

Expert Opinion on Missouri Parole Revocation System

By David Muhammad

September 10, 2018

Summary

I was retained by plaintiff's counsel in the class action *Gasca et. al. vs. Precythe et. al.*, to provide an expert opinion regarding the parole revocation process in the state of Missouri. In addition to my own knowledge and experience, in order to prepare this report I reviewed the Complaint and all 22 exhibits; field violation reports and other documents in the parole files of named plaintiffs; parole revocation hearing videos of Nicholas Gregory, Joshua Jenkins, Michael Hocott, and Michael Quinn; the Missouri Department of Corrections' (MDOC) 2016 Annual Report; the deposition transcript of Missouri Lead Parole Analyst Steve Mueller and the exhibits used during that deposition; the Missouri Department of Corrections Board of Probation and Parole Policy and Procedure Manual; a data chart of lengths of time named plaintiffs spent in custody awaiting revocation proceedings; and reports on the parole revocation processes in the states of Illinois, California, Maryland, and New York.

Based on the numerous documents I reviewed and revocation proceedings observed via video, it is clear that sufficient due process rights are not being afforded to parolees suspected of violating the terms of their parole in the state of Missouri.

Background and Overview of Professionally-Accepted Practices in Parole Revocation

According to the MDOC 2016 Annual Report, there were 16,075 people on parole in Missouri in 2016. In response to a records request submitted by plaintiffs' counsel, defendants submitted a report with three years of parole revocation hearing decisions covering the period March 20, 2014 to March 20, 2017. Missouri Lead Parole Analyst Steve Mueller's deposition testimony indicated that MDOC's Division of Probation and Parole receives 120 violation reports every day (page 39). Given that volume, it is surprising that it appears as if there were only 205 revocation hearings conducted during that three-year period, with attorneys appearing or having been retained in only three of those cases. A 2017 United States Department of Justice Bureau of Justice Statistics report indicates that in 2015, 3,873 parolees in Missouri were incarcerated after having their parole revoked. With nearly 4,000 parolees revoked annually and only 205 revocation hearings held over a three-year period, the MDOC hearing rate equates to less than 2 percent. By contrast, in the bordering state of Illinois, there are more than 1,000 revocation proceeding hearings held every month, largely due to Illinois conducting Final Revocation Hearings for all APVs brought back into custody; these hearings cannot be waived in Illinois.

Mr. Mueller testified that in 2017 there were 6,600 parolees brought back into MDOC custody for parole revocation proceedings, that more than 90 percent of them had their parole revoked, and that less than 2 percent of those who were revoked had attorneys (pages 137-142).

It appears from records reviewed and a letter from MDOC's Legal Counsel that the majority of parolees facing revocation proceedings waive their rights to hearings, although many of those

waivers are not documented. For example, a review of the records for 25 parole revocation cases covering the period December 1, 2016, to February 28, 2017, reveals that there were no Preliminary or Revocation Hearings held, and no attorneys appointed or retained (Exhibit 3). Even though no hearings were held, only 10 Preliminary Hearing waivers were signed and eight Revocation Hearing waivers signed.

A revocation system that operates with only a tiny fraction of parolees taking advantage of their hearing rights, and even fewer availing themselves of appointed counsel, raises immediate concerns regarding the sufficiency of notice and procedural fairness.

In contrast to Missouri's system, it is standard practice in many states to provide these common procedural protections as part of the parole revocation process:

- Notice of alleged violations provided to the parolee in advance of any revocation proceedings;
- Copies of all statements, reports, and evidence being used to determine the violation provided to the parolee;
- A process for determining parolee eligibility for counsel and where eligibility determined, attorneys provided at no cost;
 - The process for determining eligibility for counsel typically includes an assessment of whether or not the parolee has a reasonable claim that he/she has not committed the offense, or whether there are mitigating factors to not revoke, whether or not the parolee has the capacity to represent him/herself, and if the parolee is incapable of paying for their own attorney.
- Preliminary Hearings conducted by an impartial hearing officer to determine probable cause;
- Revocation Hearings conducted to determine whether a violation occurred and whether to revoke or resume parole with the parolee being given an opportunity to be heard;
- Written notice of the outcome of the Revocation Hearing; and
- A post Revocation Hearing appeals process.

Lack of Due Process in Initial Warrant Preparation and Service: Failure to Provide Adequate Notice of Alleged Violations

States must provide alleged parole violators (APVs) advance written notice of alleged violations of parole. The State of Missouri's process for issuing warrants appears to lack clarity, consistency, and comprehensiveness. Sometimes Field Violation Reports (FVR) are completed prior to issuance of a warrant while other times they are drafted once an offender is already in custody. Several of the named plaintiffs in this case did not know the basis upon which revocation warrants were initially issued.

In the case of plaintiff Gasca for example, according to the Complaint reviewed for this report, she was taken into custody without any written notification of the violations being alleged. Once in custody MDOC staff indicated that her FVR would be based on Failure to Report alone,

which appeared to influence her decision to waive her right to a preliminary hearing. Gasca reported that the actual FVR included violation of special conditions as a basis for revocation.

Plaintiff Warren learned of his warrant for the first time during a routine traffic stop.

In those instances where an FVR was served on a named plaintiff prior to his/her being taken into custody, those FVRs contained varying degrees of relevant information. In the one FVR that included a significant amount of narrative (Gallagher, Exhibit 11 to Complaint, November 6, 2015), a review of subsequent events in the case suggests that the lengthy discussion of child and elder abuse claims in the FVR was not in fact the basis for revocation determinations that were made. In other FVRs there is no explanation of the alleged violations themselves, only the APV's rebuttal (see, e.g., plaintiff Warren's FVR).

Even the Request for Waiver form, a document used to codify a parolee's waiver of critical hearing rights, provides no material information regarding alleged violations. Instead under the Violations field of the preliminary hearing Request for Waiver form, only the violation number and title are listed with no explanatory narrative (see Exhibit 13, for example, plaintiff Gallagher's Request for Waiver *#1 Laws, #8 Reporting Directives, #10 Intervention Fees, #11 Special Conditions*). The corresponding Final Revocation Hearing form does not even have a field for entry of allegation information (see Exhibit 15).

Procedure for Scheduling Preliminary and Final Revocation Hearings Puts Unfair Burden on Alleged Parole Violators (APV): Failure to Meaningfully Effectuate APVs' Right to Hearings

According to the documentation reviewed for this case, in order for a preliminary or final revocation hearing to be scheduled the Alleged Parole Violator must affirmatively request said hearing. This request process appears to take place in the physical presence of MDOC personnel who reportedly routinely advise/suggest that people do not avail themselves of their right to a hearing and infer that the process will be faster if hearings are waived. There should be a presumptive setting of hearings and hearings canceled only where a knowingly executed waiver has been filed.

The review of MDOC data provided in the Background and Overview section of this opinion illustrates the problems with the defendants' current approach. There is a significant disparity between the number of Revocation Hearings held and the number of parolees incarcerated as a result of revocation proceedings; in fact, it appears that the MDOC has only a 2 percent hearing rate. Similarly, there are disparities between the number of revocations taking place without hearings and the number of formal waivers on file. These facts suggest that the MDOC does not hold itself accountable for adhering to a policy of not holding hearings only when a waiver has been executed and filed, and gives credence to plaintiffs' repeated assertions that they were pressured into waiving hearings.

Failure to Provide Opportunity for Determining Eligibility for Appointed Counsel

Given the challenges that exist in the initial phases of the revocation process – from the drafting and service of warrants to the apparent presumption against holding hearings – the systemic failure of the MDOC to appoint counsel is of great concern.

As stated above, states must provide counsel to APVs when they are indigent and have difficulty in presenting their version of disputed facts; have a timely and colorable claim that they have not committed the alleged violation; or if there are substantial reasons in justification or mitigation that make revocation inappropriate.

Several of the named plaintiffs presented both colorable claims and possible mitigation. In the cases of plaintiffs Gallagher and Warren, both made assertions that they were either innocent as related to specific allegations or were justified in their behavior; these assertions were documented in various iterations of their respective FVRs. And yet neither plaintiff was provided with counsel.

In plaintiff Gallagher’s original FVR (Exhibit 11), MDOC staff note that he suffered from bi-polar disorder and poly-substance abuse, and that while in custody he was medicated with a cocktail of anti-anxiety disorder drugs. Based on my experience and professional opinion, APVs with such conditions often have difficulty effectively speaking themselves. Thus, in addition to making colorable claims of innocence and offering mitigating evidence, Gallagher is an APV that seems to fall within the category of “having difficulty effectively speaking for himself.” Even evidencing satisfaction of all three of the prongs that other states use to determine eligibility for counsel however, he (along with all other plaintiffs) has never been appointed counsel.

The *Rights of Offender to Preliminary and Revocation Hearing* handbook (Exhibit 18) appears to be the only document that arguably sets forth APV’s right to counsel. The handbook itself is not written in plain language or in a manner accessible to the expected reading comprehension level of the average APV¹. Beyond that issue, however, is the problematic content itself. The handbook states: “As the preliminary hearing is an informal review to establish probable cause only, attorneys do not have a role to play in this particular process. Generally, any request to have an attorney present shall be denied. The only exception shall be when the hearing officer has reason to believe that the offender is incapable of understanding proceedings” (Exhibit 18, page 2). This excerpt suggests that not only is the state itself failing to provide counsel where a parolee is determined to be eligible for same pursuant to a standard screening process, but also

¹ A 2014 report, *National Assessment of Adult Literacy – Prison Literacy* (<https://nces.ed.gov/pubs2016/2016040.pdf>) provides some statistical support for the strong anecdotal evidence that the prison population has limited literacy skills. The Assessment results indicate that 94% of the population has at most a high school education, with 30% not completing high school. Assessment results also reveal that the average literacy score for the population is 249 – on the given scale this reflects a low-level 2 on a scale that goes to 5. An example of a task beyond the capacity of an individual with a literacy score of 249 is scrolling through a bibliography to find the name of an author for a specific book (see Assessment, exhibit B-4). Contrast this task with reading the forms, reports, and correspondence that Missouri parolees are expected to comprehend on their own as part of the revocation process.

state is refusing to allow offenders to secure even privately retained counsel for preliminary hearings.

With respect to the Revocation Hearing the handbook notes that an offender may have a representative of their choice including “a family member a friend an employer or legal counsel”, and, “if the offender appears to be incapable of representing himself/herself, legal counsel may be provided” (Exhibit 18, page 3). There is no other reference to any right to counsel, assessment for eligibility for counsel, or process for requesting such an assessment². Legal counsel may thus attend a hearing to provide moral support, akin to a family member or friend, or may be appointed at the revocation hearing itself if the offender appears incapable of representing him/herself. This language fails to capture circumstances that would arise prior to a hearing which might warrant appointment of counsel – the existence of colorable claims of innocence or mitigation for example, as well as clear and pervasive mental health or cognitive issues.

In his deposition in this case, Missouri Lead Parole Analyst Steve Mueller admitted that the MDOC does not have any policy or procedure for providing or requesting appointed counsel when a parolee facing revocation has a colorable claim that they did not commit the alleged violation (page 172 of the deposition transcript).

The handbook similarly does not include any key facts, such as expected procedural timelines and the impact that both holding hearings (and waiving those hearings) and securing counsel may or may not have on those timelines. In addition, there is no information provided regarding a parolee’s right to appeal or the steps that should be taken to effectuate that right. Plaintiff Gasca illustrates the danger that a lack of actual information regarding these issues can present; she waived her right to a hearing believing that waiver would result in her being released from custody.

Arbitrary Bases for Depriving Offenders of Liberty

In the cases of Gallagher and Wyse, the existence of a new criminal case formed the basis for their revocations. In both cases the charges were dropped, yet plaintiffs remain in custody. The MDOC appears to lack any clear policy regarding situations where a new criminal case forms the basis for an initial revocation action and that criminal case is subsequently dropped.

Plaintiff Gallagher’s matter is of particular note. In his case it appears that the original FVR (dated November 6, 2015, Exhibit 11) was based on three standard supervision violations (one of which, violation of laws, related to a theft charge) and three special condition violations. In addition, the FVR noted that Gallagher’s mother, with whom he lived, had filed an ex parte restraining order such that he would have no place to live if discharged from custody. The theft charge was dropped. Gallagher’s mother withdrew the ex parte and asked that he be returned home.

² No other references to the right to counsel in the handbook or any other document provided to parolees, including the forms used to waive hearings.

Gallagher was violated, and the grounds upon which the violation decision was based included two additional violations not included in the FVR (Exhibit 17); only violation numbers and titles were included in the revocation order with no explanatory narrative. After repeated requests for explanation of why he was in custody Gallagher received a letter from MDOC in November 2016 outlining eight violations that were the basis for his revocation, according to a cited “Board Advisory.” This was the *first* time that Gallagher had been given substantive information about two of the reasons for his revocation – nearly a year after the date of his Order of Revocation (see Order of Revocation dated December 23, 2015 (Exhibit 17) and letter to Gallagher explaining revocation basis dated November 17, 2016, (Exhibit 20)).

In December of 2016, after attempted intervention by private counsel (Exhibit 20), Gallagher and his mother were told that no action could be taken given a new issue – pending assault charges, regarding which Gallagher had received no notice or information (Exhibit 20). On December 29, 2016, after Gallagher had been in custody for more than a year, MDOC staff wrote to inform him that the assault charges had been mistakenly applied to him earlier in the year (he was never the actual defendant in that case) yet he would still remain in custody for all the other reasons that he had previously been told about (in November 2016, a year after he had been taken into custody).

This rather long and convoluted fact pattern illustrates the pervasive challenges in the MDOC revocation process. APVs must be informed of all the allegations against them and of all the information upon which MDOC revocation decisions are based. APVs must be provided with a written explanation of the parole board’s decision. As Gallagher’s case illustrates, none of this appears to be routinely happening in the MDOC, if at all.

In the cases of Curren and Hemphill the lack of documentation provided by Defendants makes it difficult to understand the basis for any revocation decision. Plaintiff Curren was provided with an inter-office communication which stated that the Board had decided to process her for revocation, with no explanation of the basis for that decision; the communication appears to reflect the outcome of the preliminary hearing with an indication that a Final Revocation Hearing will be forthcoming, but the language is far from clear. Exacerbating the likelihood of total confusion is the fact that the communication advised plaintiff Curren of the futility of asking any questions of the author – with an indication that someone else would reach out to her with additional information in “due time” (see Exhibit 14 page 2). Plaintiff Warren similarly reported that he was told not to ask questions during his preliminary hearing or the hearing would cease. In Hemphill’s case the FVR explicitly states that no action would be taken pending a 90-day period during which MDOC would work with the offender, yet plaintiff Hemphill was apparently taken into custody the very same day the FVR was authored.

The lack of documentation regarding the basis for revocation decisions is striking. Complaint Exhibits 14 (pages 1-3) and 17 (page 1) reflect the nature of the information that plaintiffs receive subsequent to decisions that are made regarding their revocation status. These notices range from a memo stating that the Board has decided to process revocation, and admonishing

the parolee not to ask questions pending future contact by MDOC staff “in due time” (Exhibit 14, page 3), to a checkbox form with the language provided: “This decision is subject to appeal” (Exhibit 17, page 1).

Observations from Hearings Viewed

The video recordings of five parole board hearings were reviewed in developing this Expert Report. The hearings themselves were conducted in a professional and deliberative process. Three hearing panel members (one parole board member, one parole analyst, and institutional parole supervisor) sat to hear each case with the parole analyst serving as the facilitator or lead. Parolee Michael Quinn was able to have a witness present.

Exhibit 30 to the deposition of Missouri Lead Parole Analyst Steve Mueller is a report prepared by Defendants showing the time between APVs being brought into custody and their Final Revocation Hearing for the 2017 calendar year. Of the 4,362 hearings reflected in the report, 1,723 APVs had their hearing more than 90 days after being brought back into custody – two waited for more than a year.

In each of the Final Revocation Hearings I reviewed, the Parole Board members tell the APV that it can take up to six to eight weeks after the hearing just for the APV to receive notice of the outcome of the hearing. Those timelines are far too long and again reflect a lack of concern for unnecessary incarceration. In the case of Parolee Michael Quinn, it took approximately three weeks for him to learn of the decision of the Board (Decision Notice).

Another significant problem observed in the hearings is that it appears that the Missouri Parole Board is using a probable cause standard to determine whether to revoke parole. The parole analyst leading Nicholas Gregory’s Revocation Hearing said, “we have enough probable cause to find violation.” In the hearing of Michael Quinn, a panel member said several times during the Revocation Hearing that the purpose of the hearing is to determine if there is probable cause to revoke parole.

Additionally, the Missouri Department of Corrections Board of Probation and Parole Policy and Procedure Manual erroneously equates the different evidentiary standards of probable cause and preponderance of evidence (see Procedure No. P3-7.1 at page 3).

Probable cause is a low burden of proof usually used in a preliminary hearing, not a final Revocation Hearing; it should not be used as the standard for revoking parole and incarceration.

How Other States Provide Due Process Rights that Missouri Fails to Provide

The parole revocation procedures summarized in the four states below exemplify Missouri’s violations of due process rights and being out of step with best practice. These states, while not perfect and only a sampling of states with fairer and more just policies than Missouri, provide parolees with:

- Timely notice of the violations they are being accused of
- The opportunity to have a Preliminary Hearing to determine probable cause of the violation
- The opportunity to request release from custody pending the Final Revocation Hearing
- Access to legal representation paid for by the state under certain circumstances
- Access to all evidence being used against you
- The opportunity to have a Final Revocation Hearing in a timely manner where the evidentiary standard for finding a violation is the preponderance of evidence
- The right to present witnesses at the Final Revocation Hearing
- The right to confront adversarial witnesses at the Final Revocation Hearing
- Timely notice of the decision of the Final Revocation Hearing decision
- The right to appeal the Final Revocation Hearing decision

Illinois Parole Revocation

In the State of Illinois, where I serve as a Federal Court Monitor, the parole revocation process has changed significantly since the implementation of the *Morales v. Findley* Settlement Agreement provisions.

The Illinois Prisoner Review Board (PRB) governs parole revocation hearings and is a separate entity from the Illinois Department of Corrections (IDOC). The PRB is an independent body whose members are appointed by the Governor of Illinois. The PRB imposes release conditions for offenders exiting correctional facilities and conducts hearings to determine whether parolees have violated conditions of parole.

Illinois is required to provide Alleged Parole Violators (APVs) with written notice of the alleged parole violation (PV) and a Notice of Rights within five (5) calendar days of service of the PV warrant, and to inquire whether the parolee wishes to have that material read to him/her. At the time of service, APVs may choose to:

1. waive a preliminary revocation hearing (PRH); or
2. schedule a PRH, to be scheduled *within 10 business days* of service of warrant if APV does not request an attorney (or is located in Cook County)—with two exceptions:
 - a. a PRH may be held *within 20 business days* of service of warrant if APV is outside of Cook County and requested an attorney, and
 - b. *an APV may postpone for up to 30 days.*

The state is required to provide and pay for appointed counsel for APVs who qualify for an attorney after completing a screening for eligibility (the Illinois Screening Tool is included as an Appendix II). If the APV requests an attorney and establishes indigence, the Hearing Officer (HO) or PRB will assess the APV's eligibility for appointed counsel in accordance with the *Gagnon v. Scarpelli* decision. In determining eligibility, the HO will consider whether the APV has a timely or colorable claim of innocence, or, if the alleged PV is uncontested or true, there are substantial reasons which justified or mitigated the PV and make revocation inappropriate, and the reasons are complex or otherwise difficult to develop or present (*complex mitigation*).

If the HO determines at PRH that APV is eligible for an attorney, counsel will be appointed for both PRH and FRH.

At the PRH, the hearing officer is required to determine whether or not probable cause exists that the APV committed the alleged PV. The HO may make a determination only on evidence that is both presented at the hearing (and not on information presented only at the assessment for eligibility for appointed counsel) and relevant to the alleged PV.

The APV may request that the HO attempt to call any witnesses identified by the APV. The HO will summarize the witness' statement. Information provided by the witnesses shall be considered by the HO in rendering a decision. Parolees/their attorneys have the right to cross examine adverse witnesses (unless the HO specifically finds good cause for not allowing the confrontation of adverse witnesses), speak on their own behalf, and provide relevant witness testimony and documentary evidence.

If the HO finds PC, the APV shall have the right to request release (lifting of the parole violation warrant) from custody pending a final PRH and to present evidence in support of this request. After considering evidence, the HO will make a written recommendation on the Report of Findings form which shall be communicated to the PRB.

The written determination shall include a summary of what occurred at the PRH (including the parolees' position and the substance of the evidence presented during the hearing), whether PC for each charge was found, the reasons for HO's determination and any recommendation regarding release pending the FRH.

Although APVs can waive their PRHs, Illinois holds FRHs for all APVs brought back into custody for revocation proceedings. APVs are to be scheduled for their FRH at the next scheduled PRB hearing date and/or within sixty (60) calendar days of service, whichever is sooner. All FRH's must occur within 90 calendar days of service unless the APV requests a continuance, refuses to appear, is required by writ to appear in court or other legal proceedings, is unavailable due to medical or mental health reasons, is not at the DOC facility where the hearings are conducted, or because the hearing cannot occur within 90 calendar days due to other extraordinary circumstances.

Each FRH is to be heard by at least one member of the PRB and each decision is to be issued through a panel of at least three members. PRB members are required to determine whether there is *proof by a preponderance of the evidence* that the APV committed the alleged PV. APVs are permitted to cross examine adverse witnesses (unless the Presiding Officer specifically finds good cause for not allowing the confrontation of adverse witnesses), speak on their own behalf, and provide witness testimony and documentary evidence to the PRB. The APV must be provided with written explanation of the PRB's FRH decision as soon as administratively feasible, but without unreasonable delay. The written explanation must include a statement by the factfinders as to the evidence relied upon and reasons for revoking parole. The PRB member conducting the hearing usually informs the APV of their decision verbally at the

conclusion of the hearing and written notification of the formal outcomes is usually provided to the APV within 48 hours.

New York Parole Revocation Process

In the State of New York, after an APV is detained, they are served with a Notice of Violation that describes the hearing process and lists the APV's rights with respect to those hearings. The Notice of Violation advises the APV of the date, place, and time that the Preliminary Hearing will be held and all of the APV's rights at the Preliminary Hearing.

The APV's rights include the right to appear and speak on his/her own behalf and to produce letters, witnesses, or documentary evidence to support APV's case. In addition, the APV may confront and cross-examine the Division of Parole's witnesses, unless good cause is shown why they should not appear at the hearing.

On the Notice of Violation form, APVs may waive the Preliminary Hearing; doing so amounts to a finding of probable cause. The Notice of Violation also contains a tear-off form for requesting assistance in obtaining assigned counsel if the APV cannot afford to hire an attorney.

At the time of notice or service, the APV is also provided with a Violation of Release Report that describes the manner in which the APV allegedly violated one or more of the conditions of parole. Within three days (five days if the APV is out of state) of the lodging of a parole violation warrant, the APV will be served with both the Notice of Violation and the Violation of Release Report.

Within *fifteen days* of the lodging of the parole violation warrant, a Preliminary Hearing must be scheduled (unless the APV waives the hearing).

A Preliminary Hearing is a prompt, informal, minimal inquiry into one or more of the alleged violations. The hearing is held in or near the community where the offense is alleged to have occurred, or where the parolee was taken into custody. The purpose of the Preliminary Hearing is to determine whether or not there exists probable cause to believe that APV has violated one or more of the conditions of release in an important respect.

The Preliminary Hearing Officer has the power to adjourn or postpone the hearing. He or she can also decide whether to grant any request made for counsel. If, at the Preliminary Hearing, it is found that there is not probable cause to believe that APV violated a condition of release in an important respect, the warrant will be cancelled and APV will be restored to parole supervision. If probable cause is found at the Preliminary Hearing, or if the APV waives the Preliminary Hearing, an Area Supervisor or a member of the Board of Parole will review the case and determine whether to declare the APV delinquent and order a Final Hearing, or to restore APV to supervision.

If an APV is convicted of having committed a crime while under parole supervision, the APV forfeits right to a Preliminary Hearing, and may also forfeit rights to a Final Hearing. If the APV is

convicted of a misdemeanor, he or she is not entitled to a Preliminary Hearing but will receive a Final Hearing. If the APV is convicted of a felony and sentenced to an indeterminate or determinate term, parole is revoked by operation of law without the need for either a Preliminary or Final Hearing.

If an APV is unable to obtain counsel before the Preliminary Hearing the APV may request counsel at the commencement of the Preliminary Hearing. If the Hearing Officer finds that it is necessary for APV to have counsel at this hearing, he or she will order that the hearing be adjourned and take steps to assist APV to obtain an attorney.

A Final Hearing must be scheduled to take place *within 90 days* from the date of the Preliminary Hearing or from the date that the Preliminary Hearing was waived.

To revoke parole, the Division of Parole must prove at the Final Hearing by a preponderance of the evidence that APV has violated at least one of the conditions of release in an important respect, as set forth in the Violation of Release Report. At this hearing, the APV has all the rights afforded at the Preliminary Hearing. At the Final Hearing, APV may present evidence in mitigation of the alleged violation, as well as evidence supporting a disposition of an alternative to re-incarceration.

If a Final Hearing has been ordered, APV has an absolute right to have an attorney. The APV will be assigned an attorney if he/she cannot afford one. The New York State Parole Handbook, provided to parolees, states, "If a Final Hearing has been ordered in your case, you have an absolute right to have an attorney. One will be assigned to you if you cannot afford one"

The Final Hearing is held before a Parole Board Member or Hearing Officer, also referred to as an Administrative Law Judge. On the basis of this hearing, the Parole Board Member or Hearing Officer makes a decision or, in some cases, a recommendation to the Board of Parole whose members will make the ultimate decision about the revocation.

California Parole Revocation

In the State of California, the parole revocation process was significantly amended after the passage of legislation Assembly Bill 109, also known as Realignment.

As of October 1, 2011, all parolees who are revoked serve their re-incarceration time in county jail instead of state prison and that time can only be up to 180 days (with the exception of the small number of parolees who were originally given a life term sentence). As of July 1, 2013, the parole revocation process was transitioned from the State Board of Parole Hearings to the courts as the designated authority for determining parole revocations.

A petition to revoke parole is filed with a local court to initiate the parole revocation hearing process. The petition must include a written report that contains additional information regarding the petition, including the relevant terms and conditions of parole, the circumstances

of the alleged underlying violation, the history and background of the parolee, and any recommendations.

California courts are not required to conduct formal probable cause hearings for parole revocations. However, it is recommended that courts make probable cause determinations at the time of the parolee's arraignment on the violation, particularly when the arrest was not by warrant. The finding may be based on a petition to revoke parole or its supporting report.

The final revocation hearing must be held within a "reasonable time." It is recommended that courts hold the violation hearings within 45 days of the parolee's arrest unless time is waived.

Parolees are entitled to counsel, including, if necessary, appointed counsel. The courts administrate the revocation process, through a judge, magistrate, or qualified revocation hearing officer.

Maryland Parole Revocation

The Maryland Parole Commission (MPC) oversees Maryland's parole system and its revocation process. The MPC's members are appointed by the Secretary of Public Safety and Correctional Services and approved by the Governor and the Senate consent. Members are appointed for 6-year terms and must have experience and training in law, sociology, psychology, psychiatry, education, social work or criminology.

Allegations of parole violations require a preliminary hearing for probable cause, which if found, prompts a Final Revocation Hearing (FRH). APVs are allowed to have counsel present, and if eligible, counsel will be provided by the Public Defender's office. APVs may call witnesses and present evidence.

Revocation hearings are subject to judicial review. The burden of proof is on the institution and a preponderance of evidence standard is used. The parole agent responsible must present a report on the violation at the hearing.

If a person who has committed a technical violation admits fault or guilt, then instead of a preliminary hearing, they go through a Liaison Agent/Waiver Hearing (LA/W). The hearing is conducted by the MPC and the parolee waives the presence of the parole agent. Instead, a liaison agent testifies using information provided by the parole agent. A LA/W is also held in cases that include new offenses while on supervision, in which the person on parole admits guilt.

Conclusion

In my professional opinion and based on the numerous documents and video footage I reviewed in this case and observations regarding parole revocation processes in other states, sufficient due process rights are not being afforded to parolees suspected of violating the terms of their parole in the state of Missouri. Deficiencies exist at all points in the process, from the

initial notice and service of alleged violations, to the burden placed on Alleged Parole Violators to access their right to hearings, to the failure to articulate or implement any clear process for determining eligibility for appointed counsel.

Particularly disturbing is the fact that Alleged Parole Violators are not consistently provided with sufficient information about their alleged violations, the basis for actions of the Board, or the decisions that the Board has made. Absent this basic information, Missouri parolees are necessarily deprived of fundamental due process. After spending long periods of time incarcerated awaiting revocation, Missouri parolees who are revoked without due process are ultimately deprived of their liberty for more than a year. Specifically, according to a data chart provided by plaintiffs' counsel (Appendix I), the seven named plaintiffs in this case served an average of 458 days of incarceration for having their parole revoked. The plaintiffs' cases thus demonstrate that parolees in Missouri are facing severe punitive consequences through lengthy loss of liberty without the benefit of even facially sufficient due process.

Lastly, although courtesy is not technically a due process right, there appears to be a high degree of callousness on the part of MDOC staff. This is manifested in confusing correspondence that cannot possibly have been drafted with any intent for APV comprehension, and curt communication shutting down questions and rendering self-advocacy virtually impossible. This is most clearly reflected in plaintiff Gallagher's case wherein MDOC staff essentially said "oh well" upon discovering that she had inaccurately assigned a new felony to him and had used that to justify his continued incarceration (Exhibit 20).

Signed: /s/ David Muhammad

Date: 9/10/2018

Expert Witness Qualifications

I have more than two decades of experience working in the criminal justice system.

Beginning in 1997, I directed a renowned writing program, the Beat Within, at Alameda County California's Juvenile Hall. I also ran the program at three other Bay Area juvenile detention centers, working with hundreds of youth in-custody.

In 1999, I began working at The Mentoring Center (TMC) in Oakland, California, a non-profit organization that developed and implemented mentoring modalities specifically for youth in the justice system. I managed the Transition Program, working with youth incarcerated in California's Department of Juvenile Justice. I became the Executive Director of the TMC in 2002. During my tenure, TMC's budget nearly tripled and the staff size doubled. I created a new policy division of the organization, eventually resulting my involvement national justice policy efforts.

In 2005, I was recruited to be one of the Deputy Directors of the Washington, DC's juvenile justice system, the Department of Youth Rehabilitation Services (DYRS). My responsibilities at DYRS included managing 300 staff, a \$42 million annual budget, a juvenile institution, and 900 youth committed to my department's care.

At DYRS I was responsible for the long-term juvenile facility and supervision of committed youth who were in the community (equivalent of parole). I oversaw the historic closure of the notorious juvenile facility Oak Hill and the opening of the state-of-the-art New Beginnings Youth Center, which has received national acclaim as a model juvenile justice facility. I also managed the closure of the facility's solitary confinement unit and the elimination of punitive segregation. At the New Beginnings Youth Center, I wrote the operations manual for the now celebrated facility.

I also helped implement the new model of Positive Youth Development at DYRS, including re-writing the Case Management Manual for all juvenile parole officers. In addition, I was closely involved in the launch of the innovative Regional Service Coalitions, providing services, supports, and opportunities to system-involved youth in the community. Now called DC Youth Link, the initiative has experienced enormous success.

In 2010, I was named the Deputy Commissioner of the Department of Probation in New York City, the second largest Probation Department in the country, where I was responsible for overseeing 35,000 adults on probation and a staff of 800. Managing the adult division of probation, I led the effort to place Probation Officers in community settings and providing people on probation with greater opportunity and accountability, culminating in the creation of Neighborhood Opportunity Centers (NeONs). The new NeONs in every borough of New York City have become a renowned probation and re-entry innovation throughout the country.

Like in DC, while at NYC Probation, I also re-wrote the entire Supervision Manual, emphasizing effective practices and a strength-based approach. I also worked with Mayor Bloomberg's Young Men's Initiative (YMI) and was able to bring to NYC the Transformative Mentoring model that I helped develop in Oakland while the Executive Director of The Mentoring Center. Mayor Bloomberg's YMI invested \$9 million in Transformative Mentoring programs for young men on probation, known as the Arches program. After more than five years of operation and being institutionalized as a line item in the City's general fund budget, an evaluation of Arches determined that participants in the program had a more than 50 percent lower recidivism rate than others on probation who were not in the program.

I later became the Chief Probation Officer of Alameda County, where I was responsible for overseeing 20,000 youth and adults on probation, two juvenile facilities, a staff of 600, and a \$90 million budget. While at Alameda County, I was able to significantly expand the amount of community based services available for system-involved youth, including: opening three new Evening Reporting Centers as alternatives to detention; launching a new Juvenile Re-Entry Initiative that provides mentoring and employment readiness training to youth leaving the county's juvenile camp; and, in partnership with the Child Welfare agency, I helped launch a new Summer Youth and After-School employment program that provides jobs to 700 youth on probation or in foster care.

I am currently the Executive Director of the National Institute for Criminal Justice Reform (NICJR), a non-profit organization that provides technical assistance, training, and consultation to government agencies, community-based organizations and philanthropies in the areas of criminal justice, youth development, and violence prevention.

Through NICJR, I serve as a lead consultant and technical assistance provider to the Sierra Health Foundation's Positive Youth Justice Initiative, supporting probation departments throughout the State of California to transform their juvenile justice practices. I also provide leadership and technical assistance to the Ceasefire Violence Reduction Strategy in the cities of Oakland and Stockton, California.

Since 2015, I have been the federal court appointed monitor overseeing reforms in the Illinois juvenile justice system under the *MH v. Monreal* Consent Decree. Every three months, I submit detailed reports to the federal court on the progress of the Illinois Department of Justice and the Illinois Parole Review Board's compliance with the provisions of the Consent Decree.

I was also recently named the federal monitor in the *Morales v. Findley* Settlement Agreement, which requires the Illinois Parole Review Board (PRB) and the Department of Corrections (DOC) to reform its parole system. I will submit semi-annual reports to the federal court on the progress of the PRB and DOC in their compliance of the provisions of the Settlement Agreement.

I am a member of the Antelope Valley Monitoring Team which is charged with monitoring the Los Angeles Sheriff's Department's implementation of a federal Settlement Agreement.

I am currently serving as an expert witness in the case *Mason v. Schaefer, et al.* (16-cv-1356) regarding juvenile detention center conditions, solitary confinement and access to adequate mental health and educational services.

List of Publications

Reports:

Quarterly Independent Monitoring Reports re *MH v. Monreal* case, 2015-2017.

www.clearinghouse.net/detail.php?id=11364

Oakland's Successful Gun Violence Reduction Strategy, 2018. <http://nicjr.org/articles>

Four Proven Violence Reduction Strategies, 2017. <http://nicjr.org/articles>

Treat Kids as Kids, 2014. <http://nicjr.org/articles>

Articles

Local Restorative Justice Could Be Best Kind of Diversion for Youth

Juvenile Justice Information Exchange

February 14, 2018

<http://jjie.org/2018/02/14/local-restorative-justice-could-be-best-kind-of-diversion-for-youth/>

How the U.S. Can and Should Greatly Reduce Mass Probation

Juvenile Justice Information Exchange

Jun 7, 2017

<http://jjie.org/2017/06/07/how-the-u-s-can-and-should-greatly-reduce-mass-probation/>

Let's Celebrate Our Success and Work Toward Much-Needed Progress

Juvenile Justice Information Exchange

March 20, 2017

<http://jjie.org/.../lets-celebrate-our-success-and-work-towards-much-needed-progress/>

California Voters Have Opportunity to Enact Needed Criminal Justice Reforms

New America Media

Nov 2, 2016

<http://newamericamedia.org/trending/2016/11/california-voters-have-opportunity-to-enact-needed-criminal-justice-reforms.php>

Jurisdictions with Flexible Federal Funds Can Better Invest in Families and Communities

The Chronicles of Social Change

May 10, 2016

<http://chronicleofsocialchange.org/opinion/jurisdictions-flexable-federal-funds-can-better-invest-families-communities/17677>

Finally, Good News on the School to Prison Pipeline

New America Media

Nov 17, 2015

<http://www.newamericamedia.org/>

Juvenile Justice Solutions Should Always Start with Positive Youth Development

The Chronicles of Social Change

May 9, 2015

<http://chronicleofsocialchange.org/opinion/juvenile-justice-solutions-should-always-start-with-positive-youth-development/9615>

20 Years of Flawed Criminal Justice Policy

National Council on Crime & Delinquency

Nov 3, 2014

<http://www.nccdglobal.org/newsroom/nccd-blog/20-years-flawed-criminal-justice-policy>

Obama's 'My Brother's Keeper' Initiative Has Promise

The Hill

Feb 27, 2014

<http://thehill.com/blog/congress-blog/judicial/199184-obamas-my-brothers-keeper-initiative-has-promise>

Oakland Made Progress on Violent Crime in 2013

New America Media

Jan 03, 2014

[Http://www.newamericamedia.org/](http://www.newamericamedia.org/)

Prison Expansion Out of Touch With Voters, and Common Sense

New America Media

Aug 30, 2013

<http://newamericamedia.org/>

Youth Justice at the Crossroad—A New Vision of Opportunity Before Incarceration

New America Media

Apr 12, 2013

<http://newamericamedia.org/2013/04/youth-justice-at-the-crossroad--a-new-vision-opportunity-before-incarceration.php#>

A Roadmap to the Future of Juvenile Justice

New America Media

Aug 28, 2012

<http://www.newamericamedia.org/>

California Prison Overhaul: Justice Best Administered Local

New America Media

Jun 16, 2011

<http://www.newamericamedia.org/>

Reforming D.C.'s Juvenile Justice System: the Critics vs. What Really Works

New America Media

Aug 28, 2010

<http://www.newamericamedia.org/>

List of all other cases in which, during the previous 4 years, I testified as an expert at trial or by deposition

Mason v. Schaefer, et al., Case No. 16-cv-01356 (S.D. Ill.) – testified by deposition

Statement Regarding Compensation

David Muhammad will be compensated at an hourly rate of \$225 for his work to produce this expert report.

References (in order of reference in the above Report)

Complaint filed in *Gasca et. al. vs. Precythe et. al.*

Deposition Transcript of Missouri Lead Parole Analyst Steve Mueller

Complaint Exhibit #3: Plaintiffs' Counsel Sunshine Request and MDOC data response

U.S. Supreme Court Center: <https://supreme.justia.com/>

Complaint Exhibit #11: Gallagher Field Violation Report

Complaint Exhibit #18: The *Rights of Offender to Preliminary and Revocation Hearing* handbook

Complaint Exhibit #14: Parole Board Decision Memos

Complaint Exhibit #17: Parole Violation Reports

Data chart provided by Plaintiffs' Counsel: In-Custody Time Served for Violations by Named Plaintiffs

Complaint Exhibit #20: Correspondence between Plaintiff Gallagher and MDOC staff

Exhibit #30 of Steve Mueller deposition: Parole Revocation Hearings 1/1/17 to 1/1/18: Time to Hearing by Institution of Hearing

Video transcripts of the parole Revocation Hearings Alleged Parole Violators: Nicholas Gregory, Joshua Jenkins, Michael Hocott, and Michael Quinn

Board of Probation and Parole Decision Notice for Michael Quinn, July 24, 2018

Missouri Department of Corrections Board of Probation and Parole Policy and Procedure Manual

Morales v. Findley Settlement Agreement

New York State Parole Handbook: http://www.doccs.ny.gov/Parole_Handbook.html

California Department of Corrections and Rehabilitation Public Safety Realignment Resource: <https://www.cdcr.ca.gov/realignment/Parole-Revocations.html>

"The Release Valve: Parole in Maryland", Justice Policy Institute, 2009:
http://www.justicepolicy.org/uploads/justicepolicy/documents/maryland_parole.pdf

**In-Custody Time Served for Violations by Named Plaintiffs
in Class Action Complaint Gasca et. al. vs. Precythe et.**

Named Plaintiff	Date Arrested	Out Date	Approx. Time Served on Violation(s)	Source(s)
Mildred Curren	4/15/2017	9/24/2017	5 months, 9 days (162 days)	DEFs-2912, 3241, 3239
Stephanie Gasca	5/9/2017	12/22/2017	7 months, 13 days (227 days)	DEFs-1793, 2654
Timothy Gallagher	11/5/2015	7/19/2018	2 years, 8.5 months (987 days)	DEFs-8477, 8391
Kenneth Hemphill	5/3/2017	7/30/2018	1 year, almost 3 months (453 days)	DEFs-4620
Jesse Neely	1/26/2017	1/5/2018	11 months, 10 days (344 days)	DEFs-4917, 4950, 4762
Amber Wyse	4/11/2017	6/24/2019	2 years, 2.5 months (804 days)	DEFs-5442, 5455
Solomon Warren	8/23/2017	4/8/2018	7.5 months (228 days)	DEFs-7864, 7936



Morales Screening Instrument

Name: «NAME» Number: «NUMBER» Facility: «FACILITY» Date: «DATE»

PRE-SCREENING QUESTION:

1. Do you still wish to be screened for an attorney?

Yes ☐ No ☐

- a. If no, ensure that the APV understands they are waiving their right to be screened at this time. Ensure that the APV understands that if found eligible, the attorney will be appointed at no cost to him/her. Ask why they no longer wish to be screened and summarize that explanation below and have APV sign or initial this waiver of a right to be screened:

Signature of APV

- b. If yes, proceed to Section I.

SECTION I**COMPENTENCY:**

2. Do you have any problems reading, writing or understanding the English language?

Yes ☐ No ☐

- a. If yes, explain.

- b. If no, proceed to question 3.

3. What is your highest level of education completed?

<input type="checkbox"/> Elementary	<input type="checkbox"/> Some College
<input type="checkbox"/> Junior High	<input type="checkbox"/> Associate's Degree

<input type="checkbox"/> High School or GED Equivalent	<input type="checkbox"/> Bachelor's Degree or above
--	---

4. Do you have any history of mental illness or are you currently suffering from any mental illness to your knowledge? **Yes** ☐ **No** ☐

- a. If yes, explain the nature of the illness and all medications you may be taking currently.

- b. If no, proceed to question 5.

5. Have you consumed any alcohol or drugs or medications, including aspirin or Tylenol, within the last 48 hours?

Yes ☐ **No** ☐

- a. If yes, explain stating what you last consumed and when.

Then ask whether those medications or drugs are substantially and negatively affecting APV's ability to understand the alleged violations or this attorney appointment screening hearing. **Yes** ☐ **No** ☐

- i. If yes, or if lack of ability to clearly understand is apparent to hearing officer, then mark Attorney Appointed and end hearing.
ii. If no, then proceed to question 6.

6. Is there anything else I should know that would affect your ability to hear and understand the allegations in your parole violation report or the revocation proceedings themselves?

Yes ☐ **No** ☐

- a. If yes, explain:

- b. If no, make Competency Finding.

COMPETENCY FINDING:

Review all information learned regarding competency and make finding as to whether APV sufficiently understands the proceedings and is capable of speaking effectively.

☐ Found Competent – Proceed to Section II

☐ Found Not Competent – Mark Attorney Appointed; inform APV of appointment. End hearing.

«NAME», «NUMBER», «FACILITY», «DATE»

SECTION II

IDENTIFY WHETHER VIOLATION IS CONTESTED:

Describe the basic nature of each alleged violation to APV. For each alleged violation, ask APV if they contest the violation.

(IDENTIFY BY NUMBER THE CONTESTED AND UNCONTESTED VIOLATIONS)

CONTESTS: _____

DOES NOT CONTEST: _____

☐ CONTESTS ALL ALLEGED VIOLATIONS

☐ PARTIAL CONTESTATION

☐ DOES NOT CONTEST ANY VIOLATIONS

If **any** violation is uncontested, inform the APV that they will be forwarded to the final revocation hearing before the Board for discussion of aggravation and mitigation only regarding whether to revoke the APV's release or to return the APV to the community. Proceed to Section III.

If APV contests **all** violations, proceed to Section III.

SECTION III

INDIGENCY:

1. Do you have the monetary ability or sufficient assets to hire an attorney to represent you in this matter?

Yes ☐ No ☐

- a. If yes, then mark Found Not Indigent and Not Eligible and end hearing.
- b. If no, proceed to question 2.

2. Do you have a pending criminal case based upon or related to the allegations in the Notice of Charges and Parole Violation Report?

Yes ☐ No ☐

- a. If yes, proceed to question 3.
- b. If no, proceed to Indigency Finding.

3. (If Rule 1 violation alleged or APV answers “yes” to question two) Has a Public Defender been appointed to represent you in your pending criminal case?

Yes ☐ No ☐

- a. If yes, then proceed to Indigency Finding.
- b. If no, proceed to question 4.

4. Have you hired an attorney to represent you in your pending criminal case?

Yes ☐ No ☐

- a. If yes, then determine how the attorney has been hired/compensated, in light of the representation in answer to question 1 regarding a lack of funds or assets.

- b. If no, proceed to Indigency Finding.

INDIGENCY FINDING:

Review all information learned regarding indigency and make finding as to whether APV has sufficient funds or assets to hire private counsel for representation without creating an undue hardship on the APV’s ability to provide for basic needs.

☐ Found Indigent –If **any or all** violations in Section II were uncontested, proceed to Section IV-A. If APV contested **all** violations in Section II, proceed to Section IV-B.

☐ Found Not Indigent – Mark Not Eligible and end hearing.

SECTION IV

A. COMPLEX AND SUBSTANTIAL MITIGATION SUPPORTING RE-RELEASE:

- a. Investigate whether complex and substantial mitigation exists regarding APV's violation(s) using the following standard questions and follow-ups as appropriate.

1. What were the circumstances of the violation?
2. How did the violation happen?
3. Why did you commit the violation?
4. Is there a reason why the violation will not happen again?
5. Was the violation something you could have avoided?
6. What physical evidence, documents, or witnesses support your argument?

- b. Summarize mitigation as to each violation (or group of violations where appropriate) as provided by APV below:

This image shows a single sheet of white paper with horizontal blue ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

COMPLEX AND SUBSTANTIAL MITIGATION FINDING:

Review all information and circumstances, make determination, and inform APV of decision.

- ☐ No Complex and Substantial Mitigation exists. Mark Not Eligible and end hearing.
- ☐ Complex and Substantial Mitigation exists. Mark Attorney Appointed and end hearing.

B. TIMELY AND COLORABLE CLAIM THAT NO VIOLATION(S) OCCURRED:

a. Investigate whether a timely and colorable claim exists regarding APV's violation(s) using the following standard questions and follow-ups as appropriate. Note for the APV that simply denying the allegation occurred or denying that they committed it will not be sufficient to qualify for appointed counsel; there must be some evidence or testimony that would support the claim for it to be "colorable".

1. What were the circumstances of the alleged violation?
2. Why is the allegation untrue or incorrect?
3. Who can testify on your behalf to support your claim?
4. What physical evidence exists that proves that you did not violate?
5. What documents exist that prove you did not violate?

b. Summarize the proposed defense as to each violation (or group of violations where appropriate) as provided by APV below, including the specific supporting documents, physical evidence, and witness names and contact information of witnesses where appropriate:

TIMELY AND COLORABLE CLAIM FINDING:

Review all information and circumstances, make determination, and inform APV of decision.

- ☐ No Timely and Colorable Claim exists. Mark Not Eligible and end hearing.
- ☐ Timely and Colorable Claim exists. Mark Attorney Appointed and end hearing.
-

APPOINTMENT FINDING:

Review all relevant information and make determination as to eligibility for appointed counsel.

☐ ATTORNEY APPOINTED

☐ NOT ELIGIBLE

POST-SCREENING REVIEW:

Ensure that the APV has been informed of your decision regarding appointment. Mark the appropriate box to indicate that this notice has been effectuated.

Where an attorney has been appointed:

- ☐ 1. If screening occurred at a dedicated screening date, inform APV that their attorney will be notified shortly of the appointment and will represent the APV throughout the rest of the revocation process, including the upcoming preliminary or final revocation hearing, as appropriate.
- ☐ 2. If screening occurred at a previously-scheduled preliminary or final revocation hearing date, inform APV that their hearing will be continued to the next available date and that their attorney will be notified shortly of the appointment and will represent the APV throughout the rest of the revocation process, including the upcoming preliminary or final revocation hearing, as appropriate.

Where the APV has been found not to be eligible for an appointed attorney:

- ☐ 1. If screening occurred at a dedicated screening date and APV contests all violations, inform APV that they will proceed to their preliminary hearing as previously scheduled.
 - ☐ 2. If screening occurred at a dedicated screening date and any or all violations are uncontested, inform APV that they will be scheduled for the next available final revocation date before the Board. Notice of the specific date will be mailed to them.
 - ☐ 3. If screening occurred at a previously-scheduled preliminary or final revocation hearing date, inform APV that their hearing will proceed as originally scheduled.
-

APV SIGNATURE:

HEARING OFFICER NAME (PRINT)

HEARING OFFICER SIGNATURE