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CRIMINAL LAW: JUSTICE AFTER TRIAL

Terrence F. Kiely*

Professor Kiely reviews and analyzes in depth this survey year's post-trial criminal law developments in the areas of sentencing, probation, probation revocation and the Post-Conviction Hearing Act. With an eye toward the realities of prison litigation, he also has gone into and through the recent in-roads on the "hands-off" doctrine and explores the more essential administrative realm within which these decisions must reside.

INTRODUCTION

This article will analyze recent Illinois cases in the field of criminal law that fall within the broad range of post-conviction developments. The topic is an extensive one and hence the discussion to follow will attempt to organize the decisions within several basic post-conviction areas: sentencing, probation, probation revocation, the Post-Conviction Hearing Act, and finally, recent developments regarding the constitutional rights of inmates incarcerated in Illinois penitentiaries. As much as is possible, an attempt will be made to acquaint the reader with the overall decisional, administrative or statutory context in which the more recent cases chosen for analysis make their mark.

SENTENCING

Contemporaneous with the January 1, 1973, effective date of Illinois' new Unified Code of Corrections\(^1\) questions arose as to the applicability of the codes relaxed sentencing guidelines\(^2\) to cases brought to judgment prior to that date, but currently on appeal, wherein the reviewing court is urged to reduce a sentence imposed in excess of the new limits, pursuant to their power to reduce sentences under Supreme Court Rule 615.\(^3\)

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1. ILL. REV. STAT. ch. 38, §§ 1001-1-1 to 1008-6-1 (Supp. 1972) [hereinafter referred to as the new Code].
Section 1008-2-4 of the new Code provides in part:

If the offense being prosecuted has not reached the sentencing stage or a final adjudication, then for purposes of sentencing, the sentences under this act apply if they are less than under prior law upon which the prosecution was commenced.\(^4\)

In two companion cases, \textit{People v. Chupich},\(^5\) dealing with the interpretation of nearly identical language in the \textit{Illinois Controlled Substances Act},\(^6\) and \textit{People v. Harvey},\(^7\) relating directly to section 1008-2-4, the Supreme Court of Illinois has held that for purposes of the applicability of the new sentencing structures of both pieces of legislation, a case has not been finally adjudicated, within the meaning of the relevant sections, until the last direct appeal has been decided or the time for the filing of such has expired. Hence, in cases actually on appeal or still within the statutory time for appeal at the effective date of the new code, the defendants are entitled to a reduction of any sentence imposed in excess of that provided for under the new Code section 1005-8-1.

In \textit{Chupich}, the defendant was convicted of the unlawful sale of narcotics and, pursuant to the then extant \textit{Uniform Narcotic Drug Act},\(^8\) was sentenced to a term of not less than twenty-five nor more than sixty years in the penitentiary. On appeal, Chupich challenged his conviction proper, which was affirmed, and the excessive nature of his sentence in light of the less strict provisions of the \textit{Illinois Controlled Substances Act}\(^9\) which became effective during the pendency of his appeal.

The State based its argument on two grounds: first, that the General Assembly intended that the new legislation be governed by section 4 of the Statutory Construction Act, which states in part:

\begin{quote}
If any penalty, forfeiture or punishment be mitigated by any provision of new law, such provision may, by the consent of the party effected, be applied to any judgment pronounced after the new law takes effect.\(^{10}\)
\end{quote}

\begin{itemize}
  \item 53 Ill. 2d 572, 295 N.E.2d 1 (1973).
  \item \textit{I L L. R E V. S T A T.} ch. 38, § 22-3 (1965).
\end{itemize}
The State cited in support of its argument the opinion of the Illinois Supreme Court in the case of *State v. Hanson*, where, in relation to the applicability of section 4 to the Criminal Code of 1961, it was held that such "mitigation" only applied to *judgments* after the new Code took effect.

In rejecting this argument, Justice Schaefer, speaking for the court stated:

> It is clear that the General Assembly did not intend the Statutory Construction Act to govern the imposition of penalties under the statutes now before us. If it had, the provisions involved in this case would not have been necessary, and would not have been enacted.

Thus, continued Justice Schaefer, the resolution of the issue really turned on the meaning of the phrases "sentencing stage" or "final adjudication."

On this point, the State argued that "final adjudication" in section 1008-2-4 actually meant final appealable order and that hence the final judgment of the trial court, whether sentence or probation, fixed the determinative date as to the applicability of the new Code.

In rejecting this analysis, Justice Schaefer noted that such reasoning led to the conclusion that "sentencing stage" and "final adjudication" were, in effect, synonymous terms, which result was obviously not the intent of the legislature. In addition, the court noted that section 1005-6-2(e) as well as numerous other provisions of the new Code refer to "sentences" to probation.

In conclusion, Justice Schaffer held:

> We are of the opinion that "sentencing stage" and "final adjudication" do not mean the same thing, and that the appellate courts have correctly held that the penalties provided in the Controlled Substances Act are applicable to cases pending upon direct appeal. The same result will follow under the Unified Code of Corrections.

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11. 28 Ill. 2d 322, 192 N.E.2d 359 (1963).
12. 53 Ill. 2d at 583-84, 295 N.E.2d at 8.
13. This argument equates an interlocutory order which has been made "final" for purposes of appeal with a "final adjudication." The two are not equivalent. Under the State's analysis, either the reference to "the sentencing stage" or the reference to "final adjudication" is redundant. *Id.* at 584, 295 N.E.2d at 8.
14. The question of whether probation is a "punishment" for purposes of Supreme Court Rule 615 granting reviewing courts power to reduce punishments will be discussed in depth later in this section. *See* text accompanying notes 34-55 *infra.*
15. 53 Ill. 2d at 584, 295 N.E.2d at 8. *See also* People v. Pickett, 54 Ill. 2d 280, 296 N.E.2d 856 (1973). The case was remanded to determine the proper sentence
In *People v. Harvey*, involving the proper sentencing limits following a conviction for aggravated assault, the supreme court addressed itself directly to section 1008-2-4 of the new Code. Following the ruling in *Chupich*, the court applied the new sentencing provisions of section 1005-8-1 since the appeal was pending when the new Code became effective on January 1, 1973. *Harvey* was remanded for a reduction of the minimum term imposed by the trial court.

Following the decisions of the supreme court in *Chupich* and *Harvey*, the appellate courts have reduced sentences involving various crimes in a series of cases, several of which merit extended attention at this point. Two such cases, *People v. Haynes* and *People v. Rheinhart*, addressed themselves to the status of the so-called “split sentence” rule under the new Code and to the problem of those currently incarcerated pursuant to that rule, in light of the supreme court's decisions in *Chupich* and *Harvey*.

Under the authority of section 117-2 of the prior Criminal Code, since the record failed to clearly indicate the amount of substance involved, which is a determining factor in the length of the sentence.

17. Section 1005-8-1, the general sentencing provision of the new Code, provides that for any class two or class three felony, such as aggravated assault, the maximum term shall be any term in excess of one year and the minimum shall be one year, unless the court determines that a higher sentence in light of the circumstances would be appropriate. However, the section specifically states that any higher minimum term “shall not be greater than one third of the maximum term set in that case by the court.” ILL. REV. STAT. ch. 38, § 1005-8-1(4) (Supp. 1972). The same applies to negotiated pleas for reduction purposes; see *People v. Cole*, 11 Ill. App. 3d 412, 299 N.E.2d 394 (1973).
it was permissible for a trial court to require a period of incarceration of varying lengths as a condition of admission to probation. However, under section 1005-6-3(b)(1) of the new Code of corrections, the “split-sentence” is prohibited and a trial court may no longer impose a period of imprisonment as a condition to receiving probation.\textsuperscript{22} The council commentary to section 1005-6-3 (which relates to the general conditions of probation and conditional discharge) reads as follows:

The use of the so-called split sentence under which the first part of the sentence is served in the county jail is specifically prohibited except in the limited situation where probation is used in conjunction with periodic imprisonment. The use of a term of imprisonment as a condition of probation destroys probation as a means of immediate restoration to the community and undoes the ties which the offender may have there.\textsuperscript{23}

In \textit{People v. Haynes},\textsuperscript{24} the defendant, following a plea of guilty to forgery, was sentenced to probation for a five year period, the first year of which was to be served at the Illinois State Penal Farm at Vandalia. Relying on appellate decisions which had anticipated the previously discussed supreme court rulings in \textit{Chupich} and \textit{Harvey}, and noting the prohibition of section 1005-6-3, the court modified the order of probation, at defendant's urging, to eliminate the period of imprisonment.\textsuperscript{25}

In a more unique opinion, the Third District Appellate Court in the case of \textit{People v. Rheinhart},\textsuperscript{26} decided shortly after \textit{Haynes}, likewise eliminated a period of imprisonment imposed as a condition for admission to probation by the trial court. The defendant, following a plea of guilty to a charge of possession of cannabis, was sentenced to a period of probation, the first six months to be served at Vandalia. Here however, the court noted that the language of section 1008-2-4\textsuperscript{27} provided for the application of the new

\textsuperscript{22} \textit{ILL. REV. STAT.} ch. 38, § 1005-6-3(b)(1) (Supp. 1972).
\textsuperscript{23} \textit{ILL. ANN. STAT.} ch. 38, § 1005-6-3 (Smith-Hurd 1972) (council commentary). Increased use by trial courts of periodic imprisonment, provided for in section 1005-7-1, can be anticipated, as a means of accomplishing a "split-sentence" in effect in cases where such would have been imposed under prior law.
\textsuperscript{24} 10 Ill. App. 3d 923, 295 N.E.2d 354 (1973).
\textsuperscript{25} "Here defendant has, before his release, served approximately four months of the one year imposed, and we consider in light of the public policy expressed in the Code that further incarceration is not required in this case." \textit{Id.} at 926, 295 N.E.2d at 356.
\textsuperscript{26} 11 Ill. App. 3d 859, 296 N.E.2d 781 (1973).
\textsuperscript{27} \textit{ILL. REV. STAT.} ch. 38, § 1008-2-4 (Supp. 1972).
sentencing guidelines to cases on appeal only if the sentence under the new Code would be less than that provided under former law. Since the possible penalty would actually be increased under the new provisions of the Illinois Controlled Substances Act, the court felt that the new Code technically did not apply. Nevertheless, noting the obvious public policy behind the prohibition against the split sentence, the court modified the order so as to eliminate the period of imprisonment.

The Rheinhart court's general quandry as to the possible range of increased penalties under the new Code in some instances, as affecting its application to cases pending on appeal on its effective date was raised and settled in two very recent decisions. In People v. Smith and People v. Burke, it was held that for purposes of application of the new Code's sentencing parameters to cases on appeal at its effective date, the sentence actually imposed is the determinant of the lesser sentence provision of section 1008-2-4.

PROBATION

Before leaving the general topic of the power of appellate courts to reduce sentences pursuant to Supreme Court Rule 615 (or, per Chupich and Harvey, their statutory responsibility in applicable cases), several collateral and important decisions dealing with the power of such courts to reduce a penitentiary sentence to one of probation must be discussed.

There is no constitutional right to probation. In fact, it has been consistently held that the decision to grant or deny it is peculiarly within the discretion of the trial court while the scope of review has been generally limited to scrutiny of any alleged abuse of

29. "[R]ehabilitation of defendant does not require that we rigidly adhere to prior concepts, but in fact, calls for application of the spirit of the change and modification as expressed in the Unified Code of Corrections to eliminate the imposition of incarceration in this cause." 11 Ill. App. 3d at 862, 296 N.E.2d at 783.
32. 10 Ill. App. 3d at 506-07, 296 N.E.2d at 18-19; 12 Ill. App. 3d at 377-78, 298 N.E.2d at 182.
that discretion. Regardless, the appellate courts in several instances have reduced penitentiary sentences to probation pursuant to Supreme Court Rule 615 by interpreting the term "punishment" to include probation.

The part of Supreme Court Rule 615 which is relevant to this discussion reads as follows:

(b) Powers of the Reviewing Court. On appeal the reviewing court may:

* * * *

(4) reduce the punishment imposed by the trial court.

The Supreme Court of Illinois in the recent case of People ex rel. Ward v. Moran, has held that for purposes of the power of an appellate court to reduce a sentence, the term "punishment" in Rule 615 does not include probation and their power in this regard is limited to reviewing a denial of probation upon allegations of abuse of discretion by the trial court. Prior to an analysis of the Moran case, however, attention should be given to a recent second district decision, People v. Velez, inasmuch as it anticipated the issue dealt with in Moran and will thus shed some light on the rationale of that ruling.

In Velez, following a conviction for the illegal possession of dangerous drugs (Deslental and Desoxyn), the defendant was denied probation and sentenced to six months at the Vandalia prison farm.

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34. See, e.g., People v. Saiken, 49 Ill. 2d 504, 275 N.E.2d 381 (1971); People v. Carpenter, 1 Ill. 2d 347, 115 N.E.2d 761 (1953). A very recent amendment to section 1005-5-3 of the Unified Code of Corrections limits the court's power to grant probation in certain instances:

(d) When a defendant is convicted of a felony or misdemeanor, the court may sentence such defendant to:

(1) a period of probation or conditional discharge except in cases of murder, rape, armed violence, armed robbery, violation of sections 401(a), 402(a), 405(a) or 407 of the Illinois Controlled Substances Act or violation of Section 9 of the Cannabis Control Act; . . .


37. 54 Ill. 2d 552, 301 N.E.2d 300 (1973).

38. Thus the only option the appellate court has is to order a new hearing to determine if such abuse is found to have existed in the initial denial. See People v. Baumgarten, 13 Ill. App. 3d 189, 300 N.E.2d 561 (1973).

On appeal, the defendant contended that the trial court abused its discretion in denying his probation request. The majority rejected the defendant's argument but implied that in a proper case it had the authority under Supreme Court Rule 615 to reduce a penitentiary sentence to probation. Justice Moran, concurring in the specific result in the case, addressed himself squarely to the underlying issue.

Citing an early Illinois Supreme Court decision, he argued that probation is the suspension of a sentence and the phrase ".sentenced to probation" is simply an erroneous result of common usage. While penalty and punishment are synonymous terms, he continued, punishment and probation are not:

> after a judgment of guilt, a sentence is the pronouncement of punishment. Since, by its definition, probation is the suspension of punishment, it follows that one cannot be sentenced to probation. . . . Properly, one is "allowed probation" or "admitted to probation."

While Rule (615)(b)(4) empowers this court to reduce the punishment, we are not empowered to void the punishment after a judgment of guilty. To order probation on appeal would suspend and therefore effectively void any punishment imposed.

The analysis set forth by Justice Moran was the focal point of the supreme court's decision in People ex rel. Ward v. Moran.

In the case of People v. Broverman the Fifth District Appellate Court affirmed a forgery and theft conviction but vacated concurrent penitentiary terms of one to three and one to five years imposed by the trial court and ordered that the defendant be admitted to probation. The Moran case arose from an original writ of mandamus by the State's Attorney of Christian County to the Illinois Supreme Court seeking an order directing the fifth district to vacate that portion of their order admitting Broverman to probation. The supreme court, while denying the writ on the ground that the mandamus was not the proper remedy, granted the substantive relief desired, pursuant to their rarely used supervisory authority under article VI, section 16 of the 1970 Illinois Constitution.

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40. People v. Featherstone, 194 Ill. 325, 62 N.E. 684 (1902).
41. 6 Ill. App. 3d at 469-70, 285 N.E.2d at 253 (emphasis by the court).
42. 54 Ill. 2d 552, 301 N.E.2d 300 (1973).
44. ILL. CONST. art. VI, § 16 (1970).
The court, speaking through Justice Kluczynski, held that Supreme Court Rule 615(b)(4) was not intended to grant a court of review the power to reduce a penitentiary sentence to probation. Referring to the law applicable to the case, section 117-1 of the Code of Criminal Procedure of 1963, he noted that probation is left to the sound discretion of the trial court and that the scope of review has traditionally been limited to questions of abuse of such discretion. The earlier decisions positing the reduction power urged by the respondent were disregarded by the court on the basis that research had disclosed no supreme court ruling having any precedential value in that regard. After a brief discussion of the relevant statutes and of the individuality of consideration inherent in the concept of probation, Justice Kluczynski stated:

Probation and imprisonment have been classified as penal sanctions [citations omitted], but they are qualitatively distinct.

In answer to the respondent's argument that section 11 of article I of the 1970 Illinois Constitution gave appellate courts the implied power to reduce penitentiary sentences to probation, the court noted:

There is no indication that the italicized portion of section 11 is to be given greater consideration than that which establishes that the seriousness of the offense shall determine the penalty. Nor does section 11 specifically empower a reviewing court to grant probation after the trial court has imposed a penitentiary sentence.

Pursuant to its ruling, the court, under its supervisory powers, ordered the appellate court to vacate that portion of its judgment ordering probation and to determine solely the issue of abuse of discretion by the trial court.

The new Illinois Unified Code of Corrections, in effect on the date of the Moran decision, is replete with references to probation as a "sentence," and the council commentary to section 1005-6-1, the

45. ILL. REV. STAT. ch. 38, § 117-1 (1969). The court noted that at the date of decision the new Illinois Unified Code of Corrections was currently in effect.

46. See note 35, supra.

47. 54 Ill. 2d at 556, 301 N.E.2d at 302. See People ex rel. Barrett v. Bardens, 394 Ill. 511, 517, 68 N.E.2d 710, 713 (1946) where the court stated: "A sentence to imprisonment in the penitentiary cannot be synonymous with a grant of probation entitling a convicted defendant to escape a penalty of imprisonment."

48. "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."

49. 54 Ill. 2d at 556-57, 301 N.E.2d at 302.
general probation provision of the new Code specifically states that "[p]robation under the Code is a sentence, not the suspension of a sentence as under former law."50

A sentence is defined in the new Code in section 1005-1-1951 as "the disposition imposed by the court on a convicted defendant." In the council commentary to this definitional section it is stated:

The word “disposition” is substituted for the word “punishment” in this definition because “disposition” is a broader word which includes “punishment.” Otherwise this follows former law.52

Section 1005-1-18 defines probation as “a sentence or adjudication of conditional and revocable release under the supervision of a probation officer."53 Section 1006-5-3(d) provides that when a defendant is convicted of a felony or misdemeanor, the court may sentence such defendant to a period of probation.54 Paragraph (g) of the same section provides that in “no case shall an offender be eligible for a disposition of probation . . . for a Class 1 felony committed while he was serving a term of probation or conditional discharge for a felony."55 Finally, section 1005-6-4(a) of the new Code refers to a sentence of probation when referring to the tolling of probationary time upon the issuance of a revocation warrant.

Thus it appears that regardless of the classificatory and substantive changes relative to probation in the new Code, the supreme court, as stated in Moran, does not deem probation to be “punishment,” at least insofar as rule 615(b)(4) is concerned.

A final, corollary decision to be discussed involved in the probation-sentence-punishment dialogue, is People v. Gentry,56 which addresses the issue of whether a defendant admitted to probation, upon revocation is entitled, on request, to a hearing in aggravation

50. ILL. ANN. STAT. ch. 38, § 1005-6-1 (Smith-Hurd 1972) (council commentary).
52. ILL. ANN. STAT. ch. 38, § 1005-1-19 (Smith-Hurd 1972) (council commentary).
55. Id. § 1005-5-3(g) (emphasis added).
56. 5 Ill. App. 3d 1088, 284 N.E.2d 428 (1972).
and mitigation of the charges stemming from the revocation prior to receiving a penitentiary sentence.

Gentry, following a plea of guilty to a charge of burglary, was granted probation the same day for a five year period. Approximately one year later his probation was revoked and a penitentiary sentence of two to four years was imposed. The defendant’s request for a hearing in aggravation and mitigation was denied.

The First District Appellate Court, speaking through Judge Leighton, in response to the State’s argument that the defendant had, in effect, had such a hearing prior to the entry of the order of probation, stated:

Sentence, in the meaning of these words, is the pronouncement of the penalty which the law imposes as a consequence of guilt. (Citations omitted) Probation, which the court considered after defendant pled guilty, is not a sentence. (Citations omitted) It is generally said that an order admitting a defendant to probation is a suspension of the sentence. (Citations omitted) Therefore, what the trial judge considered in determining whether to grant defendant probation was not evidence “for the purpose of determining the sentence . . .” which was imposed almost a year later. Accordingly, the case was remanded for purposes of conducting a hearing in aggravation and mitigation.

Even in light of the substantive and definitional changes regarding the status of probation in the new Code, the decision of the court in Gentry may well stand, thus requiring a re-examination of the substantive nature of the two types of hearings involved, as well as the relevant data to be considered in each instance.

The disparity in interpretation of the concept of probation in the above instances highlights the continuing need for complete and definitive legislative guidelines as to both the overall intent of the drafters of the new Code in making the changes discussed and their place in the entire complex of sentence related statutory and case law. The possible impact of the ruling in the Moran case is especially unfortunate in light of the obvious attempt made by the drafters to recognize the realities of being placed on probation. A

57. “After a determination of guilt, a hearing shall be held to impose the sentence. At the hearing the court shall . . . consider evidence and information offered by the parties in aggravation and mitigation.” ILL. REV. STAT. ch. 38, § 1005-4-1(a)(3) (Supp. 1972).
58. 5 Ill. App. 3d at 1090, 284 N.E.2d at 429.
theoretical distinction between "probation" and "punishment" for purposes of Supreme Court Rule 615 only lends further credence to the position that probation is a mere technicality allowing the guilty to escape "punishment."

PROBATION REVOCATION

Under the new Illinois Unified Code of Corrections, the provisions for the granting and revocation of probation are set forth in article 6, section 1005-6-1 to section 1005-6-4. The decision to allow probation, as indicated above, lies solely within the discretion of the trial court. The new Code adds the caveat that probation should not be granted in cases where imprisonment would be necessary for the protection of the public; the offender is in need of correctional treatment that can be most effectively provided by a sentence of imprisonment; or if probation would deprecate the seriousness of the offense.

The grounds for probation revocation under the new Code are essentially the same as under prior law, namely, the violation of any criminal statute of any jurisdiction and the noncompliance with any conditions imposed by the court or the probation department. While the most common basis for the revocation of probation continues to be the commission of another offense, several recent decisions have affirmed revocations based on violations of imposed conditions.

59. ILL. REV. STAT. ch. 38, §§ 1005-6-1 to 1005-6-4 (Supp. 1972).
60. Id. § 1005-6-1(a)(1-3). See also note 34 supra.
61. ILL. REV. STAT. ch. 38, §§ 117-2(a) and 117-3(d) (1967).
62. Section 117-2(a) read "any penal statute or ordinance" of any jurisdiction (emphasis added).
63. In addition, the new Code in §§ 1005-6-3(b)(1-10), sets out conditions which may be imposed by the trial court.
64. See People v. Crowell, 53 Ill. 2d 477, 292 N.E.2d 721 (1973) (theft); People v. Hall, 10 Ill. App. 3d 1011, 295 N.E.2d 545 (1973) (robbery); People v. King, 10 Ill. App. 3d 847, 294 N.E.2d 300 (1973) (burglary); People v. Shadowens, 10 Ill. App. 3d 450, 294 N.E.2d 107 (1973) (aggravated assault); People v. Williams, 10 Ill. App. 3d 428, 294 N.E.2d 61 (1973) (burglary); People v. Woodson, 10 Ill. App. 3d 79, 293 N.E.2d 457 (1973) (criminal damage to property); People v. Witherspoon, 9 Ill. App. 3d 317, 292 N.E.2d 202 (1972) (attempted aggravated assault); People v. McCullough, 5 Ill. App. 3d 796, 283 N.E.2d 926 (1972) (out of state offense).
The more important issues raised in the recent probation revocation cases concern the standard of proof and procedures to be adhered to in revocation hearings. The new Code provides in section 1005-6-4, as under prior law, that a hearing on revocation will be had upon a petition by the probation authorities and that bail may be allowed during the pendency of the action. It is also specifically provided that the state shall have the burden of going forward and proving the violation by a preponderance of the evidence, with the alleged violator having the right of confrontation, cross-examination and representation by counsel.

It is important to note that when the alleged violation constitutes the commission of another offense, the State need not establish that the probationer has been indicted, prosecuted or convicted. The revocation may be effected by proof of the new crime by a preponderance of the evidence.

In January of 1973, the Illinois Supreme Court, in the case of People v. Crowell, removed any doubts as to the standard of proof in probation revocation hearings. The defendant had been placed on probation following a plea of guilty to theft. He was later charged

(failure to report); People v. Perez, 12 Ill. App. 3d 892, 299 N.E.2d 355 (1973) (failure to report); People v. Hardy, 8 Ill. App. 3d 854, 291 N.E.2d 242 (1973) (presence in place where liquor sold and failure to pay court costs); People v. Wade, 8 Ill. App. 3d 774, 290 N.E.2d 329 (1973) (failure to report); People v. Whitney, 7 Ill. App. 3d 92, 287 N.E.2d 33 (1972) (intoxication); People v. Harris, 6 Ill. App. 3d 487, 285 N.E.2d 583 (1972) (failure to report).

66. It also provides that a summons, in addition to a warrant may issue to the alleged violator which shall have the effect of tolling the running of the probationary period. ILL. REV. STAT. ch. 38, § 1005-6-4 (Supp. 1972).

67. The source of these provisions are based upon evolved standards in relation to such hearings. See Mempa v. Rhay, 389 U.S. 128 (1967) and the American Bar Associations Probation Standards, sections 5.1-5.4.

68. A probation violation proceeding and a criminal proceeding are independent of one another. A defendant need not be indicted, prosecuted or convicted of the offenses which are the basis for the revocation of probation.

This court adheres to the rule that in probation revocation hearings, proof of violation of probation will be established by a preponderance of the evidence.


with a similar offense and, on the basis of evidence produced at a subsequent hearing, his probation was revoked. On appeal, he challenged the revocation on the basis that his commission of the new offense was not proved beyond a reasonable doubt.

The supreme court, speaking through Justice Davis held:

Since this court has never before ruled on the precise question of what the quantum of proof should be in a probation revocation proceeding, and in absence of any statutory provisions therefor [citation omitted], we hold that a violation of the conditions of probation must be proved by a preponderance of the evidence. We note, moreover, that the General Assembly has specifically incorporated this standard in the new Illinois code of corrections. . . .

As to the adequacy of evidence presented at the hearing, the court reiterated a long-held position that a finding of a violation will not be disturbed merely on the basis of a conflict of evidence. Thus the *Crowell* decision and the new Code appear to have settled any issues regarding the standard of proof at probation revocation proceedings.

On the issue of the sufficiency of proof in each instance underlying the probation revocation, as opposed to the proper overall evidentiary standard, two cases, *People v. Kaplan* and *People v. Johnson*, merit brief attention.

In *Kaplan*, following a plea of guilty to a charge of aggravated battery, the defendant was placed on five years probation. Approximately two years later, he pled guilty to charges of battery and resisting arrest and was placed on three years probation. Subsequently upon petition, the defendant's first probationary term was revoked, in violation of an agreement to the contrary with the State's Attor-

70. *Id.* at 451, 292 N.E.2d at 723. The court also noted that, as opposed to earlier law, appellate court reviews of probation revocations were no longer final. *See Ill. Rev. Stat. ch. 38, § 117-3(e) (1971).* *Ill. Rev. Stat. ch. 110A, § 604 (b) (1971).*

71. *See,* e.g., *People v. King,* 10 Ill. App. 3d 847, 294 N.E.2d 300 (1973); *People v. Shadowens,* 10 Ill. App. 3d 450, 294 N.E.2d 107 (1973); *People v. Woodson,* 10 Ill. App. 3d 79, 293 N.E.2d 457 (1973). Shadowens held that the sentencing provisions of the new Code were applicable to appeals following probation revocation and sentencing. *See also* *People v. Birch,* 12 Ill. App. 3d 761, 299 N.E.2d 85 (1973).

72. 7 Ill. App. 3d 155, 287 N.E.2d 246 (1972).

73. 10 Ill. App. 3d 537, 294 N.E.2d 700 (1973).
ney, due to his plea of guilty to the later charge. Following the revocation, the battery and resisting arrest convictions were set aside by the trial court and the defendant was allowed to withdraw his pleas of guilty. In the instant case, the defendant urged that since the sole basis of the probation revocation were the now vacated guilty pleas, the revocation and penitentiary sentence could not stand.

The court, stressing the need for adequate proof of the underlying charge by a preponderance of the evidence, concluded:

In the instant case, probation was revoked on the sole ground that defendant had been convicted of criminal offenses. No testimony was produced as to the facts of the alleged crimes. The vacatur in the Municipal Division of the convictions and the withdrawal of the guilty pleas vitiated the basis of the revocation order.

Accordingly, the court ordered the vacatur of the revocation order and remanded for an evidentiary hearing on the petition for revocation.

In an analogous situation in *People v. Johnson*, the court again stressed the necessity of proof of the underlying charge, where that is the basis for a revocation request, by a preponderance of the evidence. The defendant, following a plea of guilty to a charge of criminal damage to property, was placed on probation, for a one year period. A short time later, a rule to show cause was requested and received by the State on the basis that the defendant had been charged with the unlawful use of weapons and attempted arson. At the hearing, the evidence against the defendant mainly consisted of the uncorroborated testimony of a police officer placing the defendant at the scene, which evidence was contradicted by defense witnesses. On appeal, the defendant challenged the sufficiency of the evidence and pointed out that the underlying charges themselves had, in one form or another, been dismissed. The trial court revoked the probation and sentenced the defendant to thirty-one days in the House of Corrections.

74. As mentioned, this was done on the ground that the defendant had pled guilty to the later charges on the promise that his conviction would not be used as a basis for the revocation of his earlier probation. Upon being brought to the attention of the trial court, the above order was entered.

75. 7 Ill. App. 3d at 157, 287 N.E.2d at 247.

76. 10 Ill. App. 3d 537, 294 N.E.2d 700 (1973).
The court, after ruling that the testimony itself was not sufficient, also stressed the dismissal of the charges\textsuperscript{77} as an additional basis for the reversal of the revocation order:

A probationer is entitled to know the nature of the charges against him. [Citation omitted]. The before mentioned complaints on which the petition for a rule to show cause was based had been dismissed on the State's own motion. It now appears that all the charges have been dismissed either by the State or by the Grand Jury for want of evidence. The charge against the defendant was not proved by a preponderance of evidence and accordingly the judgment will be reversed.\textsuperscript{78}

Thus, where the basis of the revocation petition is the commission or conviction of a subsequent offense, a probation revocation, without more, cannot stand where the underlying charge or conviction has been dismissed or vacated.\textsuperscript{79}

An additional issue, that of the Illinois Supreme Court Rule 402\textsuperscript{80} admonishments necessary to be given a defendant upon the admission of charges or conditions violations (which are the basis of the rule to show cause), was addressed by the courts over the past survey year and will be briefly analyzed at this point. Adhering to the earlier supreme court decision in \textit{People v. Pier},\textsuperscript{81} the Fourth District Appellate Court held, in the cases of \textit{People v. Bryan}\textsuperscript{82} and \textit{People v. Watkins}\textsuperscript{83} that where such admissions are made, the admonishments required by Supreme Court Rule 402 prior to the acceptance of a guilty plea in criminal trials must be given probationers.\textsuperscript{84}

\textsuperscript{77} The Cook County Grand Jury had entered a "no bill" in regard to the charges. The State moved to nolle the attempted arson charge and eventually had the unlawful use of weapons charge stricken.

\textsuperscript{78} 10 Ill. App. 3d at 539, 294 N.E.2d at 702.

\textsuperscript{79} The revocation of probation on the basis of charges eventually dismissed is an all too frequent occurrence throughout the United States.

\textsuperscript{80} ILL. REV. STAT. ch. 110A, § 402 (1971).

\textsuperscript{81} 51 Ill. 2d 96, 281 N.E.2d 289 (1972).

\textsuperscript{82} 5 Ill. App. 3d 1006, 284 N.E.2d 706 (1972). The petition also included a minor criminal violation, which the court considered improper since it had been disposed of prior to the probationary period at issue.

\textsuperscript{83} 10 Ill. App. 3d 875, 295 N.E.2d 546 (1973).

\textsuperscript{84} Since the results of a probation revocation may be a deprivation of liberty and, consequently, as serious as the original determination of guilt, we agree . . . that due process of law requires that a defendant charged with having violated his probation be entitled to a conscientious judicial determination of the charge according to accepted and well recognized procedural methods. . . . Justice demands that he also be entitled to
However, in a corollary case, *People v. Warship*, the Second District Appellate Court has held that in a criminal case, a defendant need not be admonished as to the effect that a guilty plea to the primary charge would have on such a defendant's current probationary status. In rejecting arguments as to the trial court's inadequate admonition in that regard, the court stated:

> There is no authority, either in the rules or the case law, that an accused be admonished as to the possible effect of a plea of guilty on his probationary status in relation to another case. It is inconceivable to us that any person on probation would be unaware that a subsequent felony conviction would be grounds for revocation and therefore we are of the opinion that it is not necessary that an accused be so informed.

Another aspect of probation revocation hearings, that of the reasonableness of a delay in holding the hearing following the issuance of a warrant as affecting the jurisdiction of the issuing court to order revocation, merits discussion, in light of two recent cases addressing the issue.

In *People v. Dawes*, the defendant, following a plea of guilty to a charge of obtaining money and goods by means of a confidence game, was admitted to probation for a five year period with one condition being that of restitution. Subsequently the probationary period was extended by two years. On the last day of the total period a petition urging revocation was filed with the court while the defendant was in open court. Due to a series of postponements entered to allow the defendant an opportunity to raise the required restitution funds, the actual hearing was held two years following the revocation petition.

Based upon section 117-3(b) of the old probation statute which provided that "*[w]hen a warrant is issued the court shall within a reasonable time after the apprehension of the probationer conduct a hearing...*" Dawes argued that the trial court lost jurisdiction...
due to the two year delay. In rejecting the defendant's jurisdictional argument the supreme court stated:

It appears from the record that these continuances were to enable the defendant to make restitution to avoid probation revocation. Although the actual revocation occurred more than two years after the original rule to show cause was entered, in view of the circumstances we do not consider this to be unreasonable.80

In People v. Williams, the question of the loss of jurisdiction by the revoking court due to an unreasonable delay between issuance of the probation revocation warrant and the actual hearing date, was raised with reference to the applicability of the 120 day trial rule. Williams, following a plea of guilty to burglary, was placed on probation for a five year period. Subsequently, a petition for revocation was filed due to the defendant's failure to report after the transfer of his probation to another county. Williams was arrested in a third county and pled guilty to burglary. The delay between the original petition, later amended to include the burglary conviction as additional revocation grounds, and the actual hearing was approximately fifteen months.

The defendant argued that such was an unreasonable delay, violative of his right to a speedy trial under the Sixth Amendment of the United States Constitution as implemented by Illinois' 120 day rule. In response, the court first noted that the issuance of a warrant for violation within the probationary period tolls the running of the period and thus is sufficient to maintain the court's jurisdiction. With reference to the "reasonable time" provision of the relevant probation statute, the court stated:

The court may lose the power to conduct a hearing on the issue of the alleged violation of probation if it does not proceed within a reasonable time after the apprehension of the probationer [citation omitted]. We cannot agree with defendant's theory, however, that the 120 day statute governing trials is to be imparted even by analogy into the statutory scheme for probation violation hearings. The legislature has not seen fit

80. 52 Ill. 2d at 124-25, 284 N.E.2d at 631. The court also held that the incarceration of Dawes for failing to make restitution was not in conflict with recent United States Supreme Court cases relating to the imprisonment of indigents unable to pay a fine, inasmuch as he was clearly not indigent. See also People v. Baumgarten, 13 Ill. App. 3d 189, 300 N.E.2d 561 (1973).
91. ILL. REV. STAT. ch. 38, § 103-5(a) (1971).
to treat trials and revocation hearings the same way [citations omitted]; and the courts have likewise recognized distinctions between trial and probation revocation hearings.\textsuperscript{92}

In response to the defendant's attempt to distinguish an earlier decision,\textsuperscript{93} wherein a seventeen month delay was deemed reasonable, on the basis that the probation statute there under scrutiny had no such provision, the court stated:

We cannot agree that under the former statute a hearing could be indefinitely postponed, limited only by the period of probation. We think the former statute also was subject to the constitutional right of a defendant in a probation revocation hearing to constitutional protections [citations omitted]. The present statute specifying a \textit{reasonable time} for the hearing is the expression of the constitutional protection which was implied in former section 789.1.\textsuperscript{94}

Presumably, this rationale will apply to future interpretations of section 1005-6-4 of the new Code which omits any reference to time.\textsuperscript{95}

Lastly, in \textit{People v. Harris},\textsuperscript{96} a case unrelated to the above probation topics, the Fifth District Appellate Court decided, prior to the effective date of the new Code, that, upon revocation, the probationer is not entitled to credit on a penitentiary sentence for time served on probation prior to the act constituting the violation. It should be noted, however, that the new Code, in section 1005-6-4(h) does provide a crediting provision.\textsuperscript{97} Presumably such credit, as in cases of parole revocations, will be limited to the time spent prior to the act that precipitated the revocation.\textsuperscript{98}

\begin{itemize}
\item \textsuperscript{92} 10 Ill. App. 3d at 430, 294 N.E.2d at 63.
\item \textsuperscript{93} People v. Kostaken, 16 Ill. App. 2d 395, 148 N.E.2d 615 (1958).
\item \textsuperscript{94} 10 Ill. App. 3d at 430-31, 294 N.E.2d at 63.
\item \textsuperscript{95} ILL. REV. STAT. ch. 38, § 1005-6-4 (Supp. 1972).
\item \textsuperscript{96} 6 Ill. App. 3d 487-88, 285 N.E.2d 583 (1972): “The Illinois Revised Statutes make no provision for credit for time or probation when that probation is therefore without merit.”
\item \textsuperscript{97} “Time served on probation or conditional discharge shall be credited against a sentence of imprisonment or periodic imprisonment.” ILL. REV. STAT. ch. 38, § 1005-6-4(h) (Supp. 1972).
\item \textsuperscript{98} See ILL. REV. STAT. ch. 38, § 1003-3-9(a)(3)(i) (Supp. 1973), where the Code, in referring to recommitment following parole revocation states: the recommitment shall be for that portion of the imposed maximum term of imprisonment or confinement which has not been served at the time of parole, less the time elapsed between the parole of the person and the commission of the violation for which parole was revoked, . . . [Emphasis added].
\end{itemize}
POST CONVICTION HEARING ACT—BURDEN ON PETITIONER

The following section of this article will discuss recent cases dealing with several important aspects of the Illinois Post-Conviction Hearing Act. Attention will be given to the burden on the petitioner, issues cognizable within the act and the topic of waiver and res judicata of issues due to the pendency of a direct appeal in the same case. This section will be followed by an analysis of recent decisions discussing the duties of appointed counsel with respect to proceedings under the act.

Section 1 of the Post-Conviction Hearing Act provides in part:

Any person imprisoned in the penitentiary who asserts that in the proceeding which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or the State of Illinois or both may institute a proceeding under this Article. The proceeding shall be commenced by filing . . . a petition . . . verified by affidavit.

Section 2 provides:

The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.

Pursuant to this statutory charge, the courts have continued to routinely dismiss actions initiated under the Act where the petition was unsupported in one or all of the above respects. Simple allegations or conclusions as to the violation of the petitioner's constitutional rights are not deemed sufficient to warrant an evidentiary hearing.

However, in several important recent decisions, the courts have relaxed the rigidity of the statutory requirements where the pro se petition was mis-labeled and hence summarily dismissed, but upon


101. Id. at § 122-2.

closer examination of its substantive content would have warranted at least initial consideration as a post-conviction petition.

In *People v. Mass*, the defendant, following a plea of guilty to murder and a hearing in aggravation and mitigation, was sentenced to the penitentiary for a period of ten to fifteen years. Five months later he filed a petition for a "re-Hearing in aggravation and mitigation." The trial court appointed the Public Defender to represent the defendant in "post-conviction matters." Following a statement by petitioner's counsel at the hearing that no issue other than the propriety of the sentence could be found in defendant's petition, the court denied a re-hearing. The issue on appeal was whether the mis-labeled petition was in effect a post-conviction petition pursuant to the Post-Conviction Hearing Act, requiring counsel to comply with Supreme Court Rule 651(c), relative to the duties of appointed counsel in such proceedings.

After reiterating the requirements of section 122-2 of the Act, as to the need for supportive documents, the court, noting that upon sentencing the trial court lost jurisdiction over the sentence and commitment and that counsel had been appointed for "post-conviction matters," concluded that the only way defendant's petition could have been considered was as one initiated under the Act. The court ruled:

> While the pro se "Motion for Rehearing on aggravation and mitigation" did not allege any constitutional violations of defendant's right, we feel that the ends of justice would be best served by treating the same as a post-conviction petition. . . . No useful purpose would be served by requiring defendant to file a new post-conviction petition. This being the case, appointed counsel should have complied with [Supreme Court Rule 651(c)].

Two additional cases, relating to the mis-labeling of a post-conviction petition as one seeking a "writ of habeas corpus," shed more light on the interpretation of section 122-2 of the Post-Conviction Hearing Act.

In *People v. Cobb*, decided by the Second District Appellate Court, the defendant, following a conviction for rape and aggravated

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104. ILL. REV. STAT. ch. 110A, § 615(c) (1971). This Rule requires a showing of minimal contacts with the prisoner and an examination of the record of the case.
105. 9 Ill. App. 3d at 68-69, 292 N.E.2d at 34.
106. 8 Ill. App. 3d at 1081, 290 N.E.2d 610 (1972).
kidnapping, filed a pro se petition labeled “petition of habeas corpus” which set out several alleged constitutional violations during the course of his trial. Counsel was appointed. Following the State’s argument that none of the points raised in the petition went to the lack of jurisdiction of the trial court, as required by the Habeas Corpus Act, the petition was dismissed without a hearing.

The court agreed with the argument of the State as to the jurisdictional basis of actions under the Habeas Corpus Act. They also noted that the Post-Conviction Hearing Act requires that counsel be appointed upon request and that his conduct be in accordance with Supreme Court Rule 651(c). However, the court continued that though the Illinois Supreme Court has held that a trial court may treat a petition designated as one seeking a writ of habeas corpus as one brought pursuant to the Post-Conviction Hearing Act, they are not required to do so. Accordingly the dismissal was affirmed

107. ILL. REV. STAT. ch. 65, § 22 (1971). The remedy of state habeas corpus is not available to review errors of a non-jurisdictional nature even though they involve claims of a denial of constitutional right.

Also, counsel need not be appointed to indigents under the statute:

§ 22. Causes for discharge when in custody on process of court

If it appear that the prisoner is in custody by virtue of process from any court legally constituted, he can be discharged only for some of the following causes:

1. Where the court has exceeded the limit of its jurisdiction, either as to the matter, place, sum or person.

2. Where, though the original imprisonment was lawful, yet, by some act, omission or event which has subsequently taken place, the party has become entitled to his discharge.

3. Where the process is defective in some substantial form required by law.

4. Where the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process or orders for imprisonment or arrest to issue.

5. Where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him.

6. Where the process appears to have been obtained by false pretense or bribery.

7. Where there is no general law, nor any judgment, order or decree of a court to authorize the process if in a civil suit, nor any conviction if in a criminal proceeding. No court or judge, on the return of a habeas corpus, shall, in any other matter, inquire into the legality or justice of a judgment or decree of a court legally constituted. 1874, March 2, R.S. 1874, p.565, § 22.

108. See People ex rel. Lewis v. Frye, 42 Ill. 2d 58, 245 N.E.2d 483, cert. denied, 396 U.S. 912 (1969); People ex rel. Haven v. Macieiski, 38 Ill. 2d 396,
without prejudice to the defendant as to proper filing under the act.\(^{109}\)

Thus, unlike Mass, where the trial court had in effect treated the mis-labelled petition as one seeking statutory post-conviction relief, making refiling unnecessary, the court here felt that no special burden or prejudice would result due to its affirmance of the dismissal.

The Supreme Court of Illinois, however, in *People ex rel. Palmer v. Twomey*,\(^ {110} \) has reappraised their earlier decisions, relied upon by the *Cobb* court and concluded that mis-labeled habeas corpus petitions should in the future be treated as petitions filed pursuant to the Post-Conviction Hearing Act and that counsel be appointed on request.\(^ {111} \)

Palmer, following a conviction for two counts of theft, filed pro se, a “Petition for Writ of Habeas Corpus” alleging fatal defects in his indictment and inadequacy of trial counsel. The petition was dismissed without appointment of counsel on the grounds that it was outside the scope of the Habeas Corpus Act. On appeal, the defendant argued that the court erred in not treating his petition as one brought under the Post-Conviction Hearing Act and accordingly appointing counsel per his request.

The supreme court after reviewing their earlier decision in *People v. Slaughter*,\(^ {112} \) which was the basis for the enactment of Supreme Court Rule 651 (c) relative to the duties of counsel appointed under the Post-Conviction Hearing Act, reversed their prior rulings in *Haven* and *Lewis*:\(^ {113} \)

In our opinion the rationale of *Haven* and *Lewis* and the position taken by the People are not in harmony with the philosophy of *People v. Slaughter* [citation omitted] . . . . The court [in Slaughter] first observed that

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\(^{109}\) If the complaints of the defendant should properly have been brought under a post-conviction petition, he is not precluded from doing so since the order of the trial court did not adjudicate the merits of his petition.

\(^{110}\) 8 Ill. App. 3d at 1083, 290 N.E.2d at 612.

\(^{111}\) Under the State Habeas Corpus Act, appointment of counsel is not statutorily mandated.

\(^{112}\) 39 Ill. 2d 278, 235 N.E.2d 566 (1968).

\(^{113}\) *People ex rel. Haven v. Macieiski*, 38 Ill. 2d 396, 231 N.E.2d 433 (1967); *People ex rel. Lewis v. Frye*, 42 Ill. 2d 58, 245 N.E.2d 483 (1969).
the Post-Conviction Hearing Act was intended to eliminate "the Illinois merry-go-round of writ of error, habeas corpus and coram nobis" on which a prisoner had often found himself when collateraly attacking his conviction on constitutional grounds. . . .

Justice Goldenhersh, speaking for the court, analyzed the rationale of *Slaughter* as to the responsibilities of counsel appointed under the Act, and concluded:

It is apparent that the same lack of legal knowledge which causes a prisoner to draft an inadequate post-conviction petition might result in his selecting the wrong method of collaterally attacking his conviction. A salutory result, consistent with the intent of the Post-Conviction Hearing Act as expressed in *Slaughter*, would be achieved if the circuit court, upon finding that a *pro se* petition, however labeled, and however inartfully drawn, alleged violations of the petitioner's rights cognizable in a post-conviction proceeding, would thereafter, for all purposes, treat it as such. This practice would enable the issues to be properly framed and the matter adjudicated in one proceeding and with finality. We need not and do not reach the question of whether an indigent petitioner is entitled to appointment of counsel in a *habeas corpus* action in which no such violations are alleged.

The *Slaughter* principle, with regard to the mis-labeling issue decided in *Palmer*, was again emphasized in *People v. Williams*, a case that highlights the recurrent problems of prisoners who lack legal services at the institutional level.

Williams, following a plea of guilty to deceptive practices, was sentenced and returned to Georgia to serve a federal sentence. He later filed the circuit court a pro se document entitled "Motion to Vacate Judgment and Sentence," alleging numerous violations of his constitutional rights. No counsel had been appointed. Finding that the motion was filed after thirty days from entry of judgment, the trial court denied the motion. On appeal, the defendant claimed that his motion should have been treated as post-conviction petition and thus counsel should have been appointed.

The court, after noting that the trial court considered the caption of the motion as determinative without any attempt to construe it as being within the Act, stated:

The application of the doctrine that pleadings should be liberally con-

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114. 53 Ill. 2d at 483, 292 N.E.2d at 381.
115. Id. at 484, 292 N.E.2d at 382.
117. Currently, the states of Ohio, Rhode Island and Texas, recognizing this dilemma, have instituted free, state-wide legal services for indigent inmates at the institutional level.
stressed toward the end of accomplishing substantial justice is particularly crucial in cases where the pleading party is unable to avail himself of the assistance of counsel. It is axiomatic that the vast majority of inmates of penal institutions are, by the direct effects of incarceration, rendered unable physically or financially to consult with counsel unless assisted by the courts. The dangers of exaltation of form over substance in determination of such cases are minimized by the normal procedure of appointment of counsel for preparation of an amended post-conviction petition after a prima facie case has been alleged.\textsuperscript{118}

Thus, while the standards for post-conviction petitions set out in section 122-2 of the Post-Conviction Hearing Act will be insisted upon by the courts, the spirit of \textit{Slaughter} has resulted in the \textit{Palmer} and \textit{Williams} decisions relating to poorly drafted petitions seeking to collaterally attack a conviction.\textsuperscript{119} In the future, if the allegations of the submitted pro se document are fairly within the scope of the Act it must be treated as such and counsel must be appointed on request.

\textbf{POST-CONVICTION HEARING ACT—SCOPE}

As indicated above, the Post-Conviction Hearing Act is limited in scope to an adjudication of claims of substantial deprivation of state or federal constitutional rights of a convicted felon in the proceeding which resulted in his penitentiary incarceration.

In \textit{People v. Dale},\textsuperscript{120} decided by the Illinois Supreme Court in 1950, it was held that the act did not constitutionally discriminate against misdemeanants serving jail sentences due simply to the fact that it is jurisdictionally restricted to use by those imprisoned in the penitentiary. Until June of this year, misdemeanants had only direct appeal, and the very limited vehicles of section 72 of the Civil Practice Act\textsuperscript{121} and the state Habeas Corpus Act\textsuperscript{122} with which to challenge the constitutionality of the proceedings resulting in their incarceration. Late this survey year however, the Illinois Supreme Court, in two companion cases, \textit{People v. Davis}\textsuperscript{123} and \textit{People v.}
Warr,124 reversed Dale and fashioned under their supervisory powers, a remedy in the nature of a post-conviction relief for misdemeanants.

In both Davis and Warr, the latter case consolidating three similar appeals,125 all of the petitioners, who were serving terms of one year or less, sought post-conviction relief by alleging constitutional deprivations in their respective trial level proceedings. The petitioners sought to utilize either the Post-Conviction Hearing Act, the state Habeas Corpus Act, or a combination of the two, to raise their claims. In each case the petitions were dismissed, among other reasons, on the basis that the non-felony convictions were without the jurisdictional scope of the remedies relied upon.

The court in Warr, the germinal decision, in the course of surveying available post-trial vehicles, noted that section 72 of the Civil Practice Act is very limited in scope and would automatically exclude clauses of denial of counsel, plus most other allegations of constitutional proportions commonly raised by convicts seeking post-trial relief.126 In addition, the Habeas Corpus Act only provides relief on the grounds set out in the statute. Finally, it was noted that the Post-Conviction Hearing Act applied only to persons "imprisoned in the penitentiary."127 Thus the problem, as stated by Justice Schaefer, "is the determination of the remedy to be pursued by a person convicted of a misdemeanor who asserts that his constitutional rights were violated in the proceeding which resulted in his conviction."128

People v. Dale129 was reversed on the basis of the growing number of U.S. Supreme Court decisions which have rejected under the fourteenth amendment, in large part, remedial distinctions based upon the length of the sentence imposed.130 Accordingly the court

124. 54 Ill. 2d 487, 298 N.E.2d 164 (1973).
125. People ex rel. Johnson v. Sheriff (No. 45183); People v. Finch (No. 44493); People ex rel. Finch v. English (No. 44212).
126. ILL. REV. STAT. ch. 110, § 72 (1971).
128. 54 Ill. 2d at 493, 298 N.E.2d at 167.
in *Warr*, realizing, first, the inadequacy of available post trial procedures in alleged instances of constitutional violations and, second, the non-applicability of the Post-Conviction Hearing Act to misdemeanants, utilized their supervisory authority to fashion a remedy.\(^{131}\)

Utilizing the Act as a basic model, the court held:

[U]ntil otherwise provided by rule of this court or by statute a defendant convicted of a misdemeanor who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his constitutional rights may institute a proceeding in the nature of a proceeding under the Post-Conviction Hearing Act.\(^{132}\)

The remedy provided, the court continued, would be governed by the act in all regards, with the following modifications:

1. The defendant need not be imprisoned;
2. The proceeding shall be commenced within 4 months after rendition of final judgment if judgment was entered upon a plea of guilty and within six months after the rendition of final judgment following a trial upon a plea of not guilty;\(^{133}\)
3. Counsel need not be appointed to represent an indigent defendant if the trial judge, after examination of the petition, enters an order finding that the record in the case, read in conjunction with the defendant's petition and the responsive pleading of the prosecution, if any, conclusively shows that the defendant is entitled to no relief.\(^{134}\)

As indicated above, the statutory scope of the Act is jurisdictional. In addition, it does not apply to alleged constitutional violations raised by a prisoner that are unrelated to the original proceedings.\(^{135}\) In a series of recent decisions, the Illinois courts have further delineated which allegations, on their face, are not cognizable under the Act as raising substantial constitutional issues.

In *People v. Wisdom*\(^{136}\) and *People v. Cox*,\(^{137}\) it was held that the failure of the trial court to advise a defendant of his right to ap--

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131. Differences in criminal procedure before, during and after trial may be based on differences in the gravity of the offense and the severity of its punishment [citations omitted], but those differences cannot justify the total denial of a remedy for violations of constitutional rights. *People v. Warr*, 54 Ill. 2d 489, 492, 298 N.E.2d 164, 166-67 (1973).
132. *Id.* at 493, 298 N.E.2d at 167.
133. The present statute of limitations is twenty years. See *ILL. REV. STAT. ch. 38, § 122-1* (1971).
134. 54 Ill. 2d at 492, 298 N.E.2d at 166-67. See discussion regarding the appointment of counsel under the act proper, *infra*.
137. 53 Ill. 2d 101, 291 N.E.2d 1 (1972).
peal did not amount to a constitutional deprivation cognizable in a post-conviction proceeding initiated under the Act. While Supreme Court Rule 605, adopted in 1967, requires that all defendants convicted of a felony be advised of their right to appeal, noncompliance does not raise an issue within the scope of the Post-Conviction Hearing Act.

In Cox, brought to judgment prior to the enactment of Rule 605, Justice Goldenhersh, speaking for the Illinois Supreme Court ruled:

Our rule [605] stems from the dictates of good practice rather than constitutional command, and where the question has arisen, it has been held that the failure of a court to advise of the right to appeal is not a denial of due process or equal protection. . . . Clearly, the failure to advise petitioner of his right to appeal from a judgment of conviction entered prior to the adoption of the rule raises no question of constitutional dimension. 139

In a similar fashion, the courts have reaffirmed the position that the violation of most statutes and Supreme Court Rules by the state or trial court does not amount to constitutional stature for purposes of a post-conviction proceeding under the Act.

In People v. Majeski, 140 it was held that even though the holding of the defendant for a forty day period prior to his appearance before a magistrate may have violated the statute requiring presentment without unnecessary delay, 141 the alleged violation was not a sufficient basis for post-conviction relief.

This position found clear support in People v. Gardner, 142 where the petitioner alleged that the trial court's failure to advise him of his right to indictment by a grand jury prior to the acceptance of a plea of guilty amounted to a substantial constitutional deprivation. In affirming the dismissal of the defendant's post-conviction petition after a hearing, the court stated:

Whereas the Court should have inquired as to defendant's comprehension of his rights, failure to do so does not automatically raise a constitutional objection in accepting the guilty plea. It must be remembered that this is an appeal from the denial of post-conviction relief after a hearing, and the Illinois Supreme Court has held that only those allegations that assert a

139. 53 III. 2d at 106, 291 N.E.2d at 4.
140. 7 Ill. App. 3d 624, 287 N.E.2d 725 (1972).
denial of constitutional rights will justify such an action [citation omitted]. The violation of a right granted by statute or Supreme Court Rule is not a matter that will justify relief here unless such a right involves a constitutional (State or Federal) right.

In a different statutory context, the Fifth District Appellate Court, in the case of People v. Crutcher, has ruled that the allegation of a violation of the 120 day rule also does not raise an issue of constitutional dimension for purposes of the Post-Conviction Hearing Act.

Errors in sentencing or the failure to hold a statutorily mandated hearing in aggravation and mitigation prior to sentencing where requested, likewise do not raise issues of constitutional magnitude. As stated by Justice Ryan of the Supreme Court in People v. Brouhard:

This court has held that the provisions of section 1-7(g) of the Criminal Code . . . requiring a hearing in aggravation and mitigation do not stem from a constitutional command nor confer constitutional rights [citations omitted]. This contention is therefore not proper to be considered under the provisions of the Post-Conviction Hearing Act.

In People v. Forston and People v. Ballinger, the supreme court held that where the imposition of a sentence is within the statutory limits, claims of excessiveness are outside the scope of the Act.

Finally, in People v. Christeson, the obvious but often misunderstood point was made that a proceeding under the Act is not for the redetermination of guilt or innocence, and thus contentions as to the sufficiency of the evidence are not of constitutional magnitude.

143. Id. at 590, 289 N.E.2d at 640. See also People v. Ballinger, 53 Ill. 2d 388, 292 N.E.2d 400 (1973) (alleged violations of statutory provisions rendering an indictment invalid did not raise constitutional issues cognizable under the Post-Conviction Hearing Act).
144. 8 Ill. App. 3d 772, 290 N.E.2d 417 (1971).
147. 53 Ill. 2d at 113, 290 N.E.2d at 208-09. See ILL. REV. STAT. ch. 38, § 1-7 (g) (1971).
149. 53 Ill. 2d 388, 292 N.E.2d 400 (1973).
Another aspect of the scope of the Post-Conviction Hearing Act, that of the necessity of incarceration as a prerequisite to relief, has been discussed in two recent decisions. The Illinois Supreme Court in People ex rel. Palmer v. Twomey\(^{151}\) involving a petitioner released from prison during the pendency of his post-conviction action, and the Fifth District Appellate Court in People v. Bain,\(^{152}\) involving a parolee, have established that, unlike the Habeas Corpus Act, the Post-Conviction Hearing Act does not require a lessening of the length of incarceration as a sine qua non for relief.\(^{153}\)

A final, peripheral point regarding the factor of incarceration, is that of the statute of limitations. In People v. Wallace,\(^{154}\) the petitioner, a California prisoner, sought to attack a 1959 Illinois conviction on which he had served a two year sentence. The court, while noting that as of 1965 the statute of limitations for seeking post-conviction relief under the Act was extended to twenty years,\(^{155}\) held that the five year statute in effect at the date of the petitioner's conviction governed the disposition of the instant case. Thus, the 1965 amendment does not revive any rights to post-conviction relief that have expired prior to the effective date of the amendment.

POST CONVICTION HEARING ACT—RES JUDICATA AND WAIVER

In addition to the handicap of a number of basic issues not being within the scope of the Act per se, petitioners face the additional problem of having an issue or issues, arguably within the scope of the Act, lost due to the doctrines of res judicata and waiver. The Illinois courts have continued to hold that where a defendant has taken a direct appeal from the judgment of conviction on a com-

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153. It was stated on oral argument that petitioner had been discharged and is no longer incarcerated, and it may be that he no longer desires to seek post-conviction relief. The judgment of dismissal of this cause is not res judicata and the fact that his term of imprisonment has ended does not of itself serve to bar the institution of post-conviction proceedings. 53 Ill. 2d at 484, 292 N.E.2d at 382. See also People v. Davis, 39 Ill. 2d 325, 235 N.E.2d 634 (1968).
156. ILL. REV. STAT. ch. 38, § 826 (1959).
plete record, the judgment of the reviewing court is res judicata as to all issues actually decided, and that all issues which could have been presented but were not are waived.\(^\text{157}\) The same applies even though the issues that were raised have not yet been decided by the reviewing court. As stated in *People v. Walker*:

The scope of review permitted in a post-conviction proceeding is not expanded simply because the petition is filed before a reviewing court hands down an opinion. Once an issue is presented on direct appeal to a court of review, it cannot properly be considered at a post-conviction hearing even though at the time of the hearing the reviewing court has not passed on the question.\(^\text{158}\)

Thus, unless the trial court or a court reviewing the dismissal of a post-conviction petition rules that fundamental fairness requires a review of the issue regardless of waiver or res judicata,\(^\text{159}\) the issues are lost. A further discussion of this topic will be pursued in the following analysis of recent decisions dealing with the adequacy of appointed post-conviction counsel.

### POST-CONVICTON HEARING ACT—ADEQUACY OF COUNSEL

The responsibilities of counsel appointed to represent an indigent inmate in a proceeding under the Post-Conviction Hearing Act are delineated in Supreme Court Rule 651(c),\(^\text{160}\) which was a direct result of the decision of the Illinois Supreme Court in *People v. Slaughter*.\(^\text{161}\) Section 122-4 of the Code of Criminal Proce-

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\(^{158}\) 6 Ill. App. 3d 909, 911, 286 N.E.2d 812, 815 (1972). The problems in this regard for appointed post-conviction counsel are exacerbated due to the fact that quite often the other counsel has filed a direct appeal prior to his entry in the case.

\(^{159}\) See *People v. Ikerd*, 47 Ill. 2d 211, 265 N.E.2d 120 (1970).

\(^{160}\) IL. REV. STAT. ch. 110A, § 651(c) (1971).

\(^{161}\) 39 Ill. 2d 278, 285, 235 N.E.2d 566, 569 (1968); To the end that the complaints of a prisoner with respect to the validity of his conviction might be adequately presented, the statute [re appointment of counsel] contemplated that the attorney appointed to represent an indigent petitioner would consult with him either by mail or in person, ascen-
dure of 1963 provides that in proceedings for post-conviction relief under the Act, counsel shall be appointed on request to assist indigent prisoners. Supreme Court Rule 651(c) provides:

The record filed in that [appellate] court shall contain a showing, which may be made by the certificate of the petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of the proceedings at the trial, and has made any amendments to the petition filed pro se that are necessary for an adequate presentation of petitioner's contentions.

Claims of inadequate post-conviction representation raised by unsuccessful petitioners continue to be routinely dismissed where the record or the certificate of appointed counsel indicate compliance with the mandate of Rule 651(c). In several recent decisions, the courts have amplified certain aspects of the wording of Rule 651(c) in the course of dismissing claims of the inadequacy of counsel.

With regard to the required contacts with the petitioner, the submission of a questionnaire or a series of letters, even when the defendant fails to respond, personal contacts by the law partner of the attorney actually appointed, and a personal visit required by a court order, have all been upheld as complying with that aspect of Rule 651(c).

As to the failure to amend the petitioners' original pro se petition, which is one of the most often raised complaints by petitioners, the

163. ILL. REV. STAT. ch. 110A, § 651(c) (1971). This parallels that required of appointed appellate counsel prior to the granting of a motion to withdraw as counsel. ILL. REV. STAT. ch. 38, § 22-3 (1969) provides that counsel must state that the record has been reviewed, that no substantial arguments exist and that an appeal would be frivolous. See Anders v. California, 386 U.S. 738 (1967).
courts have continued to hold that such a failure is not a violation of the requirements of Rule 651(c) per se. As stated by the supreme court in their earlier decision in *People v. Stovall*:

Where there is not a showing that sufficient facts or evidence exist, inadequate representation certainly will not be found because of an attorney's failure to amend a petition or, when amended, failing to make the petition's allegations factually sufficient to require the granting of relief.

The *Stovall* ruling has been followed with regularity where no amendment was in fact made by appointed counsel. It has also been recently determined that amendment, over the objections of the petitioner, meets the Rule 651(c) standards.

Recent decisions holding that post-conviction petitioners *were not* provided with adequate representation due to noncompliance with either the letter or the spirit of Rule 651(c), while not numerous, merit extended discussion as a means of shedding further light on the scope and intent of the supreme court's germinal decision in *Slaughter*.

Where no certificate has been filed by counsel and the record itself does not make a clear showing of compliance, the courts will reverse the dismissal of a post-conviction petition, *even though* the issues raised therein would either be res judicata or waived due to a prior direct appeal. A prime example in this regard is *People v. Brittain* recently decided by the Illinois Supreme Court. Relative to the petitioner's allegation of inadequate representation, the court, speaking through Justice Goldenhersh, stated:

> Every pleading filed on petitioner's behalf was obviously prepared without assistance of counsel, and although the transcripts of the proceedings in the circuit court in each instance note the presence of assistant public defenders, they contain not one word purportedly uttered by any of them. There is nothing to indicate that counsel, at any stage of the case in the

170. Note that the language of Rule 651(c) in this regard states that only "necessary" amendments need be made, a change from the literal reading of the relevant portion of the *Slaughter* decision, supra note 158.


174. 52 Ill. 2d 91, 284 N.E.2d 632 (1972).
circuit court, sought to ascertain the basis of petitioner's complaints, and the pro se petitions were not amended so as to state his contentions in legal form. Clearly, petitioner did not receive the effective assistance of counsel which we have held essential. . . .\(^{175}\)

The case was reversed and remanded with an additional order to appoint counsel other than the public defender, inasmuch as part of the defendant's allegations were that the public defender had improperly induced a plea of guilty at the trial level.\(^{176}\)

As noted above, the requirement of a showing of compliance with Rule 651(c) is fully applicable even in instances where the issues raised in the pro se petition would be res judicata or waived due to the finalization or pendancy of a prior direct appeal. As recently held by the Illinois Supreme Court, in certain instances fundamental fairness militates against the formalization of the twin appellate doctrines as it relates to the spirit of Slaughter and Rule 651(c).

In People v. Brown,\(^{177}\) no certificate of compliance had been filed by the appointed counsel and the record failed to indicate such compliance. The petitioner appealed the dismissal of his petition on the basis of inadequate representation. In response to the State's argument that reversal of the dismissal was not warranted since all of the issues raised in it were either res judicata or waived due to an earlier direct appeal,\(^{178}\) Justice Ward, speaking for the court, stated:

It is, of course, generally correct that claims which were or could have been presented on direct appeal may not later be raised in a petition for post-conviction relief [citations omitted]. But the State's assumption that all trial errors would be \textit{res judicata} or waived is gratuitous. To illustrate, this court, if fundamental fairness requires, may not permit the doctrine of waiver to be invoked in post-conviction proceedings on appeal [citations omitted]. Too, the purpose underlying Rule 651(c) is not

\(^{175}\) \textit{Id.} at 93-94, 284 N.E.2d at 633. \textit{See also} People v. Durley, 53 Ill. 2d 156, 290 N.E.2d 244 (1972); People v. Lampson, 8 Ill. App. 3d 544, 289 N.E.2d 651 (1972); People v. Rooney, 6 Ill. App. 3d 527, 285 N.E.2d 586 (1972).

\(^{176}\) \textit{See ILL. REV. STAT.} ch. 38, § 113-3 (1971) where provision is made for reappointment of counsel other than the public defender is made, for good cause shown.

\(^{177}\) 52 Ill. 2d 227, 287 N.E.2d 663 (1972).

\(^{178}\) The state first argued that while there was no indication that counsel had examined the record, there was no evidence that he had not done so. This argument was summarily rejected since Rule 651(c) explicitly requires a showing that counsel \textit{has} examined the trial proceedings.
merely formal. It is to ensure that all indigents are provided proper representation when presenting claims of constitutional deprivation under the Post-Conviction Hearing Act [citations omitted]. The fulfillment of this design would not be encouraged were we to ignore the rule's nonobservance in those cases appealed to this court.179

Similarly, in the case of People ex rel. Walker v. Twomey,180 the Second District Appellate Court allowed, on the basis of fundamental fairness, the filing of a second post-conviction petition alleging incompetency of trial counsel, even though that issue was raised in a pending direct appeal, after the dismissal of an original post-conviction petition. Defendant filed a petition for a writ of habeas corpus, setting forth among other points, the incompetency issue. It was dismissed on the basis that such claims were not within the scope of the Habeas Corpus Act.181

The court affirmed the habeas corpus dismissal, stating:

The remedy of habeas corpus is not available to review errors which only render the judgment voidable and are of a nonjurisdictional nature even though a claim of denial of constitutional right is involved [citations omitted]. A claim of the denial of the constitutional right to counsel cannot be determined on a writ of habeas corpus [citations omitted]. The failure of a circuit court to process and take action upon a post-conviction petition has also been held not to be a subsequent act, omission or event referred to in section 22, with the result that the petitioner's proper remedy would be mandamus rather than habeas corpus.182

However, the court continued, due to the fact that (1) the attorney appointed to represent defendant on his original post-conviction petition183 was the one alleged to have been incompetent at trial, and (2) the proscriptions of Supreme Court Rule 651(c) on

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179. 52 Ill. 2d at 230, 287 N.E.2d at 665.
183. The trial court on the hearing relative to the first petition ignored appointed counsel's statement that he had not read nor was familiar with the record, and dismissed the petition. Counsel did not appeal the decision or inform the petitioner of its dismissal.
the first petition were not met, the defendant was allowed to proceed with a second post-conviction petition:

While, in our view, none of the arguments which petitioner has raised would entitle him to relief in the nature of habeas corpus, it is also clear from the record that fundamental fairness requires that he be permitted to effectively present in a judicial proceeding his constitutional claim of incompetent trial counsel. Although a direct appeal of petitioner's claim is now pending in the Illinois Supreme Court and incompetence of counsel is alleged there, review of the incompetency issue will be limited to the record before the Supreme Court.184

In a final decision to be mentioned relative to the inadequacy of counsel appointed under the terms of the Post-Conviction Hearing Act, noncompliance with Rule 651(c) was found even though counsel had filed a certificate of compliance with the court. In People v. Luechtefeld,185 an examination of the record showed that at the time that the certificate was filed, the trial proceedings, probation hearing and probation revocation hearing had not been transcribed, obviously establishing noncompliance with Rule 651(c). Accordingly, the dismissal was reversed and the case remanded for purposes of transcription and appointment of counsel.

PRISONER RIGHTS

The final general topic to be discussed in this survey of recent developments in the post-conviction area will be certain aspects of the constitutional rights of inmates incarcerated in Illinois penitentiaries. The ensuing discussion will revolve, in the main, around three recent decisions by the Seventh Circuit Court of Appeals.186 While not decisions rendered by Illinois courts, the broad nature of the holdings and their effect on Illinois' prisoners and prison officials, require extended attention, in the author's view, in any analy-

184. 9 Ill. App. 3d at 546-47, 291 N.E.2d at 835. The claimed necessity for an evidentiary hearing was that facts not in the record were necessary to establish petitioner's claim.

185. 11 Ill. App. 3d 407, 408, 296 N.E.2d 771, 772 (1973): "Compliance with Supreme Court Rule 651(c) necessarily requires access to the transcript of the several proceedings if such can be prepared." See also People v. Russell, 7 Ill. App. 3d 850, 289 N.E.2d 106 (1972) (petitioner was entitled, in a post-conviction proceeding, to a transcript of the separate trial of a co-defendant).

sis of recent post-conviction developments relevant to members of the Illinois bar.

To summarize broadly, the cases raise the following basic issues: the appropriate constitutional test by which to gauge the propriety of institutional restrictions on a prisoner's correspondence rights; the requirements of due process prior to the revocation of an inmate's statutorily earned "good time" credit; the retroactive application of such procedures to prison rules infraction hearings; the scope of the State's responsibility to protect inmates from violent attack by other inmates; the restrictions on the right of access to court and counsel; and finally, the use of segregated confinement as a constitutional mode of punishment for internal rules violations.

Morales v. Schmidt\(^{187}\) arose out of the entry of a preliminary injunction by the District Court for the Western District of Wisconsin\(^{188}\) enjoining Wisconsin corrections officials from restricting correspondence between Juan Morales and his sister-in-law. In a letter to her, Morales noted that he was the father of a child by her and that he hoped to continue their relationship upon his release. The letter was intercepted by officials at the Wisconsin State Prison of Waupun and read.\(^{189}\) Pursuant to regulatory discretion, she was placed on Morales' restricted correspondence list,\(^{190}\) on the basis it would be inappropriate to allow continuance of correspondence with one whom the inmate had had an illicit relationship, especially since the letter indicated an intention to continue it.\(^{191}\)

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188. 340 F. Supp. 544 (W.D. Wis. 1972). Though Morales was on parole at the time of appeal, the court did not consider that sufficient to render the issues moot, due to the controls exercised over parolees and the possibility of Morales' return to prison in the event of a violation of parole conditions.
189. In Illinois, incoming as well as outgoing mail may be read as well as inspected for contraband. See ILL. DEPT. CORRECTIONS Reg. No. 823 (1-2) (1970). The reading of inmate mail is a common practice in U.S. prisons and is normally justified on the basis of the "security" of the institution.
190. "[At the discretion of the warden, superintendent, or designated official, the delivery or dispatch of any inmate correspondence . . . may be withheld for reasons of propriety, security or the welfare of the institution or inmate. . . .]" Regulations, DIVISION OF CORRECTIONS, State of Wisconsin (1971). This regulation was passed pursuant to section 53.09 of the Wisconsin statutes which prohibits communications between any prisoner and outside person except as provided by prison regulation.
191. This regulation and the accompanying action is far from exceptional and is a common feature of an overall official attitude toward inmate responsibility in
The trial court centered its ruling on several bases: the freedom to use the mails is a first amendment right; a non-convicted person would have been free to send the correspondence at issue; that when the state acts to deny this freedom to a member of the class of persons who have been convicted of crime, the state has the burden of showing a compelling state interest in doing so; and lastly, that the state's interest in internal discipline and Morales' rehabilitation failed to meet that test.

Judge Pell, speaking for the majority on appeal, noted the continual difficulty faced by the courts in trying to assess what constitutional rights are possessed by those incarcerated in American jails and penitentiaries and the extent of such rights. The dilemma has increased, the court continued, as more cases are brought which seek the further delineation of the basic issues. As to the precise issue raised by Morales—the violation of his rights under

vogue among state and federal correctional officials. See, e.g., Federal Bureau of Prisons, Policy Statement No. 7300.1A(5b) (March 16, 1972), where the guidelines for correspondence restrictions state:

The guiding consideration or criteria for all correspondence should be:

(1) is the correspondent genuinely interested in the inmate or just a chance acquaintance; or

(2) does the correspondent seek to continue a genuine friendship or is the correspondence likely to result in some future relationship detrimental to the inmate or to the correspondent?

See also Ill. Dept. of Corrections, Reg. No. 823(1)(I.A.) (1973), which provides:

Inmates may receive an unlimited number of letters from anyone, except where the Chief Administrative Officer believes that certain correspondence would represent a threat to the safety, security, or morale of the institution. It should be noted that under any of the above regulations, there are no definitional standards by which to make the necessary determinations regarding restrictions on an inmate's mail privileges.


193. Since the gradual erosion in the past eight years of the "hands-off" doctrine, through which courts deferred to administrative discretion on most matters, the federal courts, via 42 U.S.C. § 1983 and the federal Habeas Corpus Act, have been literally inundated with claims of prisoners challenging the constitutionality of the conditions of their confinement. See generally Comment, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L. J. 506 (1963).
the first, fifth, ninth and fourteenth amendments—earlier decisions dealing with various aspects of an inmate's correspondence rights were deemed of minimal assistance, inasmuch as they dealt in the main with legal or quasi-governmental communications or with factual settings too far removed from those involved in the instant case.\textsuperscript{194} The vital issue, as contended by the State, was the district court's adoption of the "compelling state interest" test as the proper conceptual vehicle by which to judge the validity of prison regulations affecting the constitutional rights of inmates.

The State argued that few, if any, prison regulations, vitally necessary for the functional operation of an institution, could withstand attack under such test. The court noted that the test was only one of several used to determine the constitutional propriety of governmental curbs on a citizen's liberty and further noted the inherent imprecision of any such concept. In responding to the fears set forth by the State, the court rejected the invitation to rule that certain conditions were inherent in institutional life,\textsuperscript{195} but enunciated their view of the hazards involved in any pell-mell approach towards determining the scope of a prisoner's constitutional rights:

\begin{quote}
In our opinion, courts have been widely hesitant about involving themselves too deeply in the day-to-day operations of a state penal system. Prison administrators necessarily must have freedom to exercise discretion in the execution of their duties.\textsuperscript{196}
\end{quote}

As to the district court's determination of the applicability of the equal protection clause and the "compelling state interest" test to the two classes of prisoner and non-prisoner, the court, refining its

\begin{quote}
\textsuperscript{195} Although some courts have referred to conditions "inherent" in a system of punishment, we think such an inquiry is unwise. It would plunge us into a philosophical debate far removed from our proper judicial function of interpreting and applying the Constitution. Further, a decision based on our understanding of "punishment" would merely reflect our personal predilection for certain social and moral policies, e.g., retribution or utilitarianism.
\textsuperscript{196} Morales v. Schmidt, No. 72-1373 at 11.
\end{quote}
above position, stated:

We disagree that the equal protection clause mandates the elimination of the distinction between the two classes here. The Supreme Court has indicated that the constitutional limitations on governmental actions differ depending on the role in which the government is acting in a particular case. This is so despite the fact that each situation might involve the same constitutional interest of the affected individuals.\textsuperscript{187}

Accordingly, the court continued, the constitution does not require that a state show a compelling governmental interest when it seeks to restricts an inmate or parolee's associations or written communications with persons who are not their counsel or governmental officials:

The appropriate standard by which to judge the constitutionality of the kind of restriction the defendant wishes to impose in this case is the usual one for analyzing State action, namely, whether the action contemplated bears a rational relationship to or is reasonably necessary for the advancement of a justifiable purpose of the State.\textsuperscript{188}

The court indicated that regardless of their ruling, prison administrators were not free to determine on their own what rights were or were not possessed by prisoners under their charge and that a cursory review of future prisoner's claims should not be expected by the State.

Pursuant to their ruling, the order of the district court was reversed, and due to the insufficiency of the record, the case was remanded to determine if the State's proposed correspondence regulations were justified under the rational relationship standard.\textsuperscript{199}

The second case, \textit{Miller v. Twomey},\textsuperscript{200} was actually the consolidation of six separate actions,\textsuperscript{201} four by Illinois prisoners and two

\textsuperscript{187} \textit{Id.} at 10.

\textsuperscript{188} \textit{Id.} at 12.

\textsuperscript{199} In the course of its opinion the court did note the fact that several federal courts, in keeping with the decision of the district court, have applied the "compelling state interest" test to a wide range of restraints placed upon the rights of inmates. \textit{See, e.g.}, Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970); Carothers v. Follette, 314 F. Supp. 1014 (S.D. N.Y. 1970). \textit{But see} Wilson v. Prasee, 463 F.2d 109 (3d Cir. 1972); Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1970); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Seale v. Manson, 326 F. Supp. 1375 (D. Conn. 1971).

\textsuperscript{200} 479 F.2d 701 (7th Cir. 1973).

\textsuperscript{201} United States \textit{ex rel.} Miller v. Twomey; Green v. Bensinger; Thomas v. Bensinger; Krause v. Schmidt; Armstrong v. Bensinger; Gutierrez v. Department of Public Safety. The court initially cited the recent decision of the United States
by Wisconsin inmates. All were brought pursuant to 42 U.S.C. § 1983 alleging a violation of federally protected rights by the respective State prison officials. In Miller, Green and Thomas, the plaintiff's pro se complaints alleging the unconstitutional deprivation of "good time credits" were dismissed without a hearing. In Krause, the trial court held that due process must be afforded inmates before the state officials may punish them by way of segregation or loss of "good time" credits. In Armstrong, a group of inmates challenged the procedures by which they were placed in a newly created "Special Program Unit" at Joliet Penitentiary for especially disruptive prisoners. Finally, in Gutierrez, the plaintiff appealed from a dismissal of his negligence action against the warden arising out of a beating he received at the hands of another inmate. These groupings of cases will be discussed in the above order.

The law of the State of Illinois, under prior law\textsuperscript{202} and the new Unified Code of Corrections,\textsuperscript{203} provides that the Department of Corrections shall establish a regulatory scheme for diminution of sentence on the basis of an inmate's good behavior. In return for such behavior, a certain amount of "good time" is allotted the prisoner each month. It serves both to reduce the length of his maximum sentence\textsuperscript{204} as well as his minimum term for purposes of his first

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\textsuperscript{202} Supreme Court in Preiser v. Rodriguez, 411 U.S. 475 (1973) which held that prisoners seeking restoration of good time credit must proceed by way of habeas corpus rather than by § 1983. However, they noted that the defendants did not raise that objection to the court's jurisdiction, and thus proceeded.

\textsuperscript{203} ILL. REV. STAT. ch. 108, §§ 45, 47 (1963).

\textsuperscript{204} ILL. REV. STAT. ch. 38, § 1003-6-3 (Supp. 1972).

\textsuperscript{204} The present good time schedule is set out in ILL. DEPT. CORRECTIONS, REG. No. 813 (1-2) (1970):

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<td>1 year &amp; 9 months</td>
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appearance before the Pardon and Parole Board. In addition to the basic good time schedule, several other department regulations provide for the accumulation of "good time" credits.

The current statute, as under prior law, requires the establishment of department procedures for the revocation of accumulated good time credit based upon a subsequent institutional rules violation. The basic institutional rules of conduct are set out in Regulation 805These, in effect are the "laws" of the prison community,

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17th & 9 & 9 \\
18th & 10 & 3 \\
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21st & 11 & 9 \\
22nd & 12 & 3 \\
23rd & 12 & 9 \\
24th & 13 & 3 \\
25th & 13 & 9 \\
\end{array}
\]

206. See Ill. Dept. Corrections, Reg. No. 814 (1973), which provides for "institution credits" removing up to 90 days from the time an inmate must spend in order for him to be eligible to see the Parole Board after an initial refusal of parole.
207. These credits are also subject to revocation for subsequent violation of institutional rules of conduct.
The following acts or actions by inmates in Adult correctional institutions will be considered violations of rules and/or regulations:
1. Disobeying any order from any institutional employee or any prison rule.
2. Being disrespectful to any employee of the institution or to any person visiting the institution.
3. Refusing properly authorized work and/or housing assignments; carelessness or negligence of work or refusal to work.
4. Swearing, cursing, or use of any other vulgar, abusive, insolent, threatening, or improper language toward any other inmate or employee or indecency in language, action, or gesture at any time.
5. Assaulting an employee or inmate or fighting with an inmate or employee.
6. Leaving a cell, a place of assignment, or other appointed place without permission.
7. Willfully disfiguring or damaging any part of the institution or any materials, tools, or machinery.
8. Committing of any mutinous act, inciting to riot and/or general disturbance in any part of the institution or on any work assignment.
the violation of which can result in reclassification, loss of privi-
leges, confinement in an isolation cell ("hole"), loss of good time
credit or reassignment to an administrative segregation wing of the
institution. A finding of guilty on any of the twenty-nine major
offenses also,\textsuperscript{211} in addition to the above sanctions, substantially re-
duces the inmate's prospect for receiving parole.

9. Using intoxicants, being under the influence of any kind of drug or
medication not prescribed by institutional personnel, or having posses-
sion of narcotics, barbiturates and/or amphetamines.
10. Making or having possession of any kind of dangerous weapon.
11. Failing to report to a work assignment and/or any destination without
authorized permission or excuse.
13. Forging or altering a pass.
14. Giving false information to an employee.
15. Passing or receiving contraband from another inmate, visitor and/or
employee.
17. Possessing a syringe and/or needle.
18. Possessing controlled medication without prescription and authoriza-
tion from an institutional medical official.
19. Forging a request of any type, i.e. check requests, commissary orders, etc.
20. Stealing and/or unauthorized possession of State property or property
of employees or other inmates.
21. Making unauthorized telephone calls from a place of work to persons
outside the institution or within the institution.
22. Stealing or giving away unauthorized food or medication.
23. Obtaining or attempting to obtain unauthorized medication.
24. Refusing to keep person or housing assignment clean and tidy.
25. Violating the General Laws of the State.
26. Engaging in or pressuring others to engage in any unnatural sexual
activity.
27. Gathering around an employee in a threatening or intimidating
manner.
28. Smoking in unauthorized areas.
29. Tattooing the body or piercing the ears.

\textsuperscript{211} Inmates are given a "ticket" by a correctional officer, following which, the
inmate appears before the above mentioned disciplinary board. The various offenses
are not defined for use by the officer or inmate. However, the \textit{Correctional Officers
Training Guide}, prepared by the American Correctional Association, provides fu-
ture officers with the following striking aid:

\textbf{Some Types of "Problem" Inmates}

Following are some of the types of problem inmates encountered in a
correctional institution. Each requires understanding and a different ap-
proach in disciplinary training. The employee must know the men he
is dealing with and must shape his disciplinary techniques accordingly.

1. Indifferent; disinterested. 11. Rash, careless, impatient.
In the *Miller, Green* and *Thomas* cases, each plaintiff had suffered the revocation of accumulated good time credits of varying amounts following the alleged violation of institutional rules. In each of these cases, the revocation took place prior to the redrafting of disciplinary procedures which became effective on December 1, 1970. Those procedures provide for a hearing on the charge before a three-man board, composed of two members of the security staff and one social service staff member. This procedure, in the same basic form, is now embodied in section 1003-8-7 of the Unified Code of Corrections.

The plaintiffs alleged a denial of due process in the manner in which their respective credits were revoked on the basis that no prior notice of the offense was given; that there was no opportunity to confront their accusers, cross-examine them or call witnesses in their own behalf; that there was an absence of counsel or substitute counsel; and finally, the absence of a written record.

The court began its analysis by noting the recent unanimous decision by the United States Supreme Court in *Morrissey v. Brewer*, which held that parole revocation is a deprivation of liberty within the meaning of the due process clause of the fourteenth amendment and that accordingly certain procedural safeguards must attend state action in such proceedings. While holding that the *Morris-
sey case was not dispositive of the cases at issue, the court concluded that it did sound the death knell for the wide-open discretion formally allotted correctional officials in the past. While cautioning as in Morales that such a position does not mean a review of every decision made by seasoned prison administrators, it does require scrutiny for any "grievous loss" of liberty suffered by a prison inmate at the hands of institutional officials.

Noting that when an inmate may enjoy liberty is directly affected by the disallowance of good time credits, the court concluded that such equals "the grievous loss" suffered by a parolee on revocation and thus required the presence of due process standards. While rejecting the plaintiff's argument that the rights of confrontation, cross-examination and counsel or substitute counsel were essential to any proceeding in which good time may be revoked, the court held:

shown); (e) a "neutral and detached" hearing body; and (f) a written statement by the fact finders as to the evidence relied on and the reasons for the revocation. Id. at 489.

217. In view of the fact that physical confinement is merely one species of legal custody, we are persuaded that Morrissey actually portends a more basic conceptual holding: liberty protected by the due process clause may—indeed must to some extent—coexist with legal custody pursuant to conviction. The deprivation of liberty following an adjudication of guilt is partial, not total. A residuum of constitutionally protected rights remains.

479 F.2d at 712.

218. This does not mean, however, that every decision by prison officials should be subject to judicial review or that the courts rather than experienced administrators should write prison regulations. Morrissey reminds us that due process is a flexible concept which takes account of the importance of the interests at stake; thus, it is abundantly clear that a myriad of problems of prison administration must remain beyond the scope of proper judicial concern.

479 F.2d at 713.

219. The court failed to indicate the devastating effect such revocations have on parole opportunities, making such determinations akin to parole revocation hearings themselves. In addition, such revocation can and does alter an inmate's institutional classification which may dramatically affect the conditions of confinement as well as its length.

220. In relation to counsel or substitute counsel, the court first disagreed with the proposition that whatever procedural safeguards are required for a parole or probation hearing are also required in an in-prison disciplinary hearing. Secondly, the court indicated that Morrissey itself does not require it. See Ill. Rev. Stat. ch. 38, § 1003-3-9 (Supp. 1973). Under present practice, the Illinois Parole and Pardon Board permits parolees to be represented by counsel. Section 1003-3-2(f) provides for use of the Board's subpoena power to compel attendance of witnesses and to produce documentary evidence. Ill. Rev. Stat. ch. 38, § 1003-3-2 (Supp. 1973).
Plainly, an in-prison disciplinary proceeding may be at least as informal as a parole revocation hearing. Thus, there is no absolute right to confront or to cross-examine witnesses; it is doubtful that counsel or a lay substitute is essential. At a minimum, however, the prisoner must receive adequate advanced written notice of the charges against him, he must be afforded a fair opportunity to explain his version of the incident and, insure a degree of impartiality, the factual determination must be made by a person or persons other than the officer who reported the infraction.\(^2\)

This ruling relating to the procedures required at any prison disciplinary hearing prior to the imposition of sanctions amounting to a "grievous loss" is in keeping with the philosophy of other federal circuits,\(^2\) several of which require the additional relief requested by Miller, Green and Thomas.\(^2\) The new Illinois Unified Code of Convictions, enacted and effective prior to this decision, reflects this ruling to the letter in section 1003-8-7(e).\(^2\) Currently, the revoca-

\(221.\) 479 F.2d at 715-16. Correctional officials are particularly concerned lest courts see the disciplinary hearing as a trial. The over-riding authority of the officer and the general acceptance of his written version of the event could be severely hampered by the presence of counsel, fact-finding, and meaningful cross-examination:

The administrative problems involved in having staff members and inmates at the hearing and the possibility of feelings of hate and resentment by the inmate against those testifying makes this practice undesirable in most cases. The soundest practice is to have a staff member investigate and report his findings to the disciplinary officer, including statements of witnesses, where applicable, for use at the time of hearings. In short, the hearing should be an orderly attempt to arrive at the truth and is not a formal court proceeding. As much of the inmate's case history and record of adjustment as is pertinent should be taken into account and not merely his criminal history and previous infractions.

**MANUAL OF CORRECTIONAL STANDARDS, supra note 215 at 410.**


224. (e) In disciplinary cases which may involve the imposition of disciplinary isolation, the loss of good time credit or eligibility to earn good time credit, or a change in work, education, or other program assignment of more than 7 days duration, the Director shall establish disciplinary procedures consistent with the following principles:

(1) Any person or persons who initiate a disciplinary charge against a person shall not determine the disposition of the charge. The Director may establish one or more disciplinary boards to hear and determine charges. To the extent possible, a person representing the counseling staff of the institution or facility shall participate in determining the disposition of the disciplinary case.
tion of good time credits is implemented by an institutional Merit Staff upon the recommendation of the Disciplinary Committee following a finding of an infraction of a rule(s), where deemed appropriate. Merit Staff procedures also substantially comply with the courts ruling in *Miller v. Twomey.*

Regarding the claims in *Krause* and *Armstrong,* relative to the placement of complainants in punitive isolation and a "Special Program Unit" without a prior hearing meeting the due process standards, the court reiterated its conclusions as to the spirit of *Morrissey* and addressed the respondents' argument that certain emergency situations warranted immediate action without the need for a full-scale hearing. On this issue, the court stated:

A good faith determination that immediate action is necessary to forestall a riot outweighs the interest in accurate determination of individual culpability before taking precautionary steps. Indeed, even in many of the minor decisions that guards must make as problems suddenly confront

(2) Any committed person charged with a violation of Department rules of behavior shall be given notice of the charge including a statement of the misconduct alleged and of the rules this conduct is alleged to violate.

(3) Any person charged with a violation of rules is entitled to a hearing on that charge at which time he shall have an opportunity to appear before and address the person or persons deciding the charge.

(4) The person or persons determining the disposition of the charge may also summon to testify any witnesses or other persons with relevant knowledge of the incident. The person charged may be permitted to question any person so summoned.

(5) If the charge is sustained, the person charged is entitled to a written statement of the decision by the persons determining the disposition of the charge which shall include the basis for the decision and the disciplinary action, if any, to be imposed.

**ILL. REV. STAT.** ch. 38, § 1003-8-7(e) (Supp. 1973).


226. "The inmate may submit a written statement to the Merit Staff, and the inmate must be given the opportunity to personally appear before the Merit Staff. The Merit Staff shall base its decision on the inmate's record." *Id.* at para. 6.

227. Krause also raised the revocation of his good time credit as in the *Miller, Green* and *Thomas* cases.

228. In *Krause,* following a disturbance in a dining hall, in which windows were broken, fires set and other inmates and personnel hurt, Krause and co-plaintiff Moore were, without a hearing, placed in "indefinite lower segregation."

In *Armstrong,* he and other named plaintiffs representing a class, were placed in the "Special Program Unit" at the Joliet Penitentiary, following a violent disturbance at the baseball field. After an in-house determination by officials as to the culpable inmates, the transfer was effected without individual determinations of guilt or compliaty.
them in their daily routines, the state's interest in maintaining disciplined order outweighs the individual's interest in perfect justice.\textsuperscript{229}

The court went on to note however, that in cases involving the type of violence instanced in the \textit{Krause} and \textit{Armstrong} cases,\textsuperscript{230} where the emergency has passed, the individual's interest in a fair evaluation of the facts increases over the corresponding state interest in prompt disciplinary action. Accordingly, the court held:

In any case which may involve "grievous loss," we believe the bare minimum is that applicable to a proceeding which may result in the revocation of statutory good time, namely, an adequate and timely written notice of the charge, a fair opportunity to explain and to request that witnesses be called or interviewed, and an impartial decision maker.\textsuperscript{231}

Thus, as previously noted,\textsuperscript{232} any Illinois in-prison proceeding, the result of which may amount to a "grievous loss" to the affected prisoner, must be accompanied by the above delineated procedural steps.\textsuperscript{233}

Finally, in relation to the eighth amendment issue of the responsibility of prison officials for injuries suffered at the hands of other inmates, raised in \textit{Gutierrez}, the court sided with institutional of-

\textsuperscript{229} 479 F.2d at 717.

\textsuperscript{230} The trial court in \textit{Armstrong} ruled that confinement in the Special Program Unit was not for rehabilitative purposes as contended by respondent and found that it was a form of punishment, thus raising constitutional issues. Admission to the Unit is governed by Department Regulation and was deemed by counsel to be an instance of the growing unconstitutional use of "behavior modification" facilities as punishment for political activity in U.S. state and federal penitentiaries. \textit{See} ILL. DEPT. CORRECTIONS, Reg. No. 808 (1970):

A Special Program Unit has been established at the Joliet Branch of the Illinois State Penitentiary where inmates, who clearly demonstrate an inability or an unwillingness to adjust satisfactorily and derive measurable benefits from programs of the various Adult Division institutions, may be transferred. This unit is designed to deal with inmates presenting special behavioral problems through intensive therapeutic techniques. . . .

No inmate may be retained in the Special Program Unit for more than one year without the approval of the Administrator of Program Services, who will base his decision on a complete written report submitted to the Administrator of Program Services annually, as long as the inmate is retained in this program.

\textsuperscript{231} 479 F.2d at 718. Judge Doyle's order which required confrontation, cross-examination and counsel or substitute counsel in future Wisconsin disciplinary hearings was modified accordingly.

\textsuperscript{232} \textit{See} text accompanying notes 212-15, \textit{supra}.

\textsuperscript{233} It should be noted however, that the court did not address itself to the punishments imposed per se, but merely conditioned the application of the particular sanctions involved. Challenges to the sanctions proper remain for future litigation in this field.
Gutierrez was severely beaten by a fellow inmate and claimed that the officials subjected him to cruel and unusual punishment in violation of the eighth amendment due to their negligent failure to segregate the other prisoner from the general population.234

The issue was whether the acceptance of the foreseeable risks of violence which are involved in a decision to permit a potentially dangerous inmate to associate with the general population subjects a correctional officer to section 1983 liability when such violence occurs. Due to the potential impact that a reply in the affirmative would have on the entire correctional machinery, the court affirmed the dismissal of the complaint, stating:

Though the analogy is not decisive of this case, we note that plaintiff's theory, if valid, might require parole boards to defend their exercise of discretion when the ever-present risk of recidivism materializes and a parolee commits a foreseeable attack on another citizen. Even if the defense of good faith is adequate to defeat such claims, the introduction of judicial review would inevitably inhibit the exercise of discretion.

Within the prison itself the warden and his agents must also be permitted a wide area of unreviewable discretion. The proper placement or classification of the especially dangerous inmate should not present him with a Hobson's choice between alternative Eighth Amendment claims; segregation on the basis of mere suspicion or inadequate history of violence might have subjected him to a claim by . . . Gutierrez.235

Accordingly, it was held that even assuming that the error in judgment was attributable to negligence, such an allegation is insufficient to describe a violation of the eighth amendment and hence the plaintiff clearly could not recover damages under section 1983.236

234. It was alleged that the other inmate's prior history and his general reputation among inmates put the defendants on notice of the risk that he might engage in acts of violence. The court ruled that an examination of the records regarding the attacker justified the allegations of foreseeability on plaintiff's part.

235. 479 F.2d at 721.

236. See the opinion of Swygert, Chief Judge, dissenting in part, which takes the majority in Miller to task for placing fetters on the full implications of Morrissey.

Attempts at a solution to the ever present factor of inmate versus inmate violence create incredibly complex problems for inmates, administrators and courts alike. The prospect of isolating potentially violence prone inmates under any criterion—which assumedly would be as dubious as those standards used to justify long term isolation—would result in the need for even closer daily supervision than is presently given, thus further reducing the small kernel of privacy available to prisoners. In turn, lower level officials and correctional officers would be faced with the need to make continuing judgments, the subtlety of which, in light of their other duties and inadequate training in this regard, belies the prospect. The practical effect of such determinations and accompanying action would be to eliminate to varying degrees, the privileges, training and parole opportunities of those selected, thus further exacerbating the original dilemma.
The final case to be analyzed, *Adams v. Carlson*, was a class action initiated under 42 U.S.C. §1983, by certain inmates of the federal penitentiary at Marion, Illinois. The plaintiffs, following a denial of their motion for an injunction, raised four basic claims for relief: that placement of class members in segregated confinement violated their rights under the due process clause of the fifth amendment; that the indefinite segregated confinement involved was cruel and unusual punishment in violation of the eighth amendment; and that designated official actions interfered with the plaintiffs access to court and counsel in contravention of their rights under the sixth amendment.

Following a general work stoppage and subsequent disturbance, approximately eighty-six prisoners were placed in segregated confinement. Afterwards, Marion officials convened a disciplinary committee to finalize the dispositions already made. Each inmate was orally informed of the charge against him, told the name of the accusing officer and allowed to comment on the charge. The inmates were not told who gathered the information supporting the charge. On this basis, the committee made their judgment. Upon a finding of guilty, indefinite segregation was imposed as punishment. The affected inmates were not given advance notice of the charges nor were they theretofore provided with official definitions of the various offenses alleged. Approximately eleven months in segregation were served by part of the class.

Judge Swygert, speaking for the majority on the issue of the con-

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**ADJUSTMENT COMMITTEE.** Adjustment Committee membership includes the Chief Correctional Supervisor, Chairman, Correctional Supervisor of the Unit, and Caseworker from the Classification and Parole section and the Associate Warden serving in Advisory Capacity. It is their responsibility to receive and investigate misconduct reports, conduct hearings, make findings and impose effective goal-oriented disciplinary action.

All major misconduct reports will be referred to the Adjustment Committee. Following action by the Adjustment Committee, the Associate Warden and Warden will review the disposition.

239. At the time involved, prison regulations did not provide for advance notice, but simply required that the officer notify the shift supervisor and prepare a written report of the incident. *See Marion Penitentiary, Policy Statement MI-7400.5B* (Oct. 19, 1970).
stitutionality of the above proceedings, began by noting that the district court's ruling, rendered before the court's decision in *Miller* was based on *Adams v. Pate*, decided by the Seventh Circuit Court of Appeals in 1971, which decision did not require the procedural steps mandated in *Miller*. Thus, the basic issue was the retroactive application of the *Miller* criterion to these prison rules infraction board proceedings.

In response to the government's argument that such a ruling would violate the traditional proscription in criminal cases against retroactivity, the court noted the position of the United States Supreme Court which has held that the Constitution neither prohibits or requires retroactivity of new principles and that the greater the effect of a decision on the basic integrity of the fact-finding process, the greater the burden on the government to establish that the retroactive application would result in a "probable and extensive disruption of the administration of criminal justice." Such integrity was found to be greatly effected on the instant case. Also, the fact that the type of hearing at issue is civil rather than criminal in nature and that an administrative board rather than a court renders the verdict were not deemed persuasive. Accordingly, retroactivity was ordered, thus requiring rehearings in each of the cases involved:

A rehearing under *Miller* is a much less complex and time-consuming matter than a criminal retrial. Moreover, a *Miller* rehearing raises a relatively minor problem of lost or forgetful witnesses since it is fair to say that segregation is typically a shorter affair by far than the term of a criminal sentence.

The case was remanded to determine, as with the *Miller* remand, the extent to which the delineated standards required enlargement or clarification, and thus whether new hearings were to be ordered.

240. 445 F.2d 105 (7th Cir. 1971).
241. It was also noted that the procedures found on the district level to be in compliance with *Pate* were formulated after the dispositions at issue. Thus the court in the instant case had to determine whether the original proceedings met due process standards.
244. "What a prisoner suffers upon segregation, then, differs from what he suffered upon conviction by shades of degree, not of kind." No. 72-153 at 12.
245. *Id.* at 13.
As to the appellants' position that their indefinite segregation amounted to cruel and unusual punishment per se, the court initially determined that the scheme of indefinite segregation employed at Marion was not unconstitutional on its face. The constitutional

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246. It is important to distinguish "disciplinary isolation" from the concept of "administrative segregation." The former is imposed due to rules infractions, for short periods, in a range from several days to two weeks in an isolation cell without normal cell privileges. Administrative isolation results in the affected inmate being removed from the general prison population for periods of years in some instances. The standards utilized suffer the same lack of definitional content as most other prison rules that affect the daily lives of inmates.

See, e.g., ILL. DEPT. CORRECTION, Reg. No. 807(1-2) (1970):

Segregation is a classification category for inmates in Adult Division institutions. Inmates may be placed in a segregation classification by the Institutional Assignment Committee or Program Team if they:
1. Indicate a chronic inability to adjust in the general prison population.
2. Constitute a serious threat to the security of the institution.
3. Require maximum protection for themselves or if others require maximum protection from them.

Inmates placed in segregation retain most normal cell privileges but are in effect, cut off from other human contact:

Inmates assigned to a segregation classification are subject to the following controls and privileges:
1. Housing in a separate area of the institution determined by the Chief Administrative Officer;
2. Work involving only routine housekeeping duties;
3. Three meals a day—served in cells;
4. Television and/or radio privileges may be denied by the Chief Administrative Officer;
5. No institutional activities enjoyed by the general population;
6. Regular mail privileges;
7. Chaplains will visit the segregation area regularly or upon request;
8. Visits will be in a separate visiting room and will be conducted in the presence of an officer;
9. Showers are to be provided at least once each week, and normal toilet articles are to be provided;
10. Referrals to the physician or dentist upon request or for medical emergencies;
11. The opportunity to exercise for a period of one hour either indoors or outdoors when the security of the institution is not jeopardized;
12. Regular commissary order—which will be delivered to the segregation unit—unless an inmate is out of grade;
13. Clothing is to be issued;
14. A reasonable amount of reading material and educational materials approved by the Education Department;
15. Bedding is to be changed weekly and weekly laundry services are to be provided;

Id. Review of this classification is had by an Assignment Committee every 90 days. Segregation of more than one year must be approved by the chief administrative officer after a personal interview.

247. The court noted that, as in Illinois state penitentiaries, periodic review was had by inmates placed in segregated confinement. See MARION PENITENTIARY, POL-
issue relevant to any eighth amendment disposition was whether the punishment meted out was disproportionate to the determined rules infraction.\textsuperscript{248} Disproportionality, the court continued, is a question of fact and since the record was incomplete in that regard, the eleven months confinement at issue could not, other than on remand be found disproportionate and hence, in violation of the eighth amendment.

On the issues of access to court and counsel, the court was asked to rule on the constitutional propriety, under the sixth amendment, of the construction of a glass partition in the attorney visiting room, which limited the contact to telephone communications, and the seizure and non-return of the legal papers of those placed in segregation.\textsuperscript{249} The overall reaction of the court, as in most cases involving access to legal counsel, was firm and cogent:

Citation of authority is hardly needed for the proposition that an inmate's right of unfettered access to the courts is as fundamental a right as any other he may hold [citations omitted]. All other rights of an inmate are illusory without it, being entirely dependent for their existence on the whim or caprice of the prison warden [citations omitted].\textsuperscript{250}

However, the court noted that the partition in question affected

\textit{ICY Statement MI-7400.5C (July 17, 1972)}:

Adjustment Committees will meet no less than three times a week. All inmates in segregation status will be reviewed at least once a week on the record. At the time of this review, the Committee will determine if any program changes are needed, and will document the record accordingly.

Every inmate who spends over ten continuous days in segregation will have his case formally reviewed by the Committee a second time and this review will be repeated at least every 30 days thereafter that the inmate remains in segregation. This means that the Committee will have the inmate appear before them or if the circumstances so dictate, the Committee will visit the inmate where he is being confined. If commitment to segregation continues beyond 30 days there will be a psychiatric or psychological interview. This interview and report should address itself particularly to the threat the inmate poses to himself or to others. The Committee's overall evaluation should also comment on the inmate's effect on the security or orderly operation of the institution. A similar interview and report shall be made no later than each six months thereafter.

The 10 day and 30 day reviews will be documented along with the Committee findings or decisions and will be sent to the next highest authority for review. . . . A copy of the 30 day review will be sent to the Assistant Director of Institutional Services.

\textsuperscript{248} No. 72-153 at 24-7.

\textsuperscript{249} These precautions were taken in response to further disturbances, cell fires set by inmates and a series of searches that produced a loaded weapon and gunpowder.

\textsuperscript{250} No. 72-153 at 17.
the ease of attorney-client communication and was not a total prohibition or denial of access in a traditional sense. Hence, the partition arrangement per se did not violate a fundamental right. Nevertheless, in keeping with the balancing test enunciated in *Morales*, the court found that the justifications offered by the government—the fear of attorneys smuggling in contraband weapons—did not amount to a rational basis reasonably related to the security of the institution. Accordingly, the district court was ordered to enjoin any further restrictions of the type at issue and ordered the removal of the partition.

On similar reasoning, the court ordered the return of appellant’s legal materials previously confiscated and held by Marion officials. In addition to the general position of the Supreme Court as to the necessity of providing inmates reasonable access to law books and other law related documents, the rationale given by the officials—that such might be used to start future fires—was deemed “dubious” at best.

The recurring theme, evident in the three cases discussed above, is one of extreme caution. The Seventh Circuit can be expected in the future to continue its hesitant approach to constitutional claims of prisoners, which approach, under the “rational basis” test enunciated in *Morales*, demonstrates that the traditional “hands-off” doctrine has yet to receive a decent burial.

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252. A vital right of appellants is at stake. Without proof of its justification by the Government, we must resolve doubts in favor of appellants. If however, an inmate has displayed a marked propensity toward arson or suicide by fire . . . and if the prison warden has removed from his cell and replaced all flammable necessities of life, his access to, and not possession of, personal legal materials may be justifiable. No. 72-153 at 23 n.27.