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# Constitutional Law - Parole Revocation Hearings - Due Process Does Not Require That Federal Parolee Subsequently Convicted and Incarcerated for State Offense be Given Immediate Parole Revocation Hearing

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# Constitutional Law

CONSTITUTIONAL LAW—PAROLE REVOCATION HEARINGS—DUE PROCESS DOES NOT REQUIRE THAT FEDERAL PAROLEE SUBSEQUENTLY CONVICTED AND INCARCERATED FOR STATE OFFENSE BE GIVEN IMMEDIATE PAROLE REVOCATION HEARING.

*United States ex rel. Caruso v. United States Board of Parole (1978)*

As a result of narcotics charges [1] brought against Ciro Caruso, a federal parolee, the United States Board of Parole [2] issued a parole violator warrant for Caruso and lodged it as a detainer with New Jersey officials.[3] Although Caruso had filed a written request with the Board that it execute the warrant,[4] the Board decided, pursuant to an ex parte dispositional review, to let

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1. Ciro Caruso pleaded guilty to charges of possession and distribution of cocaine and heroin and was sentenced to serve 14 to 20 years in a New Jersey state prison. United states *ex rel.* Caruso v. United States Bd. of Parole, 570 F.2d 1150, 1152 (3d Cir. 1978).

2. Pursuant to the Parole Commission and Reorganization Act of 1976, 18 U.S.C. §§ 4201-4218 (1976), the United States Board of Parole became the United States Parole Commission. *Id.* § 4202.

3. 570 F.2d at 1152. Under the statute in effect at the time of Caruso's arrest in New Jersey, 18 U.S.C. § 4205 (1970) (repealed 1976), a warrant could be issued and lodged unexecuted with the incarcerating authority. 28 C.F.R. § 2.53 (1975). The prisoner was permitted by regulations to request a dispositional review (as opposed to a revocation hearing), at which time he could be represented by counsel and would have an opportunity to call witnesses on his behalf. *Id.* After the dispositional review the Regional Director could:

(1) Let the detainer stand;
(2) Withdraw the detainer and close the case if the expiration date has passed;
(3) Withdraw the detainer and reinstate to supevision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release;
(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

28 C.F.R. § 2.53 (1975). The current statute, 18 U.S.C. § 4214(b) (1976), and the regulations thereunder, 28 C.F.R. § 2.47 (1978), are similar to those in effect at the time of Caruso's arrest.

Detainers are usually used in three types of situations: 1) to hold an inmate for outstanding charges; 2) to hold an inmate for subsequent incarceration on another sentence; or 3) to hold an inmate for a parole or probation violation. *See* Dauber, *Reforming the Detainer System: A Case Study*, 7 CRIM. L. BULL. 669, 676 (1971). The Supreme Court has described a "detainer" as follows:

> A detainer in this context is an internal administrative mechanism to assure that an inmate subject to an unexpired term of confinement will not be released from custody until the jurisdiction asserting a parole violation has had an opportunity to act—in this case by taking the inmate into custody or by making a parole revocation determination. When two autonomous jurisdictions are involved, as for example when a federal detainer is placed against an inmate of a state institution, a detainer is a matter of comity.

Moody v. Daggett, 429 U.S. 78, 80 n.2 (1976).

4. 570 F.2d at 1152. At that time, Caruso argued that his drug offenses resulted from an addiction and that the detainer would prevent him from receiving treatment for this condition by barring his participation in rehabilitation programs. *Id.*

it remain unexecuted.[5] Rather than appeal,[6] Caruso filed a petition for a writ of habeas corpus in the United States District Court for the District of New Jersey.[7] The district court dismissed the petition with prejudice.[8]

On appeal, Caruso alleged that the decision by the Board of Parole not to execute the warrant, thereby denying him an immediate parole revocation hearing, operated to prevent him from participating in prison programs which would facilitate his rehabilitation and early release.[9] He asserted that the Board of Parole's decision, reached without a hearing, infringed his liberty interests and was a denial of due process.[10] The United States Court of Appeals for the Third Circuit affirmed the dismissal,[11] *holding* that the lodging of an unexecuted federal parole violator warrant as a detainer with state authorities does not operate as a denial of a state prisoner's due process rights in delaying his parole revocation hearing. *United States ex rel. Caruso v. United States Board of Parole*, 570 F.2d 1150 (3d Cir. 1978).

Prior to the United States Supreme Court's decision in *Moody v. Daggett*,[12] the circuits were divided on the question of whether a parolee, convicted and incarcerated for another offense while on parole, was entitled to an immediate revocation hearing when an unexecuted warrant was lodged as a detainer with prison authorities.[13] Several courts had held that a delay in the holding of a parole revocation hearing until the end of the second sentence resulted in the suffering of a grevious loss by the prisoner and was therefore constitutionally impermissible.[14] These courts had found unconstitutional deprivations in the prisoner's inability to preserve mitigating evidence until a hearing could be held,[15] to participate in rehabilitation pro-

5. *Id.* at 1152. For an outline of the effect of such action, *see* note 3 *supra*.

6. 570 F.2d at 1152. Caruso received a Notice of Action informing him that he had 30 days to appeal the Board's decision. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* at 1153.

10. *Id.* at 1156.

11. The case was heard by Judges Garth and Adams, and Judge Layton of the United States District Court for the District of Delaware, sitting by designation. Judge Garth wrote the opinion for the majority. Judge Adams filed a dissenting opinion.

12. 429 U.S. 78 (1976).

13. The courts of appeals that had found a delayed revocation hearing impermissible prior to *Moody* included: Jones v. Johnston, 534 F.2d 353 (D.C. Cir. 1976); Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975). *See also* Shepard v. United States Bd. of Parole, 541 F.2d 322 (2d Cir.), *vacated sub nom.* United States Parole Comm'n v. Shepard, 429 U.S. 1057 (1976), *vacated as moot on remand*, 554 F.2d 64 (2d Cir. 1977). The courts of appeals that permitted delayed parole revocation hearings prior to *Moody* included: Thomas v. United States, 539 F.2d 572 (5th Cir. 1976) (per curiam); Reese v. United States Bd. of Parole, 530 F.2d 231 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976); Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975); Small v. Britton, 500 F.2d 299 (10th Cir. 1974).

14. Jones v. Johnston, 534 F.2d 353 (D.C. Cir. 1976); United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975), *mandate recalled*, 560 F.2d 264 (7th Cir. 1977); Peele v. Sigler, 392 F. Supp. 325 (E.D. Wash. 1974). *See also* Shepard v. United States Bd. of Parole, 541 F.2d 322 (2d Cir.), *vacated sub nom.* United States Parole Comm'n v. Shepard, 429 U.S. 1057 (1976), *vacated as moot on remand*, 554 F.2d 64 (2d Cir. 1977).

15. United States *ex rel.* Hahn v. Revis, 520 F.2d 632, 637 (7th Cir. 1975), *mandate recalled*, 560 F.2d 264 (7th Cir. 1977).

grams during the course of the second sentence,[16] or in the loss of the opportunity to obtain concurrent sentences.[17] These courts accepted the argument that the existence of the unexecuted warrant caused prison officials to negatively view the prisoner's amenability to treatment and biased parole authorities against the granting of a second parole.[18] Conversely, other courts had found that these potential losses were not protected liberty interests, and thus had concluded that no due process right to an immediate parole revocation hearing attached when the warrant was lodged as a detainer.[19]

In *Moody*, the Supreme Court resolved this split of authority by holding that a federal parolee, subsequently convicted and incarcerated for another federal offense, had not been denied due process because of the failure to hold an immediate parole revocation hearing when an unexecuted parole violator warrant is lodged as a detainer.[20] In so doing, the Court distinguished its earlier decision in *Morrissey v. Brewer*,[21] where it had held that the execution of a federal parole violator warrant entitled the parolee to a reasonably prompt revocation hearing due to the nature of the parolee's interest in remaining unincarcerated.[22]

In attempting to establish a protected liberty interest similar to that in *Morrissey*, the petitioner in *Moody* had argued that the existence of the unexecuted warrant would adversely affect the length and conditions of his confinement, and that the delay in holding the revocation hearing exposed him to the risk of losing any mitigating evidence.[23] The Court dismissed each of these contentions, commenting that they either involved unprotected liberty interests or were based upon unfounded claims.[24] The Court noted

16. Jones v. Johnston, 534 F.2d 353, 362-63 (D.C. Cir. 1976).

17. *Id.* at 364.

18. *Id.* at 362-63. *See also* Note, *The Detainer Process: The Hidden Due Process Violation in Parole Revocation*, 52 CHI.-KENT L. REV. 716 (1976).

19. Cases finding no grievous loss included: Small v. Britton, 500 F.2d 299 (10th Cir. 1974); Cook v. United States Attorney Gen., 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974); Burdette v. Nock, 480 F.2d 1010 (6th Cir. 1973); Noolander v. United States Attorney Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973).

20. 429 U.S. 78, 86 (1976).

21. 408 U.S. 471 (1972).

22. *Id.* at 483-84. *Morrissey* had been the basis for the decisions of several of the courts that held that a revocation hearing cannot be delayed even when the parolee is incarcerated for another offense. *See* note 13 *supra*. The *Morrissey* Court examined the nature of the parolee's interest and found that, though his freedom from incarceration was subject to many restrictions, it included "many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." 408 U.S. at 482. The Court also commented that "[t]he parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." *Id.*

23. 429 U.S. at 85.

24. *Id.* at 88 n.9. The Court confronted the substance of each of the petitioner's contentions in a footnote, commenting that procedures existed for the preservation of any evidence that might be lost, and stating:

> Petitioner further claims that evidence of mitigation may be lost if the revocation hearing is not held promptly, but he makes no claim that there is additional evidence in his case which may be vitiated by a delay. Had such claims been made, the Commission has the power, as did the Board before it, to conduct an immediate hearing at which

that the petitioner's loss of liberty, if any, stemmed from his conviction for other offenses rather than from the lodging of the unexecuted parole violator warrant.[25] It concluded that no right to a revocation hearing attached until the incarcerated parolee was taken into custody as a parole violator upon execution of the warrant.[26]

The *Moody* Court also rejected the petitioner's argument that the issuance of the warrant as a detainer diminished his opportunity for an early parole on his second sentence.[27] The Court determined that the petitioner, in exercising his statutory right to a hearing upon his application for parole[28] from his second sentence, would be able to present his case to the same authority that had issued the warrant and therefore would have as much of an opportunity to persuade the Parole Board that he should be released as he would have had at an immediate revocation hearing.[29] The Court in *Moody*, however, expressly reserved decision on whether a different result would be reached if the detainer were lodged by one sovereign against a prisoner incarcerated by another.[30] It was this issue which confronted the Third Circuit in *Caruso*.

After summarily disposing of the Government's argument that Caruso was not entitled to judicial relief since he had not availed himself of his right to an administrative appeal,[31] the court discussed Caruso's first contention—that the lack of a prompt revocation hearing would affect his

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petitioner can preserve his evidence. 18 U.S.C.A. § 4214(b)(2) (June 1976 Supp.); 28 C.F.R. § 2.47 (1976).

Petitioner also argues that the pending warrant and detainer adversely affect his prison classification and qualification for institutional programs. We have rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right. In *Meachum v. Fano*, 427 U.S. 215 (1976), for example, no due process protections were required upon the discretionary transfer of state prisoners to a substantially less agreeable prison, even where that transfer visited a "grievous loss" upon the inmate. The same is true of prisoner classification and eligibility for rehabilitative programs in the federal system. Congress has given federal prison officials full discretion to control these conditions of confinement, 18 U.S.C. § 4081, and petitioner has no legitimate statutory or constitutional entitlement sufficient to invoke due process.

429 U.S. at 88 n.9.

25. 429 U.S. at 86-87.

26. *Id.* at 86.

27. *Id.* at 88.

28. The current parole statute, 18 U.S.C. § 4208 (1976), provides that a prisoner eligible for parole is entitled to a hearing. *Id.* The former statute, 18 U.S.C. §§ 4201-4210 (1970), did not have such a provision.

29. 429 U.S. at 88.

30. *Id.*

31. 570 F.2d at 1152. The court considered whether its decision in United States *ex rel.* Sanders v. Arnold, 535 F.2d 848 (3d Cir. 1976), was applicable. In *Arnold*, the court held that a habeas corpus petition for relief from a decision of the Parole Board that revoked the petitioner's parole had to be dismissed because the petitioner had failed to pursue his right to an administrative appeal. *Id.* at 851. Although Caruso had also failed to appeal the Board's decision in his case, the court found *Arnold* inapplicable because counsel for the Commission (Parole Board) had informed the court that it was no longer Commission practice to permit appeals from the Regional Commissioner's decision not to hold a revocation hearing. 570 F.2d at 1152–53.

first sentence in that it might impair his ability to present mitigating evidence and therefore prejudice his opportunity to convince the Parole Board that he should not later be reimprisoned.[32] The court found *Moody* controlling in this instance,[33] commenting that the fact that the second sentence was imposed by the State of New Jersey, rather than the United States, would have no bearing on the Parole Board's ultimate decision concerning Caruso's reimprisonment under the first federal sentence.[34] The court stated that no right to a revocation hearing attached until the warrant was executed and Caruso was in federal custody as a parole violator.[35] With respect to Caruso's ability to present evidence of mitigating circumstances, the court noted that he had failed to establish that any such evidence existed, and that a mere assertion of possible prejudice was insufficient to require an immediate revocation hearing.[36]

The second element of Caruso's complaint was that the existence of the unexecuted warrant as a detainer would make it less likely that New Jersey officials would grant him an early parole from his state sentence and that he would be barred from participating in rehabilitation programs which also might expedite his release.[37] Noting that Caruso's fears were "far too uncertain and inchoate to rise to the level of a deprivation of a liberty interest,"[38] the Third Circuit held that the allegations that adverse state action would be taken as a consequence of the lodging of a federal detainer were insufficient to invoke the right to an immediate revocation hearing.[39] In addition, the court commented that the harm Caruso claimed he would suffer would not occur at the hands of federal officials.[40]

32. 570 F.2d at 1153.

33. *Id.* at 1154.

34. *Id.* The court noted that the former regulations, 28 C.F.R. § 2.53 (1975), had no stated policy as to whether the remainder of the parolee's first sentence would be served concurrently with, or consecutively to, the intervening sentence, while the new regulations, 28 C.F.R. § 2.47(c) (1977), specifies that it is the Commission's policy that the remainder run consecutively to the new offense. 570 F.2d at 1154 n.7. The court continued that, following *Moody*, the Commission's policy would not affect their decision, since no right to a revocation hearing attached until the warrant was executed and Caruso was in federal custody as a parole violator. *Id.* at 1154.

35. 570 F.2d at 1154.

36. *Id.* at 1154 nn.8 & 9. The court commented that the only mitigating evidence claimed by Caruso was the fact of his drug addiction. *Id.* n.8. This claim, the court felt, did not rise to the level of "substantial mitigating circumstance" which, in the context of 28 C.F.R. § 2.47(c) (1977), would inveigh against the Parole Board's ultimate decision to let the two sentences run consecutively. 570 F.2d at 1154 nn.8 & 9. The court did indicate, however, that if the claim of mitigating evidence was credible, the Commission may have a duty to hold an immediate dispositional hearing. *Id.* n.9. In certain circumstances, it commented, the Regional Commissioner may be required to permit the parolee a chance to place mitigating evidence on the record. *Id.* *See* 429 U.S. at 88 n.9, 18 U.S.C. § 4214(b)(2) (1976). A close reading of 28 C.F.R. § 2.47(a) (1977) reveals that in all cases the parolee shall be given an opportunity, with the aid of counsel, to submit a written document containing mitigating evidence. *Id.*

37. 570 F.2d at 1154.

38. *Id.* at 1155. It is unclear from the court's wording whether the basis for this statement rested on the fact that there was only a possibility of adverse action or whether Caruso's allegations were insufficiently substantiated.

39. *Id.*

40. *Id.*

Observing that Caruso was in reality alleging that the State of New Jersey had taken, or would take, arbitrary and capricious actions against him because of the existence of the federal detainer,[41] the *Caruso* court suggested that the appropriate action was against the state prison officials and parole authorities.[42] Indeed, the court noted that Caruso's position in relation to the state authorities would probably be no different if a revocation hearing were held immediately, since a detainer would still be lodged with New Jersey prison officials if the Commission were to sentence him to a consecutive term for violating his parole.[43] The majority concluded by citing several other decisions by courts of appeals which were in accord with their decision.[44]

In a strongly worded dissent, Judge Adams stated that the case should not be disposed of without first remanding to the district court for evidentiary hearings on Caruso's allegations that New Jersey officials were barring him from rehabilitation and work release programs as a result of the federal detainer.[45] If those allegations were true, Judge Adams continued, Caruso had been deprived of a liberty interest as a result of a change in his legal status brought about by the federal government's action in lodging the unexecuted warrant as a detainer.[46] This federally created change of status and its resultant effect on Caruso, the dissent argued, gave rise to a need for due process procedural safeguards in the form of an immediate revocation hearing.[47]

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41. *Id.*

42. *Id.*

43. *Id. See* 28 C.F.R. §§ 2.47(c), 2.52 (1977). *See also* note 3 *supra.*

44. 570 F.2d at 1155. The court cited: United States *ex rel.* Hahn v. Revis, 560 F.2d 264 (7th Cir. 1977) (federal parolee not permitted revocation hearing when incarcerated for state offense); Hicks v. United States Bd. of Paroles and Pardons, 550 F.2d 401 (8th Cir. 1977) (federal parolee not permitted revocation hearing when incarcerated for state offense). *See* 570 F.2d at 1155. The court also cited two cases where a revocation hearing was not required when one state lodged a detainer with another state: Larson v. McKenzie, 554 F.2d 131 (4th Cir. 1977) (per curiam); Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975). *See* 570 F.2d at 1155.

45. 570 F.2d at 1155-56 (Adams, J., dissenting). Judge Adams expressed the opinion that for the purposes of a habeas corpus petition, especially one prepared pro se, the facts alleged must be taken as true unless patently frivilous. *Id.* at 1156 (Adams, J., dissenting), *citing* Blackledge v. Allison, 431 U.S. 63 (1977). He also pointed out that the Second Circuit had found that New Jersey followed a per se rule that prisoners with outstanding detainers were not eligible for prison release programs. 570 F.2d at 1156 (Adams, J., dissenting), *citing* Shelton v. Taylor, 550 F.2d 98, 103 (2d Cir. 1977).

46. 570 F.2d at 1159 (Adams, J., dissenting).

47. *Id.* The essence of Judge Adams' argument can be found in the following statement:

> In the case before us, Caruso avers that the federal detainer not only operates to impair his opportunities for parole, rehabilitation and remission of sentence, but that it effectively bars him from the possibility of achieving normalcy. This comes about, he argues, because of the consequences which New Jersey attaches to his classification by federal officials. In this latter aspect, Caruso's claim shares much in common with the contentions upheld by cases which establish that governmental infliction of "stigma" or harm to "good name, reputation, honor or integrity" must be preceded by a due process hearing. The harm in both situations comes about as a result of the conjunction of the classification of a citizen by the government, and the reaction of others to such classification.

*Id.* at 1157-58 (Adams, J., dissenting) (footnote omitted).

The Third Circuit's rejection of Caruso's claim that the lack of a prompt revocation hearing might adversely affect his federal sentence followed logically from *Moody*.[48] Both the majority and dissent agreed that Caruso was not deprived of an opportunity to serve his first and second sentences concurrently since the Parole Board had the power to revoke his parole retroactively.[49] It was the petitioner's claim that the existence of the detainer prejudiced his chance for an early parole on his second sentence which elicited the judges' divergent views.

It is submitted that the majority could have taken a more direct route to reach its conclusion that Caruso was not entitled to a revocation hearing.[50] The Supreme Court has held that a prisoner has no protected liberty interest in the conditions of his confinement when the determination of those conditions is vested exclusively in the hands of prison authorities.[51] The

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In addition to advocating this due process analysis, Judge Adams concluded that Caruso had protected liberty interests in the opportunity to participate in rehabilitation programs and in eligibility for an early parole from his second sentence. *Id.* at 1159-61 (Adams, J., dissenting).

48. *See* 429 U.S. at 87. For a discussion of the *Moody* decision, *see* notes 20-30 and accompanying text *supra*.

49. 570 F.2d at 1160 (Adams, J., dissenting). If the Parole Board should later revoke Caruso's parole retroactively, Caruso's federal sentence would run from the date his parole was deemed to be revoked.

50. Although the question was expressly reserved in *Moody*, 429 U.S. at 88, the Court in that case provided an ample basis for concluding that *Moody's* reasoning would apply in the context of a federal parolee imprisoned by state authorities. *See id.* at 85-89. The *Moody* Court made it clear that the parole revocation hearing mandated by *Morrissey* was to protect an interest not present when a parolee has been subsequently convicted and incarcerated. *Id.* at 87. Its opinion also created doubt as to whether a parolee–prisoner has liberty interests in the condition of his confinement, or in his eligibility for parole from his second sentence. *Id.* at 87 n.9. Finally, the Court noted that, given federal parole revocation procedures, no need for an immediate revocation hearing arises to preserve mitigating evidence. *Id. See* note 24 *supra*.

51. Meachum v. Fano, 427 U.S. 215 (1976). In *Meachum*, Massachusetts prisoners challenged their transfer from a minimum security prison to a maximum security prison on the basis of a denial of due process because they had not been afforded a fact finding hearing. *Id.* at 223. The Court stated:

> We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. . . .
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> Similarly, we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison if, as is likely, the State has more than one correctional institution. The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons.
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> . . . .
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> . . .That life in one prison is much more disagreeable than in another does not itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

majority thus could have concluded that even if Caruso's allegations were true, no right to a hearing arose because the deprivations which he had claimed to suffer at the hands of New Jersey officials were not protected liberty interests. Instead, the majority preferred to base its decision on a finding that it was not the action of the Parole Board which allegedly affected Caruso, but rather that Caruso's guilty plea was the source of his purported deprivation.[52]

While this rationale differs from that employed by other circuits which have decided this issue since *Moody*,[53] the Third Circuit's reasoning is

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> Our cases hold that the convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect. . . . But none of these cases reaches this one; and to hold as we are urged to do that any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.

*Id.* at 224-25 (citation omitted) (emphasis supplied by the Court).

The dissent in *Caruso* cited Wolff v. McDonnell, 418 U.S. 539 (1974), in support of the position that prisoners do, in some cases, retain a liberty interest in the conditions of their confinement. 570 F.2d at 1160 (Adams, J., dissenting). However, the majority in *Caruso* could easily have distinguished *Wolff*, as did the Supreme Court in *Meachum*, by pointing out that in *Wolff* an Ohio statute had granted the interests that the petitioners in that case claimed the state had wrongly taken, while in *Caruso* there was no state statute establishing the interests the petitioner there claimed were protected. 427 U.S. at 226. The *Meachum* Court stated:

> The liberty interest protected in *Wolff* had its roots in state law, and the minimum procedures appropriate under the circumstances were held required by the Due Process Clause "to insure that the state-created right is not arbitrarily abrogated." . . . This is consistent with our approach in other due process cases such as *Goss v. Lopez* . . . ; *Board of Regents v. Roth* . . . ; *Perry v. Sindermann* . . . ; *Goldberg v. Kelly* . . . .

*Id.* at 226 (citations omitted).

52. The court seems to have chosen this rationale in response to Judge Adams' dissent. *See* 570 F.2d at 1155 n.10. Judge Adams argued that the Board's action in lodging the detainer was analogous to those situations in which a governmental agency stigmatizes an individual, without a hearing, and in such a way that he suffers the loss of a protected liberty interest. *Id.* at 1157-58 (Adams, J., dissenting). *See* note 47 and accompanying text *supra*. The majority's emphasis on Caruso's guilty plea appears to have been an attempt to distinguish *Caruso* from that group of cases relied on by the dissent. It would thus seem that the majority viewed the Parole Board's characterization of Caruso as a parole violator as the result of his guilty plea and not an ex parte accusation to which Caruso was denied an opportunity to respond. Although the majority did not cite it, a recent Supreme Court case, Codd v. Velger, 429 U.S. 624 (1977) (per curiam), lends support to this conclusion. In that case, the Court concluded that there is no right to a due process hearing to clear one's reputation unless the claimant alleges that the governmental characterization was false and was arrived at through a discretionary fact finding process. *Id.* at 627–28.

53. Among those cases which have determined that no right to an immediate revocation hearing accrued where the parolee was incarcerated for a subsequent offense, many have based their decision on the lack of custody under an unexecuted warrant or the absence of a protected liberty interest. United States *ex rel.* Hahn v. Revis, 560 F.2d 264 (7th Cir. 1977) (no right to a hearing because petitioner not in custody under unexecuted warrant); Larson v. McKenzie, 554 F.2d 131 (4th Cir. 1977) (state lodged detainer against prisoner–parolee in another state; court held no right to a hearing because petitioner not in custody under unexecuted warrant); Coronado v. United States Bd. of Parole, 551 F.2d 275 (10th Cir. 1977) (no right to hearing because petitioner not in custody under unexecuted warrant); Hicks v. United States Bd. of Paroles and Pardons, 550 F.2d 401 (8th Cir. 1977) (no right to a hearing because petitioner not in custody under unexecuted warrant); Head v. United States Bd. of Parole, 553 F.2d 22 (7th Cir.), *cert. denied*, 431 U.S. 959 (1977) (*Moody* controls).

nonetheless sound. Fundamental fairness, the purpose of procedural due process,[54] is best served in the instant situation by denying Caruso the right to an immediate revocation hearing. While the Constitution affords procedural protection for an individual who has been deprived of a liberty or property interest by state action,[55] the opportunity to defend against a subsequent criminal charge provides the parolee with greater procedural safeguards than are available in a *Morrissey* type parole revocation hearing.[56] No interest in fundamental fairness would be served by permitting a parolee to have a second opportunity to challenge allegations that he has committed acts which violated the conditions of his parole.[57]

54. *See* Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting); Griffin v. California, 380 U.S. 609, 615-16 (1965) (Harlan, J., concurring); Pointer v. Texas, 380 U.S. 400, 408-09 (1965) (Harlan, J., concurring); Hannah v. Larche, 363 U.S. 420, 442 (1960); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring); Rogge, *An Overview of Administrative Due Process*, 19 VILL. L. REV. 1, 3-5 (1973).

55. A state must provide notice and a hearing before depriving a person of "life, liberty or property." *See* Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972); Fuentes v. Shevin, 407 U.S. 67, 80 (1972); Bell v. Burson, 402 U.S. 535, 542 (1971).

There appear to be at least two classes of state action which require procedural safeguards. The first are those actions, such as that in *Morrissey*, where the state denies or terminates a right previously granted by state law. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (due process required where school authorities deprive students of statutory right to public education through suspension); Wolff v. McDonnell, 418 U.S. 539 (1974) (due process required before state can deprive prisoner of good time credits granted under state law); Morrissey v. Brewer, 408 U.S. 471 (1972) (due process required where judicial parole authorities revoke federal parole).

The second class of cases are those where the state, in the process of exercising its discretion, defames the complaining individual. This class deals with the indirect effect of a governmental classification on the individual's right to enjoy state created or constitutional liberties rather than the government's direct deprivation of protected rights. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433 (1971) (posting an individual as an excessive drinker to whom alcohol could not be sold held violative of due process); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123 (1951) (Attorney General's labeling of an organization as "communist" required procedural due process); Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (the Court held that the petitioner had no protected liberty interest in being rehired by his employer, but noted that if, in terminating the petitioner's employment, charges of misconduct had been made, a right to due process would attach). *See also* Codd v. Velger, 429 U.S. 624 (1977) (per curiam). *Cf.* Paul v. Davis, 424 U.S. 693 (1976) (reinterpreting several cases and holding that there is no protected liberty interest in reputation per se).

Since the Supreme Court's decision in *Moody*, subsequently convicted parolees are foreclosed from claiming a right to due process under the first class of cases. *See* 429 U.S. at 87. Since a parolee's loss of freedom results not from the issuance of the unexecuted warrant but rather from his conviction for the subsequent offense, the parolee cannot claim that the Parole Board has denied him his conditional liberty. *Id.* The Parole Board in *Caruso* did not make a determination, as did the authorities involved in *Goss, Wolff*, and *Morrissey*, that the petitioner was not entitled to rights he had previously been granted. *See also* 570 F.2d at 1155. As to Caruso's right to a due process hearing under the second class of cases, it is suggested that his right to contest the state charges against him in a full criminal proceeding operates as a sufficient due process protection against his being unjustly defamed as a parole violator. *See* note 56 and accompanyiny text *infra*.

56. *See* Reese v. United States Bd. of Parole, 530 F.2d 231 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976). In *Reese*, the court ruled that in determining whether a violation of the conditions of parole occurred, the Parole Board was entitled to rely on the criminal procedure leading to the parolee's conviction for the subsequent offense. 530 F.2d at 234. *See also* note 57 *infra*.

57. The Court in *Morrissey*, while requiring a revocation hearing, specified that "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a

The Third Circuit recognized that a parolee is not deprived of fundamental fairness by being forced to await the Parole Board's decision. Once a parolee has been convicted, the only function of a parole revocation hearing is to decide whether the parole relating to the petitioner's first sentence should be revoked.[58] Since the Parole Board has the power to make its decisions effective retroactively,[59] the parolee is not deprived of an opportunity to serve his second sentence concurrently with his first by virtue of the fact that a revocation hearing is delayed.[60]

As a practical matter, it is submitted that the Third Circuit's decision in *Caruso* is correct. The problems which detainers have been said to impose upon incarcerated parolees[61] are not amenable to correction through a due process hearing. As the court in *Caruso* observed, the most likely result of such a hearing would be a decision by the Board to let the detainer stand,[62] in which case there would be no relief for the prisoner. If the negative effects on a prisoner which accompany the existence of a detainer are unjustified,[63] the most constructive avenue for change would be the education of misguided prison officials.[64] Perhaps, as the court in *Caruso* noted, suits against such officials could be maintained.[65] In any case, a due process parole revocation hearing for subsequently convicted parolees is not the answer.

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defendant in such a proceeding does not apply to parole revocations." 408 U.S. at 480. It is thus clear that an opportunity to contest the subsequent charges in a criminal proceeding afforded Caruso greater procedural protections than he would have had in a parole revocation hearing.

58. 429 U.S. at 89.

59. *Id.* at 87. *See* text accompanying note 49 *supra*.

60. 570 F.2d at 1154.

61. *See* Dauber, *supra* note 3, at 692-96. Dauber notes that the existence of a detainer may have many adverse effects on a prisoner. It may affect the way in which prison personnel view the inmate, the programs in which he may participate, his eligibility for a second parole, and his psychological adjustment to confinement. *Id. See also* Note, *supra* note 18, at 716; Note, *Procedural Due Process and the Convicted Prisoner*, 10 J. MAR. J. 313 (1977).

62. 570 F.2d at 1155.

63. *See* Dauber, *supra* note 3. Dauber comments that the actions taken by prison authorities with regard to detainers are often based on a lack of information. *Id.* at 673-74, 712-13.

64. The import of Dauber's analysis seems clearly to recommend such an approach, in addition to other changes in the detainer system. *Id.*

65. 570 F.2d at 1155. *See also Dauber, supra* note 3. Dauber comments that a suit may be maintained against the incarcerating authority under the Civil Rights Act. *Id.* at 714.