore, the court's contention that the granting of bail or release by a court not in control of the proceedings would create such "insuperable"[66] problems for the parole board that parole could not be

63. U.S. CONST. amend. VIII; N.Y. CONST. *art.* I, § 5.

64. Instant case at 33, 300 N.E.2d at 719, 347 N.Y.S.2d at 184. The court concluded from this lack of constitutional right to bail that the right to bail is purely statutory, and that the statutory right exists only in criminal proceedings. This excluded a statutory right to bail for parolees, since the parole revocation process is not a criminal proceeding. *Id.* at 34, 300 N.E.2d at 720, 347 N.Y.S.2d at 184.

65. This is one of at least three interpretations of the meaning of the excessive bail clause. Since the United States Supreme Court has not spoken on the issue, the New York Court of Appeals could have adopted such an interpretation. For a full discussion of this constitutional question, see Foote, *Crisis in Bail,* 113 U. PA. L. REV. 959, 969-71 (1965).

66. Instant case at 34, 300 N.E.2d at 720, 347 N.Y.S.2d at 184.

granted is unconvincing. This analysis overlooks the fact that the concept of bail was developed in order to assure the appearance of the accused by means less drastic than incarceration.[67] Thus, if the alleged violation is not serious, there is no rational basis for detaining the accused parole violator if the parole board can use alternative means to insure eventual appearance at the hearing. For example, the parole board does have sufficient control over the parolee to require him to report by phone or in person every day. Certainly this would be an adequate alternative means of control and would cause no "insuperable" problem, particularly for a technical violation. Moreover, even when the alleged violation is a serious one, such as arrest on suspicion of committing a new crime, there is no reason for the parole board to detain the parolee without bail. In such a case the police may arrest and the court would decide whether the individual was a good or bad bail risk. If a court decides that the parolee is a good risk, the parole board should not be permitted to independently supersede its determination.[68]

In spite of the fact that *Morrissey* attempted to extend due process rights to parolees, some commentators on the impact of this case were reluctant to count it among the landmark decisions of immediate operational significance.[69] This reluctance resulted from the Supreme Court's failure to mandate either right to counsel or a right to bail or pre-hearing release.[70] The failure of the New York Court of Appeals to extend the right to counsel under the New York State constitution to the preliminary hearing, except on a case-by-case basis, while simultaneously maintaining that no right to bail exists, will do little to remedy the *Morrissey* defects. Instead, the impact of the instant case will be to reinforce the *Morrissey* weaknesses. The spurious distinction between the preliminary and final hearings will, in practice, lead to a serious undermining of the procedural rights developed by *Menechino*.

Perhaps in theory the preliminary hearing is a mere "informal minimal inquiry," insignificant when compared with the final hearing at which the parolee's fate "hangs in the balance";[71] in fact the pre-

67. *See* 2 F. POLLOCK & F. MAITLAND, *supra* note 12, at 589-90.

68. *See also* Morrissey v. Brewer, 408 U.S. 471, 497 n.8 (1973) (Douglas, J., dissenting opinion).

69. *See, e.g.*, Cohn, *A Comment on Morrissey v. Brewer: Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616 (1972); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 95-102 (1972).

70. Cohn, *supra* note 69, at 620-21.

71. Instant case at 31, 300 N.E.2d at 718, 347 N.Y.S.2d at 181-82.

liminary hearing is the *only* hearing.[72] This result obtains because the preliminary hearing is indeed a "critical stage," as recognized by the Supreme Court in dealing with criminal prosecutions.[73] Although parole revocation is not a part of the criminal process,[74] both the logic and the policies underlying the Supreme Court's decisions in the criminal area provide useful guidelines for determining what would constitute a "critical stage." Such stage exists when: rights must be asserted or the opportunity lost;[75] the result may affect the whole trial;[76] the skilled interrogation of witnesses requires the experience of a lawyer;[77] and trained counsel can more effectively discover the case against his client and thus prepare a proper defense.[78] Since these identical contingencies could arise at the preliminary parole reovcation hearing, there is no justification for the drastic difference in treatment. Until that fact is recognized by the judiciary, the courts will be filled with appellants so arguing.

Thus, when the majority decided to adopt *Gagnon's* case-by-case approach as New York law, rather than to extend *Menechino* to the preliminary hearing as a state right, it guaranteed more litigation. The guidelines will encourage the majority of parolees to request counsel based on claims of difficulty in presenting their version of the disputed facts. However, placing the decision of which requests should be granted in the hands of the parole board will mean that most will be denied since parole boards have fought steadily against the intervention of counsel in the parole revocation process.[79] Therefore, it will be the judiciary which will ultimately be forced to decide which new cases mandate the assistance of counsel.

If guidance can be gained from an examination of the development of the right to counsel in the criminal process, the continuing source of controversy and litigation caused by a case-by-case approach[80]

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72. *See* note 54 *supra.*

73. Coleman v. Alabama, 399 U.S. 1, 10 (1969); White v. Maryland, 373 U.S. 59, 60 (1963).

74. Instant case at 30, 300 N.E.2d at 718, 347 N.Y.S.2d at 181; *see* Gagnon v. Scarpelli, 93 S.Ct. 1756, 1759 (1973); Morrissey v. Brewer, 408 U.S. 471, 480 (1972).

75. White v. Maryland, 373 U.S. 59, 60 (1963); Hamilton v. Alabama, 368 U.S. 52, 53 (1961).

76. Hamilton v. Alabama, 368 U.S. 52, 54 (1961).

77. Coleman v. Alabama, 399 U.S. 1, 9 (1969).

78. *Id.*

79. *See* note 54 *supra.*

80. *See, e.g.,* Gideon v. Wainwright, 372 U.S. 335, 338 (1962) for discussion

will again be abandoned in favor of an absolute right.[81] Until this occurs, however, the impact on individual parolees will be disastrous. The decision not to require counsel at the preliminary hearing will result in more findings of probable cause. This, coupled with the parolee's inability to be released on bail or on his own recognizance in order to gather evidence on his own behalf, will result in more revocations. More revocations will in turn mean more reincarcerations which will result in a disruption of the rehabilitative process. This will occur because the parolee will be torn from his family and job and suffer damage to his already marred reputation. Thus, he will have difficulty in establishing in his employer, the community at large, and perhaps in himself as well, a confidence in his eventual rehabilitation. Moreover, the instant decision will increase the parole board's discretion, thereby increasing the parolee's perception that someone can deprive him of his liberty arbitrarily. Such a perception might very well do permanent damage to the parolee's chances for a rehabilitated belief in due process of law to the detriment of the very correctional process for which the parole system was designed.

PEGGY RABKIN

CRIMINAL LAW—NEW YORK ADOPTS THE INEVITABLE DISCOVERY EXCEPTION—UPHOLDS THE VALIDITY OF WARRANTLESS ARRESTS AND SEARCHES—STRIKES DOWN DEATH PENALTY STATUTE.

On the night of September 8, 1969, at approximately 9 p.m., petitioner robbed a service station attendant in Canastota, New York, fleeing with the attendant's wallet and the station's cash receipts in an automobile belonging to a friend. A few minutes after the holdup, two policemen identified the automobile and proceeded to stop and question the petitioner. Suddenly, he produced a revolver and fatally shot both police officers. Before losing consciousness, however, one of the officers transmitted the petitioner's last name and the car's license number to headquarters. Meanwhile, petitioner abandoned his friend's car and forced a woman to drive him in her own auto-

of the Bettes v. Brady, 316 U.S. 455 (1942) case-by-case approach as a continuing source of litigation in both state and federal courts.

81. *See* Gideon v. Wainwright, 372 U.S. 335 (1962).