No. 30967 – *State of West Virginia ex rel. Bruce Patton v. James Rubenstein, Commissioner, West Virginia Department of Corrections and the West Virginia Board of Probation and Parole*

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Albright, Justice, dissenting:

I respectfully dissent to the majority's opinion, based upon the absence of meaningful consideration of mitigating circumstances and alternative dispositions and upon the Board's failure to satisfy the principles announced in *State ex rel. Eads v. Duncil*, 196 W. Va. 604, 474 S.E.2d 534 (1996).

In *Morrissey v. Brewer,* 408 U.S. 471 (1972), the United States Supreme Court explained that a parole revocation proceeding is a two-step process. The first step in a revocation decision involves the "wholly retrospective factual question" of whether a parolee has actually violated one or more of the conditions of his parole. 408 U.S. at 479. The second prong of the inquiry is whether revocation is appropriate under the circumstances of the particular case or whether other steps should be taken to both protect society and improve the parolee's chances of rehabilitation. *Id.* at 480; *see also Morgan v. MacLaren School, Children's Services Div.*, 543 P.2d 304, 307 (Or. 1975). This two-step procedure has been extensively analyzed, and one commentator has explained that the decision to revoke parole involves two separate determinations, as follows:

> The first is a narrow factual determination that the parolee has committed an act which is a violation of his parole. This determination includes findings regarding the circumstances in which the violation occurred. Generally the Board's factual determination is either admitted or not actively contested by the parolee, because revocation proceedings are seldom initiated unless there has been a clearcut violation. If the parole officer's allegations are disputed, the source of dispute is more likely to concern the circumstances surrounding the charge rather than the violation itself, which often appears on its face to be only a technicality.
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> The second determination in the revocation decision is whether the violation and the circumstances in which the violation occurred justify revocation, giving due consideration to the parolee's overall conduct. To decide, the Board must weigh the severity of the parolee's conduct in the situation in which a violation was found against mitigating factors regarding the parolee's overall conduct. This weighing of adverse and mitigating factors is a value judgment involving a prediction of the risk of continued socially proscribed conduct by the parolee.
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> The state has the initial responsibility of producing evidence indicating the occurrence of a violation and the presence of surrounding circumstances serious enough to justify revocation. Generally, the evidence is the investigating parole officer's report, which was the basis for his recommendation that parole be revoked. If the Board determines that a violation has occurred, the parolee must produce evidence substantiating the existence of mitigating factors which persuade the Board that revocation is not justified. Such mitigating evidence may involve an explanation of the situation in which the violation occurred or the introduction of information regarding the parolee's general conduct which is not directly related to the circumstances of the violation.

Comment, *Due Process for Parolees: Oregon's Response to Morrissey v. Brewer*, 53 Or.L.Rev. 57, 59-60 (1973) (footnotes omittes).

The essential second stage must not be overlooked. As noted by the Supreme Court of Washington in *Petition of Haverty*, 618 P.2d 1011 (Wash. 1980), "[t]he integrity of the *revocation* fact-finding process, the method through which the decision to revoke is made, is obviously affected by failure to consider in a mitigation hearing those factors given constitutional significance by *Morrissey*." *Id*. at 1013; s*ee also Nixon v. Quick*, 781 A.2d 754, 763 (D.C. 2001) (noting that the parole board "had available to it a number of alternative options as sanctions for Nixon's violations, including modification of the conditions of parole, reprimand, reinstatement of supervision, and residential community treatment"); *Commonwealth ex rel. Rambeau v. Rundle*, 314 A.2d 842 (Pa. 1973) (implementing the *Morrissey* two-step revocation procedure in Pennsylvania).

Thus, the duty of the Board in the present case must be recognized as two-fold. In consideration of the first prong, the Board correctly determined that the charged violations occurred. But, it essentially stopped there. The second prong was not evaluated. Three members of this Court apparently agree with that truncated version of the inquiry and have affirmed the action of the Board. Yet, the second half of the story, as required to be developed by *Morrissey*, remains incomplete. No meaningful inquiry into potential alternatives was conducted; no significant consideration of mitigating circumstances is reflected in the record.

Indeed, Mr. Patton did drive a very short distance on a suspended license; he was out after his 9:00 p.m. curfew; and he did buy beer at a Go-Mart. For the Board and the majority of this Court, that is the end of the story, and Mr. Patton is returned to prison. Glaringly absent from such consideration is an inquiry into the reasons for Mr. Patton's actions. Additional considerations should have been addressed with regard to the circumstances under which these violations occurred and the extent to which the context of a violation affects the selection of punishment for that violation. Aristotle concisely explained that "we do not know a truth without knowing its cause."

These questions appear to have been deemed irrelevant by the Board and by the majority of this Court, in blatant disregard for the principles announced in *Morrissey* and in derogation of the specific guidelines promulgated by the West Virginia Legislature. In syllabus point three of *Eads*, this Court has expressly stated that "[t]he West Virginia [Parole Board] must obey legislation and must act in a way which is not unreasonable, capricious, or arbitrary." 196 W. Va. at 605, 474 S.E.2d at 535. In discussing his interpretation of the statutory vision regarding alternative dispositions, Chairman Stump stated as follows in the present case: "We have too many [bills] over there [at the Legislature]. But until the Legislature decides to put some cash behind it, it's not going to go very far. You know, they do that often. God love their heart. And they don't have a lot of cash."

There was a duty in this case to analyze not only the reality of the violations but the mitigating factors and potential alternatives to return to prison, as legislatively envisioned. That duty was unfulfilled. The result was an arbitrary and capricious judgment which should have been reversed by this Court. In its haste, the majority of this Court could see no further than the bare existence of the violations. Through such oversight, this Court has sanctioned the Board's disregard of mitigating circumstances and alternative disposition options and has ratified a miscarriage of justice which has quite possibly destroyed the potential for Mr. Patton's rehabilitation and reintegration as a contributing member of society.

I do not advocate absolution of all responsibility for these parole violations. The violations did occur, and the precipitating factors should have been addressed in a manner which alerted Mr. Patton to the seriousness of any parole violation, no matter how minor it may facially appear. The precipitating factors should also have been examined in an attempt to realign Mr. Patton's curfew restrictions to the realities of his employment obligations. Yet these rehabilitative potentials were essentially ignored, and the Board's action was condoned by the majority of this Court.

I also disagree with the majority's holding that the Board complied with the principles announced in *Eads*. Syllabus point two of *Eads* specifies that the record must "affirmatively show that the documents and evidence produced in the revocation proceeding

have been submitted to all duly appointed and qualified members of the [Board]. . . ." 196 W.Va. at 605, 474 S.E.2d at 535. The failure in *Eads* was substantially more egregious, based upon the absence of any documentation demonstrating that the full Board considered the revocation and the fact that the parole revocation order was signed by only one member of the Board. 196 W.Va. at 611, 474 S.E.2d at 541. Yet, in the present case, the Board members who were not present at the hearing did not have the benefit of a complete transcript or an audible taped version of the hearing. They relied almost exclusively upon the presentation of evidence by only one member of the Board. West Virginia Code of State Regulations § 92-1-13.1 permits "[o]ne member of the Board" to be present at the hearing; yet § 92-1-15 requires that "[u]pon review of the hearing transcript or upon receipt of the waiver of the hearing. . . [,]" the Board will render an ultimate decision. The affidavit signed by Chairman Stump evidences no review of a hearing transcript in the present case. Chairman Stump states only that he "met with the other two signing members of the Board, Christi Love and Benita Murphy, and discussed this matter thoroughly after they had reviewed my written Summary and Recommendation." Thus, from the record before this Court, it appears that the explicit directive of West Virginia Code of State Regulations § 92-1-15 was not followed.

The Board declined to meaningfully consider mitigating factors or less restrictive alternatives, and it failed to adhere to the principles of *Eads* and the distinct mandates of the West Virginia Code of State Regulations. Moreover, herein lies an

additional example of the failure of the Board to provide significant guidance to the parolee on what precisely is expected of him. This individual found a steady job; yet, the hours of the job prompted this claim against him. He was working in a situation where driving a vehicle might become necessary; yet, it does not appear that any meaningful consideration was given to that potentiality. As I emphasized in my concurrence and dissent in *State ex rel. Stollings v. Haines*, 212 W. Va. 45, 569 S.E.2d 121 (2002), within the context of denial of parole,

> This Court should be encouraging the Parole Board to further develop its ability to give a person who is denied parole a clear picture of what must be done, or not done, to bring that prisoner's "liberty interest" in the "expectation of parole" beyond expectation to fruition. *Tasker*, 165 W.Va. at 59-60, 267 S.E.2d at 186-87. In my view, our task is not to set those standards (except as we must to assure due process). The development of such standards is, in the first instance, the proper work of, and within the statutorily protected expertise of, the Board. The problem here is that the failure to further develop the ability of the Board to give a person denied parole a clear picture of what must be done or not done to earn parole almost guarantees that on another day, in another case, this Court will find itself compelled to intervene to assure due process, a fundamentally fair proceeding, and one that reaches conclusions to grant or deny parole in accord with the *objective criteria* provided by the parole statute. From my review of current literature on the subject, there are a myriad of tools available, means to defining and articulating reasonable standards for the difficult decisions the Board must make – tools that also assure that the Board's decisions cannot reasonably be found to be arbitrary and capricious, tools that may be applied within the integrated framework of our sentencing statutes and the parole provisions of our Code.

Id. at 53-54, 569 S.E.2d at 129-30. These types of decisions involve some degree of judgment and intuition. However, a discord is created by the failure to develop and adhere to a specific set of meaningful standards by which parole violations and potential revocations are to be judged. As cited above, this Court has invited such development; yet to this point, there is no indication that any movement toward such development has been initiated.

I am in unqualified agreement with any parole revocation decision necessary to protect the public. However, it must be recognized that the problem of prison overcrowding stems, in part, from the low parole release rates in the State of West Virginia. Criminal justice records indicate that while West Virginia's crime rate remains one of the lowest in the nation, the state's prison population is increasing at an alarming rate. Recent data from the state's parole board indicates that only fifteen percent of West Virginia prisoners facing their first parole hearing receive parole. The data also suggests that the percentage of interviewed inmates who actually receive parole has been consistently decreasing since 1990. The suggestion, forwarded in public debate, that the West Virginia prison population includes more violent offenders than other state prison populations and that these statistics justify this state's low parole release rates is somewhat implausible.

Parole revocation determinations, such as the one under review in the present case, comprise only one component of this extensive issue. If meaningful standards for granting or revoking parole were developed, an element of predictability would be introduced

into the system. Adequate psychological examinations and other prognosticative tools, in conjunction with articulated standards, would likely achieve several positive results: (1) reduction in the potential that an initial intuitive judgment would be wrong; (2) increase in potential that a judgment to retain an individual would operate to protect the public from truly dangerous criminals; (3) providing inmates who are genuinely striving toward parole with confidence in the integrity of the system, generating more favorable behavior and work results; (4) providing the public with the confidence that where release determinations – even those ultimately proven wrong – are reached for good reason readily apparent from the record and based on clearly articulated methodologies; and (5) probable reduction in recidivism rates.

Although this Court should certainly not be in the business of second guessing every parole revocation determination, the absence of clearly articulated standards leaves this Court with no alternative to setting aside any blatantly arbitrary and capricious decision. I consequently take this opportunity to once again urge the development of clearly articulated and meaningful standards for the determination of these vital issues of revocation of parole. The system has shamelessly failed Mr. Patton in the present case, and I must therefore respectfully dissent to the majority opinion.

I am authorized to state that Chief Justice Starcher joins in this dissenting opinion.